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The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?

Ken Stahl

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The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?

Ken Stahl*

Abstract

Over the past several years, state legislatures confronting a severe housing shortage have increasingly preempted local land use regulations that restrict housing supply in an effort to facilitate more housing production. But even where state legislatures have been successful, they now confront another problem: many of the preempted land use regulations are duplicated at the neighborhood or block level through private “covenants, conditions and restrictions” (CCRs) enforced by homeowners associations (HOAs). In response, California’s legislature has begun aggressively invalidating or “overriding” these CCRs. While many states have barred HOAs from prohibiting pets, clotheslines, signs, and flags, California has moved much farther, prohibiting HOAs from unreasonably limiting accessory dwelling units and overriding any private CCR that would inhibit the construction of 100% affordable housing of any density.

These overrides present serious legal questions because CCRs are property and contract rights that may be protected by the Constitution’s Takings and Contract Clauses. Overrides have not resulted in much published litigation in the past, but California’s new

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wave of aggressive CCR overrides may change that. While the Contract Clause argument is exceptionally weak, homeowners who are disabled from enforcing a servitude benefitting their property due to a legislative override have a viable argument that the override is an unconstitutional taking because it interferes with their reasonable expectations regarding the use of their property. On balance, however, I argue that most CCR overrides will survive a Takings Clause challenge because the enforceability of CCRs has long been subject to alteration or even termination by courts or legislatures on public policy grounds, so a homeowner would reasonably expect a CCR to be unenforceable if it conflicts with public policy as determined by the legislature. Nevertheless, the current Supreme Court has been very aggressive in recent Takings Clause cases, so legislatures will have to be careful in crafting overrides to ensure they satisfy the Court's increasingly stringent standards.

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I. INTRODUCTION

One of the most closely-watched legal trends at the state level over the past few years has been the spate of efforts by legislators in many high-opportunity states to increase housing production by “preempting” local land use regulations that have the effect of suppressing housing supply, such as density and height restrictions, lengthy discretionary permitting processes, high fees, and the like.¹ But observers of the preemption phenomenon have correctly noted that such efforts are likely to have limited success unless legislators also take on the much more prevalent phenomenon of land use restrictions enforced by private common interest communities, commonly referred to as homeowners associations (HOAs).² HOAs are ubiquitous, vastly outnumbering local governments, and they act essentially as little municipalities, taxing residents through mandatory assessments and regulating land use with detailed restrictions, called “covenants, conditions, and restrictions” (CCRs), that often mirror local land use regulations.³ Indeed, CCRs are typically *far more* restrictive than local land use regulations in many respects.⁴

In California, where the shortage of housing supply has led to an acute housing crisis, the state has acted aggressively in the last few years to address this problem, enacting several pieces of legislation invalidating CCRs that restrict housing supply and hinder the implementation of state laws preempting local land use regulations.⁵ For example, when California passed legislation

1. See Kenneth A. Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179, 181 (2021) (“[S]tate legislatures like California’s Senator Scott Wiener have come to the view that states need to take a more assertive role in land-use regulation, overriding (or ‘preempting’) some local control.”).

2. See Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 793–98 (2020); see also Ganesh Sitaraman et al., *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1821–25 (2021) (“The choice facing policymakers in the future, therefore, might not be between restrictive and relaxed zoning in the urban core; it might end up being between public zoning regulations and private suburban ones.”).

3. See Serkin, *supra* note 2, at 793–97 (observing the ubiquity of HOAs in the United States and the similarities between certain deed restrictions and covenants enforced by HOAs and land use restrictions imposed by local governments).

4. *Id.* at 795 (“Substantively, covenants governing HOAs tend to be much more restrictive than most zoning ordinances.”); see *infra* Section II.B. (discussing why CCRs are typically far more restrictive than governmentally imposed land use restrictions).

5. See Serkin, *supra* note 2, at 798 (“California recently adopted new limits on local governments’ ability to regulate accessory dwelling units.”); see, e.g., CAL. CIV. CODE §4751 (West 2020) (“Any [CCR] contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in a planned development, and any provision of a governing document, that

in 2019 that largely prohibited local governments from prohibiting the construction of small backyard cottages, called “accessory dwelling units” (ADUs) on land where residential use is permitted by local zoning regulations,⁶ the legislature simultaneously passed companion legislation that barred HOAs from placing unreasonable restrictions on the construction of ADUs.⁷ In 2021, California passed several more bills overriding CCRs dealing with housing, including one law that permits landowners to place 100% subsidized affordable housing on their land notwithstanding CCRs that restrict the residential use of the parcel in any way.⁸

These examples are hardly the first instances of state legislatures “overriding” private CCRs.⁹ All fifty states have detailed legislation regarding the governance and management of HOAs, including voting rules, budgeting, disclosure, and so forth, and a few states authorize state agencies to regulate HOAs.¹⁰ Several states have laws regulating the duration of CCRs.¹¹ Many states also regulate the substance of CCRs, most commonly by barring HOAs from prohibiting things such as signs, flags, clotheslines, pets, satellite dishes, and the like.¹² California has probably been more assertive than any other state in overriding CCRs, requiring HOAs to permit small day care centers, group homes, senior and employee housing, in addition to many other

either effectively prohibits or unreasonably restricts the construction or use of an accessory dwelling unit or junior accessory dwelling unit on a lot zoned for single-family residential use . . . is void and unenforceable.”)

6. See Assemb. B. 68, 2019–2020 Leg., Reg. Sess. (Cal. 2019); Assemb. B. 881, 2019–2020 Leg., Reg. Sess. (Cal. 2019); S.B. 13, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

7. See Assemb. B. 670, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

8. See *infra* Section II.C.

9. See Laura Bliss, *Oregon’s Single-Family Zoning Ban Was a ‘Long Time Coming,’* BLOOMBERG (July 2, 2019), <https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning> (detailing Oregon’s H.B. 2001 overriding single-family zoning).

10. See JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY 826–28 (1998). The states all adopted model condominium enabling legislation in the 1960s after the Federal Housing Administration authorized the insuring of mortgages in multi-unit projects. *Id.*

11. See, e.g., MASS. GEN. LAWS ch. 184, § 27 (West 2013); LA. CIV. CODE ANN. art. 780 (West 2013).

12. See FLA. STAT. ANN. § 718.123 (granting certain civil rights to CIC residents). At least nineteen states recognize a “right to dry,” prohibiting HOAs and sometimes landowners from preventing residents from using clotheslines or dry racks to dry clothing. See Martha Neil, *19 ‘Right to Dry’ States Outlaw Clothesline Bans: Is Yours Among Them?*, ABA J. (Aug. 14, 2013, 8:24 PM), https://www.abajournal.com/news/article/20_right_to_dry_states_outlaw_clothesline_bans_is_yours_among_them; see RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. (2000) (listing other common overrides, at least as of April 1, 1999).

restrictions on HOAs.¹³

These new laws are different, however, in that they much more aggressively cut to the core of what HOAs are really about: the ability to strictly control the character of the community by excluding undesirable uses of property within the community.¹⁴ For a variety of reasons, ranging from fiscal concerns about property values to fears of racial change and laments about traffic congestion, dense housing (especially affordable housing) is the land use type that is most unwanted in single-family residential areas.¹⁵ For that reason, zoning ordinances as well as CCRs are often laser-focused on keeping dense, affordable housing away from single-family neighborhoods.¹⁶ And it is for that same reason that state laws preempting local zoning regulations on dense housing have faced several bitter rounds of litigation, most of which have so far resolved in favor of the power of the state to legislate.¹⁷

Therefore, it is reasonable to expect that although legislative overrides of CCRs regarding clotheslines and solar panels have not met with many judicial challenges, these newer laws that invalidate CCRs relating to housing density are much more likely to be the subject of litigation.¹⁸ The purpose of this

13. See Karl E. Geier, *Statutory Overrides of “Restrictive Covenants” and Other Private Land Use Controls: The Accelerating Trend Towards Legislative Overwriting of Contractual Controls of the Use and Development of Real Property*, 32 MILLER & STARR REAL EST. NEWSALERT 240, 242 (2022) (citations omitted) (“California Legislature has adopted a number of laws deliberately intended to prevent the application or enforcement of private restrictions These include . . . small residential care facilities or group homes for families, adults, or children unable to care for themselves, small residential care facilities for the elderly, small child day care facilities, employee housing for six or fewer persons . . .”).

14. See *id.* at 244 (observing that the recent California bills “take the notion of legislative preemption of private restrictions to a new level”).

15. See William Marble & Clayton Nall, *Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development*, 83 J. POL. 1747, 1748 (2021) (demonstrating that homeowners, regardless of political ideology, oppose denser housing in their communities); KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA’S HOUSING CRISIS 87, 117–18 (2020) (describing a comprehensive study of homeowners’ attitudes towards new development that shows density, traffic, neighborhood character, and parking among the main reasons for opposing new housing).

16. See Serkin, *supra* note 2, at 752–53, 795 (noting that zoning regulations often seek to constrain change in communities by regulating things like more affordable housing options).

17. See generally *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877 (Ct. App. 2021) (finding in favor of the government); *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649 (Ct. App. 2021) (same).

18. See also Neil, *supra* note 12 (describing how at least nineteen states have recognized a “right to dry”).

Article is to describe and evaluate the legal arguments that might be raised to challenge the validity of CCR overrides, with particular focus on the latest round of aggressive legislation from the state of California.¹⁹

As an initial matter, there is an important qualitative difference between legislative *preemption* of land use regulations enacted by *local governments* and legislative *overrides* of CCRs enforced by *HOAs*.²⁰ To the extent local governments enjoy any protections against preemption by the state, those protections come from doctrines of intrastate federalism enshrined in state constitutions, particularly the doctrine of “home rule” that places some outer limits on the ability of state legislatures to preempt local regulatory power.²¹ As I have addressed in a previous article, the home rule doctrine actually provides very little protection for local land use regulation against state preemption, even where the local government is a “charter city” entitled to heightened protections against state preemption.²² Home rule typically favors the power of the state to legislate on matters of statewide concern, such as a statewide housing crisis.²³ Those courts that have addressed state preemption of local land use regulation in recent years have come to the same conclusion.²⁴

In contrast to the local government, which is considered a public body within the quasi-federal structure of state government, the HOA is generally considered a private entity, an extension of the property rights of homeowners for whom the HOA is simply a convenient mechanism to enforce those rights.²⁵ State law usually treats CCRs as servitudes, which are constraints on

19. See *infra* Part III (evaluating multiple constitutional arguments against CCR overrides).

20. See generally Geier, *supra* note 13 (observing that the recent California bills “take the notion of legislative preemption of private restrictions to a new level”).

21. See Stahl, *supra* note 1, at 185–86 (providing the basic principles of the home rule doctrine).

22. See Stahl, *supra* note 1, at 188 (outlining how home rule does not protect local land-use decisions against preemption).

23. See Stahl, *supra* note 1, at 183 (discussing courts’ tendency to favor state preemption of local housing laws with statewide implications).

24. See Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 283 Cal. Rptr. 3d 877, 897 (Ct. App. 2021); Ruegg & Ellsworth v. City of Berkeley, 277 Cal. Rptr. 3d 649, 685 (Ct. App. 2021).

25. See Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1522 (1982) (discussing the general view that HOAs are private rather than public government entities). Many commentators have compared homeowners’ associations 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., Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 6–7 (1989). By and large, courts have refused this invitation, and declined to find that HOAs are “state actors” subject to constitutional constraints. See, e.g., Comm. For a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d

a landowner's use of property for the benefit of neighboring landowners, contained or referenced in the landowners' deeds, and running with the land to subsequent purchasers.²⁶ Because these servitudes are referenced in the deed, homeowners are presumed to *voluntarily* subject themselves to CCRs when they choose to purchase property.²⁷ That volitional component of CCRs is what causes courts to treat them as formally private, in contrast to the coercive nature of land use regulations enacted by public municipalities.²⁸ To the extent state legislative overrides of CCRs interfere with or abrogate the ability of homeowners to enforce their private property rights through the HOA, the state could be liable under the Constitution's Takings Clause, which prohibits the state from taking private property without compensation,²⁹ or potentially the Contract Clause, which prohibits the government from impairing the obligation of contracts.³⁰

To my knowledge, no law review article has addressed the validity of CCR overrides, possibly because, as previously mentioned, most overrides have traditionally been fairly modest and have not generated much published litigation.³¹ Now that the state is taking a more assertive role in overriding CCRs, however, the constitutionality of CCR overrides is likely to become a more salient question. The first part of this Article discusses several different

1060, 1074 (N.J. 2007) (observing that most courts have not found HOAs to be state actors and finding that HOA regulations affecting signs, community newsletters, and use of community room were not constitutional violations because private property rights outweighed expressive rights). Nevertheless, as explored more fully in Part II, courts have used statutory and common law doctrines to constrain the ability of HOAs to entrench upon constitutional rights or otherwise interfere with fundamental public policy objectives, suggesting that HOAs occupy a quasi-public status and that states have a wide berth to override CCRs notwithstanding the private property rights of homeowners. *See, e.g., id.* at 1075 (observing that CCRs that unreasonably restrict free speech are unenforceable as a matter of public policy).

26. *See Fox v. Kings Grant Maint. Ass'n*, 770 A.2d 707, 715 (N.J. 2001) (determining that condominiums are common-interest communities and therefore considered servitudes); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000).

27. *See Tentindo v. Locke Lake Colony Ass'n*, 419 A.2d 1097, 1097 (N.H. 1980) (highlighting that the choice to join an association is completely voluntary); *see Ellickson, supra* note 25, at 1529 (discussing the voluntary nature of CCRs).

28. *See Ellickson, supra* note 25.

29. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

30. U.S. CONST. art. I, § 10, cl. 1 (No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .”).

31. *See supra* text accompanying notes 6–8 (discussing legislation from 2019 and 2021 to override CCR).

types of overrides, focusing on some of the more recent efforts.³² The second part addresses the constitutional arguments that could be raised against these overrides.³³ As I describe, the most serious argument against the constitutionality of CCR overrides, especially the more recent ones, is that they interfere with a homeowner's "reasonable expectations" to enforce covenants restricting residential use and housing density, and therefore constitute a taking under the *Penn Central* takings test.³⁴ Nevertheless, I argue that overrides are likely to be upheld against constitutional challenges except in very unusual circumstances.³⁵ CCRs have always been subject to significant legislative and judicial constraints, and courts have not been shy about altering or invalidating CCRs that restrain the use of land or are otherwise inconsistent with public policy.³⁶ For that reason, homeowners do not have a reasonable expectation that CCRs will be enforceable where they conflict with fundamental public policy concerns, such as the need to address an affordable housing crisis.³⁷

To be sure, it is wise to avoid too much confidence in predicting how the Supreme Court will resolve Takings Clause cases because the taking inquiry is extremely amorphous.³⁸ The current Supreme Court has been very aggressive in recent cases, which may signal an approach that is more favorable to landowners and less favorable to government interference with property rights.³⁹ In that light, state legislatures should be careful in how they craft CCR overrides to ensure they can satisfy the Court's scrutiny.⁴⁰

32. See *infra* Part II.

33. See *infra* Part III.

34. See *infra* Section II.A.3; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).

35. See *infra* Section III.A.3 (discussing the hurdles in meeting the *Penn Central* test to prevail in a Takings Clause claim).

36. See *infra* Section III.A.3 (discussing how courts evaluate reasonable expectations in the CCR context).

37. See *infra* Section III.A.3.b (discussing homeowners' reasonable expectations when a CCR conflicts with legislative policy on affordable housing).

38. See *Penn Cent.*, 438 U.S. at 123 ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.").

39. See, e.g., *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) (holding that California's regulation requiring farm owners to permit periodic access to union organizers constituted a per se physical taking); see also *infra* text accompanying notes 149–158.

40. See *infra* Section III.A.3.

II. PART I: THE EVOLUTION OF CCR OVERRIDES

A. The Housing Crisis and Zoning Reform

The recent trend of CCR overrides is rooted in the severe housing crisis facing many areas around the country with strong job growth over the last decade or so.⁴¹ As housing costs have soared to unprecedented levels in many of these high-opportunity regions, homelessness and gentrification have spiked, and young people have been forced to either forego families or flee to lower cost areas, raising home costs there in turn.⁴² In the last few years the corrosive role of land use regulations in creating this state of affairs has drawn attention.⁴³ Restrictions on use, density, lot coverage, lot size, minimum square footage, as well as excessive fees, lengthy discretionary permitting processes, and burdensome environmental review processes, have the cumulative effect, and often the purpose, of restricting the housing supply, raising the cost of housing, increasing sprawl and vehicle emissions, and worsening racial and class segregation.⁴⁴ Much of the blame for overly restrictive land-use regulation has been directed at local governments, who traditionally have exercised most day-to-day land use control in the United States.⁴⁵ Local governments are far more likely to heed the demands of local homeowners, who tend to oppose new development “in [their] backyard,” than they are to prioritize the regional or statewide need for housing.⁴⁶

41. See Brent Nyitray, *The Jobs-housing Mismatch: This Is How Far Housing Availability Lags Behind Job Growth*, USA TODAY, <https://www.usatoday.com/story/money/personalfinance/real-estate/2021/09/29/what-the-jobs-housing-mismatch-means-for-the-future-of-real-estate/49199399/> (Sept. 29, 2021 9:20 AM).

42. See Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25, 31–33 (2018) (describing broad effects of restrictive local land-use regulations, including increased home costs). See generally Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1 (2019) (describing the effects of stringent restrictions on the new housing supply).

43. See Stahl, *supra* note 1, at 181 (noting the backlash against state intervention in areas typically reserved for local government).

44. See, e.g., Been, *supra* note 42, at 32 (“Restrictions on supply often are associated with lower density and less-compact development because they divert housing demand to lower density suburban or rural areas, leading to longer commutes and more driving, which results in increased air pollution and greenhouse gas emissions.”).

45. See Serkin, *supra* note 2, at 758 (“[L]and use regulation is fundamentally a local enterprise . . .”).

46. See Katherine Levine Einstein et al., *Who Participates in Local Government? Evidence from*

In response to the escalating housing crisis, many states in recent years have passed legislation reducing some of these restrictions and preempting the power of local governments to impose overly burdensome land use regulations.⁴⁷ California and Oregon have recently passed legislation that preempts some local land-use authority,⁴⁸ while legislators in several other states have proposed similar legislation.⁴⁹ Local governments and angry homeowners have furiously opposed these efforts, but the courts to date have had little difficulty upholding the validity of state preemption of local land use control.⁵⁰ As I argued in a recent article, state legislatures have broad powers to preempt local land use regulation, even in states where local governments enjoy some degree of protection from state preemption under the home rule doctrine⁵¹ While the effects of the legislation are still to be determined, there is strong evidence that the state's efforts to increase the housing supply have been successful.⁵² For example, cities in California saw a dramatic increase in applications to build ADUs almost immediately after the state enacted legislation removing many local ADU restrictions, with Los Angeles reporting an

Meeting Minutes, 17 PERSPS. ON POL. 28, 30 (2018) (discussing influence of homeowners over local policies). Recent empirical research confirms long-standing anecdotal observations about the dominance of homeowners in local politics and their general resistance to new development. *See, e.g., id.* at 39 (finding that homeowners are significantly more likely to participate in local land use meetings and overwhelmingly oppose new housing construction).

47. *See, e.g., infra* notes 49–50 and accompanying text.

48. *See* S.B. 9, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (permitting landowners to split lots and build duplexes on each lot); Assemb. B. 68, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (limiting local discretion to deny or regulate construction and use of backyard cottages); S.B. 330, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (streamlining zoning process); S.B. 1333, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (mandating that charter cities conform zoning laws to a general plan); S.B. 35, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (streamlining zoning process); Bliss, *supra* note 9 (reporting on Oregon's H.B. 2001 overriding single-family zoning).

49. *See* Kriston Capps, *Denser Housing Is Gaining Traction on America's East Coast*, BLOOMBERG (Jan. 3, 2020, 3:00 AM), <https://www.bloomberg.com/news/articles/2020-01-03/maryland-s-ambitious-pitch-for-denser-housing>; Kriston Capps, *With New Democratic Majority, Virginia Sees a Push for Denser Housing*, BLOOMBERG (Dec. 20, 2019, 5:03 AM), <https://www.bloomberg.com/news/articles/2019-12-20/inside-the-virginia-bill-to-allow-denser-housing>.

50. *See* Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 283 Cal. Rptr. 3d 877, 883 (Ct. App. 2021); Ruegg & Ellsworth v. City of Berkeley, 277 Cal. Rptr. 3d 649, 654 (Ct. App. 2021).

51. *See* Stahl, *supra* note 1, at 181 (exploring a more recent shift towards assertive state regulation over local control).

52. *See, e.g.,* Josh Cohen, *California ADU Applications Skyrocket After Regulatory Reform*, NEXT CITY (Jan. 4, 2018), <https://nextcity.org/daily/entry/california-adu-applications-skyrocket-after-regulatory-reform> (exemplifying success of the state's effort to increase ADU supply by "slashing regulations").

increase from just eighty applications in 2016 to nearly two thousand in 2017.⁵³

B. *The Problem of HOAs*

As Professor Chris Serkin has pointed out, however, these efforts to preempt local land use control are likely to have limited success as long as homeowners, who favor restrictive land use regulations, can simply substitute private deed restrictions enforced by HOAs (aka CCRs) in place of public land use regulations.⁵⁴ Serkin observes that homeowners associations are ubiquitous in the United States, dwarfing the number of local governments, and that many deed restrictions enforced by HOAs are substantively similar to the typical land use regulations imposed by local governments.⁵⁵ In fact, CCRs are often much more onerous than governmentally imposed land use regulations because, while HOAs prescribe rules on land use, density, bulk, and so forth—rules that are often far more restrictive than local zoning regulations—they also dictate things like paint colors, pets, signage, and even what type of car homeowners can have.⁵⁶

The reason why HOAs can prescribe such restrictive rules is because, as discussed earlier, CCRs are nominally private property law arrangements to which homeowners presumptively consent when they purchase their homes, as opposed to coercive governmentally-imposed regulations.⁵⁷ CCRs are generally contained in a declaration that is referenced in homeowners' deeds and "recorded" with the county to officially place anyone with a potential interest in the property on notice that they will be taking that interest subject to the recorded declaration.⁵⁸ CCRs contained in the recorded declaration are accorded a strong presumption of validity because they are presumed to be consensual.⁵⁹

53. *Id.*

54. See Serkin, *supra* note 2, at 793–97.

55. *Id.*; see also Sitaraman et al., *supra* note 2, at 1821–25.

56. See Serkin, *supra* note 2, at 795–97.

57. See *supra* notes 27–28 and accompanying text (referencing a case where the court stated that joining an association is voluntary).

58. H. D. Warren, Annotation, *Personal Covenant in Recorded Deed as Enforceable Against Grantee's Lessee or Successor*, 23 A.L.R. 2d 520 (1952).

59. See *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1278 (Cal. 1994), and text accompanying notes 127–228.

As Serkin notes, because HOAs generally have even stricter land use regulations than local governments, they tend to cause the same problems as zoning—often to an even greater degree—including higher home costs, sprawl, and racial segregation.⁶⁰ With regard to race, Serkin and co-authors Ganesh Sitaraman and Morgan Ricks write that “[t]he history of HOAs is inextricably bound up with whites-only communities seeking to exclude Black residents.”⁶¹ Today, “HOAs still tend to be more racially homogenous than the municipalities in which they are located. Worse, there is some empirical evidence that the presence of HOAs exacerbates segregation in the rest of the municipality.”⁶²

Curiously, Serkin and his co-authors argue that state preemption of local zoning regulations is likely to backfire because homeowners will simply substitute much more restrictive CCRs in place of local zoning.⁶³ They might have argued, instead, that state legislatures should pair preemption of local zoning regulations with preemption of CCRs, as California has begun to do.⁶⁴ Though Serkin does briefly take note of recent California legislation restricting the ability of HOAs to regulate ADUs, he concludes somewhat offhandedly that “[t]his approach is both innovative and unusual and is unlikely to provide a blueprint that other states will follow.”⁶⁵

It now appears that Serkin’s prognosis may have been premature.⁶⁶ As discussed further below, California has since followed up the ADU legislation with even more aggressive overrides of other types of CCRs that limit housing

60. See Sitaraman et al., *supra* note 2, at 1823–24 (noting that HOAs “produce all of the problems that zoning opponents decry . . . while simultaneously being even less flexible than zoning”).

61. *Id.* at 1824; see Serkin, *supra* note 2, at 797–98.

62. See Sitaraman et al., *supra* note 2, at 1824.

63. See *id.* at 1821 (noting that HOAs are a “kind of substitute” for zoning).

64. See CAL. CIV. CODE § 4751(a) (West 2020) (noting that “[a]ny covenant, restriction, or condition . . . that prohibits or unreasonably restricts the construction or use of an accessory dwelling unit on a lot zoned for single-family use” is void and unenforceable); see also Sitaraman et al., *supra* note 2; *infra* Part II.C (noting that California has put in place aggressive overrides of CCRs that limit housing development).

65. Serkin, *supra* note 2, at 798.

66. Compare *id.* (concluding California’s attempts to restrict HOA’s abilities to regulate ADUs will not succeed), with *infra* Section II.C (noting four significant legislative overrides that California passed in 2021 alone); see also Benjamin Donel, *California’s New Accessory Dwelling Units Laws: What You Should Know*, FORBES (Mar. 12, 2020, 8:30 AM), <https://www.forbes.com/sites/forbes-financecouncil/2020/03/12/californias-new-accessory-dwelling-units-laws-what-you-should-know/> (explaining how California regulators are viewing ADUs as answers to the housing crisis).

development.⁶⁷ To be clear, Serkin had good reason for thinking that state overrides of CCRs would be unusual.⁶⁸ Historically, states have not been particularly active in overriding CCRs because there is a collective action problem confronting those with an interest in reducing restrictive CCRs.⁶⁹ HOAs are well-organized, well-financed, and highly motivated to push their agenda in state legislatures, whereas those who would stand against the HOA lobby—usually disgruntled homeowners who chafe against harsh CCRs—are weakly motivated, under-resourced, and disorganized.⁷⁰ Of course, until recently, state preemption of local land use regulation was also uncommon for the same reason.⁷¹ The local government lobby is strong, well-organized, and financed with tax dollars, whereas those who would oppose local land use regulations—usually renters facing rising home costs caused by zoning regulations that constrict the housing supply—are notoriously difficult to organize and generally lacking in resources.⁷²

The reason state preemption of land use regulation has started to occur with greater intensity in the last few years is because the housing crisis has grown so severe as a result of restrictive land use regulations that the

67. See *infra* Section II.C (discussing four recent legislative overrides of CCRs that restrict the residential use of property).

68. See Serkin, *supra* note 2, at 751–52 (noting that, despite California’s recent enactment of various measures allowing ADUs, zoning and density limits serve important functions like regulating the pace and costs of community change); *infra* notes 72–75 (describing the strong characteristics of HOAs and local governments lobbies and how this causes states to side with these groups).

69. See generally Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2001) (explaining that a common stake in local resources leads to groups of users attempting to manage these resources without governmental interference); Kenneth A. Stahl, “Yes in My Backyard”: Can a New Pro-Housing Movement Overcome the Power of NIMBYs?, 41 ZONING & PLAN. L. REP. 1, 3 (2018) (illustrating the concept of collective action and explaining how it makes people less willing to act on certain issues).

70. See *Objective of the California Association of Homeowners Associations Inc.: Homeowner Association Data & Statistics*, CAL. ASSOC. OF HOMEOWNERS ASSOCS., <https://www.calassochoa.com/ABOUT-US/Our-Objective-HOA-DATA-STATISTICS.aspx> (last visited Sept. 26, 2022) (detailing various statistics regarding HOAs in California, the “sizeable muscle” these organizations contain, and how they work together to provide “tremendous strength and influence” to enact legislation benefiting homeowners); see generally Mark Purcell, *Ruling Los Angeles: Neighborhood Movements, Urban Regimes, and the Production of Space in Southern California*, 18 URB. GEOGRAPHY 684 (2013) (providing examples of HOAs pushing bills through state legislature).

71. See *infra* notes 73–76 and accompanying text.

72. See, e.g., Stahl, *supra* note 70, at 3–4 (explaining natural organizing advantages possessed by anti-development forces, and disadvantages confronting housing advocates).

opposition has finally become energized and organized to do something about it.⁷³ The “Yes in my Backyard” or “YIMBY” movement is a powerful grassroots movement for reform of land use regulation that has emerged within the last decade, fueled largely by the anger of young middle-class professionals who have found that despite good compensation, restrictive land use regulations have kept them from being able to buy homes in high-opportunity areas of the country.⁷⁴ Their energy, enthusiasm, and money, matched with outstanding leadership and support from businesses who have seen high home costs affect their ability to attract employees, have translated into a consistent ability to out-organize the local government lobby and influence the course of state legislation.⁷⁵ The same dynamic explains why we are now seeing efforts to override CCRs—YIMBY and other housing groups have been able to out-organize the HOA lobby and pass legislation overriding restrictive CCRs.⁷⁶

C. California’s 2021 Legislation

In 2021 alone, California passed four significant legislative overrides of CCRs that restrict the residential use of property.⁷⁷ First, AB 1584 bars CCRs from effectively prohibiting or unreasonably restricting homeowners from renting their units, and it affirmatively requires HOA governing boards to amend the declaration of CCRs to remove any such restrictions, with or without the approval of the members.⁷⁸ Second, SB 478 prohibits local governments from imposing building density limitations (called “floor area ratio”) below a state-mandated minimum, and it also overrides CCRs that effectively

73. See *id.* at 1 (detailing how homeowners often oppose the construction of new development in their communities and how those advocating for the construction of more housing have responded).

74. *Id.* at 7–8, 12 (discussing the motivations and specific characteristics of members of the YIMBY movement).

75. *Id.* at 5 (highlighting the prevalence of YIMBY chapters “making their voices heard at city councils and state legislatures” and how this is causing momentum in effecting systematic change).

76. See, e.g., ASSEMBLY FLOOR ANALYSIS: CONCURRENCE IN SENATE AMENDMENTS FOR AB 721, at 4 (2021) (stating that just one small neighborhood group publicly in opposition to AB 721); SENATE FLOOR ANALYSIS: SENATE RULES COMMITTEE, Assemb. B. 670, 2019 Leg., Reg. Sess., at 6 (Cal. 2019) (showing that just two small HOAs opposed bill overriding CCRs regarding accessory dwelling units). Indeed, none of the recent bills overriding CCRs faced any serious opposition from the HOA lobby. See ASSEMBLY FLOOR ANALYSIS: CONCURRENCE IN SENATE AMENDMENTS, *supra*; SENATE FLOOR ANALYSIS: SENATE RULES COMMITTEE, *supra*.

77. See *infra* notes 79–85 and accompanying text (detailing four of California’s legislative overrides of CCRs).

78. See Assemb. B. 1584, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

prohibit or unreasonably restrict developments below that same minimum.⁷⁹ Third, AB 1466 strengthens existing state law regarding the removal of discriminatory restrictive covenants from deeds, such as covenants limiting ownership or occupancy of real property on the basis of race, by effectively requiring the removal of those restrictions in many circumstances.⁸⁰ As discussed further below, although such discriminatory restrictions have long been unenforceable, the restrictions themselves generally remained in the deeds that passed to subsequent purchasers.⁸¹ AB 1466 provides a number of mechanisms for removing those restrictions.⁸²

Fourth, the bill that promises to be the most significant in practice and that presents the most serious legal questions is AB 721.⁸³ This bill provides that the owner of a parcel of land subject to a recorded covenant in a deed restricting the residential use of the property can have that covenant removed, making the covenant void and unenforceable, if the owner covenants to develop the land for 100% affordable housing.⁸⁴ For example, if a parcel of land contains a deed restriction that limits it to one single-family home, or prohibits residential use altogether, the land owner could have that restriction removed from their deed and build housing at *any* density permitted by the local zoning ordinance, as long as the development is restricted to 100% affordable housing.⁸⁵ Naturally, AB 721 is intended to pair with several recent state laws that incentivize, and in some cases require, local governments to permit higher-density housing in their zoning ordinances.⁸⁶

AB 721 requires some elaboration because its significance and novelty

79. See S.B. 478, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

80. See Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (detailing the effect of the bill on racially restrictive covenants of lands).

81. See *infra* Section II.D (explaining how AB 1466 requires recorders of deeds passed on to take affirmative steps to remove discriminatory restrictions).

82. See Assemb. B. 1466, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

83. See Assemb. B. 721.

84. See *id.*

85. See *id.* (“The bill would authorize the owner of an affordable housing development to submit . . . a copy of the original restrictive covenant and a restrictive covenant modification document . . . that modifies or removes any existing restrictive covenant language to the extent necessary to allow an affordable housing development to proceed.”).

86. See ASSEMBLY FLOOR ANALYSIS: ASSEMBLY BILL POLICY COMMITTEE ANALYSIS FOR AB 721, at 4 (May 25, 2021) (observing that CCRs restricting affordable housing development conflict with zoning laws and “undermine California’s efforts to promote affordable and supportive housing construction”).

are not immediately apparent.⁸⁷ On the surface, the law may not seem especially important.⁸⁸ Financing subsidized housing in California is extremely difficult, so 100% affordable housing is something of a “unicorn.”⁸⁹ But housing demand in California has grown so severe that there is now profit to be made even in 100% subsidized affordable housing.⁹⁰ More importantly, given the level of housing demand and the legislature’s increasingly aggressive approach to preemption, this law could be the proverbial “camel’s nose under the tent.”⁹¹ We may soon see similar CCR overrides for housing developments with much lower affordability thresholds.⁹²

Conceptually, AB 721 is much more far-reaching than previous CCR overrides, sweeping away any restrictions on residential use or density that interfere with affordable housing production.⁹³ Although it passed with little fanfare, if the law is successful in producing affordable housing or spinning off additional legislation with lower affordability thresholds, it will surely become very controversial.⁹⁴ As discussed in the introduction, homeowners are

87. See *infra* notes 89–99 and accompanying text (discussing the layers of AB 721 and the novel approach it takes to overriding CCRs).

88. See *infra* text accompanying notes 100–105 (explaining the AB 721’s proposed method of invalidating CCRs, via the use of “Restrictive Covenant Modification”).

89. See Liam Dillon & Ben Poston, *Affordable Housing in California Now Routinely Tops \$1 Million Per Apartment to Build*, L.A. TIMES (June 20, 2022 5:00 AM), <https://www.latimes.com/homeless-housing/story/2022-06-20/california-affordable-housing-cost-1-million-apartment>.

90. See *id.* (highlighting that the exorbitant price tags attached to subsidized housing developments means taxpayers are subsidizing fewer apartments and, in turn, the waiting list of renters in need of affordable housing is growing). See generally Manuela Tobias, Matt Levin, & Ben Christopher, *Californians: Here’s why Your Housing Costs are So High*, CALMATTERS (Sep. 24, 2022), <https://calmatters.org/explainers/housing-costs-high-california/> (presenting the current high housing needs in California).

91. See generally Mario J. Rizzo & Douglas Glen Whitman, *The Camel’s Nose Is in the Tent: Rules Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 541 (2003) (describing how “[o]ne practical argument tends to lead to another, which means that one justified action, often a decision, tends to lead to another”).

92. See *infra* Part III (explaining the validity of CCR overrides and the expectation that these overrides will become more apparent in the future). See generally Dwight Merriam, *Affordable Housing: Three Roadblocks to Regulatory Reform*, 5 J. OF COMPAR. URB. L. & POL’Y 219, 240–44 (2022) (recognizing restrictive covenants as one of the roadblocks for affordable housing and providing examples of efforts at removing restrictive covenants by legislatures from states like Washington and Delaware).

93. See Assemb. B. 721 (making “any recorded covenants, conditions, restrictions, or limits” on the use of land “unenforceable against the owner of an affordable housing development”).

94. See Marble & Nall, *supra* note 15, at 1753 (theorizing that homeowners tend to place their desire to protect their home values and quality of life above that of providing more housing opportunities for others in their community).

extremely resistant to adding even modest housing density into their communities, especially if it takes the form of affordable, multi-family housing.⁹⁵

Perhaps because the law figures to be controversial, AB 721 takes a novel and somewhat unusual approach to overriding CCRs.⁹⁶ It is worth exploring that approach in some detail because it both provides insight into some of the political strategies related to CCR overrides and raises important legal questions.⁹⁷ The traditional approach to overriding CCRs prior to AB 721, embodied in California's legislation overriding CCRs restricting family day care centers, was for the legislature to declare that the public policy of the state is to permit such uses and to render void any CCRs barring or unreasonably limiting those uses.⁹⁸

AB 721 does not take quite that approach.⁹⁹ To be sure, the preamble does include language suggesting that affordable housing is an important public policy, and it notes that public policy supports the elimination of covenants restricting affordable housing.¹⁰⁰ But the law does not take the next step of simply declaring invalid any CCRs that restrict affordable housing.¹⁰¹ Instead,

95. See discussion *supra* Part I (discussing the focus on keeping dense, affordable housing away from single family neighborhoods that are already concerned about threats to property values, traffic congestion, and racial change); see also Marble & Nall, *supra* note 15, at 1753 (“[L]ike demographically comparable conservative homeowners, [liberal homeowners] tend to oppose measures that would allow more housing development.”).

96. See discussion *infra* Section II.D (explaining that this novel approach involves the same restrictive covenant modification mechanism as AB 1466, which allows for racially restrictive covenants to be officially removed from deeds and the chain of title).

97. See *infra* Section II.E (discussing the political strategy behind AB 721).

98. See CAL. HEALTH & SAFETY CODE § 1597.40(a) (West 2020) (“It is the public policy of this state to provide children in a family daycare home the same home environment as provided in a traditional home setting.”); CAL. HEALTH & SAFETY CODE § 1597.41(a) (West 2020) (“Every provision in a written instrument relating to real property that purports to restrict the conveyance, encumbrance, leasing, or mortgaging of the real property for use or occupancy as a family daycare home is void . . .”).

99. See Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (noting that restrictions will become unenforceable only “if an approved restrictive covenant affordable housing modification document has been recorded in the public record”).

100. See Assemb. B. 721 § 1(a) (“The lack of available and safe affordable and supportive housing equitably distributed throughout California presents a crisis for Californians that threatens the health of California citizens and their communities.”); *id.* § 1(d) (“The safety and welfare of the general public is promoted by eliminating, with limited exceptions as specified herein, the ability of recorded covenants, conditions, restrictions, or private limits on the use of land to prevent the construction or maintenance of additional affordable and supportive housing particularly in areas that have historically excluded this type of housing.”).

101. See Assemb. B. 721 (making CCRs upon transfer or sale of a property “unenforceable against

AB 721 borrows the approach of a contemporaneously enacted bill discussed above, AB 1466.¹⁰² AB 1466 provides that in the case of a deed containing a discriminatory covenant, typically one that discriminates on the basis of race, a “Restrictive Covenant Modification” form can be filed or “recorded” with the county recorder (the public official charged with maintaining local real property records), which would have the effect of removing the offensive language from the deed.¹⁰³ AB 721 similarly allows landowners to record a “Restrictive Covenant Modification,” which would remove any language with the effect of barring 100% affordable housing on a parcel, thereby rendering the covenant void and unenforceable.¹⁰⁴

D. Restrictive Covenant Modifications: AB 721 on Implicit Discrimination and the History of Racially Restrictive Covenants

To understand why AB 721 takes this approach, some context on the history of racially restrictive covenants and the emerging use of restrictive covenant modifications to address them may be helpful.¹⁰⁵ Covenants explicitly prohibiting homeowners from selling or renting their homes to non-white people were extremely prevalent in the United States during the postwar suburban boom, profoundly shaping the American landscape into the racially segregated pattern that has become one of the signature characteristics of

the owner of an affordable housing development”).

102. *Compare id.* (authorizing property owners to submit a “restrictive covenant modification document” in order to modify, remove, or make unenforceable a restrictive covenant), *with* Assemb. B. 1466, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (similarly authorizing title companies, county recorders, and real estate brokers, among other agents, to file restrictive covenant modification forms). In enacting AB 721, the California legislature described AB 1466 as a related existing law. *E.g.*, *Covenants and Restrictions: Affordable Housing: Hearing on Assemb. B. 721 Before the Assemb. Comm. on the Judiciary*, 2021 Leg., Reg. Sess. 10 (Cal. 2021) [hereinafter *Hearing on Assemb. B. 721*] (noting that AB 721 “models existing processes for recording real estate documents,” referring to the California law amended by AB 1466).

103. *See* Assemb. B. 1466.

104. *See* Assemb. B. 721.

105. *Cf. id.* § 1(c) (describing, as background for the bill, how “[r]ecorded covenants burdening real estate have historically been used to perpetuate discrimination and racial segregation in housing”); Press Release, Assemb. Member Richard Bloom, Bill to Remove Racist Housing Covenants Awaits Governor’s Signature (Sept. 2, 2021), <https://a50.asmdc.org/press-releases/20210902-bill-remove-racist-housing-covenants-awaits-governors-signature> (“AB 721 is a crucial step in remedying California’s painful history of segregation and redlining.”).

metropolitan regions.¹⁰⁶ HOAs were particularly notorious, and quite popular, for deploying such covenants to engage in racial exclusion.¹⁰⁷ Racially restrictive covenants were eventually declared unconstitutional by the Supreme Court in 1948 and have been considered unenforceable ever since, but an important problem remained, which state legislatures have only just begun to address.¹⁰⁸ Although racially restrictive covenants are unenforceable, the racially offensive language often remains in the deed and in the chain of title that is reported to subsequent purchasers.¹⁰⁹ Property records are maintained at the county level by officials called “recorders,” and county recorders traditionally did not have any mechanism to erase obsolete deed restrictions from the chain of title.¹¹⁰ Indeed, recorders resisted altering the deeds because they took the view that “the integrity of a property lot’s chain of title is based on the indestructibility of recorded documents in the custody of the local

106. Carol M. Rose, *Property Law and Inequality: Lessons From Racially Restrictive Covenants*, 117 NW. U. L. REV. 225, 234 (2022) (claiming that “racial covenants became routine in new subdivisions from the later 1930s through the first years of the housing boom that followed the Second World War”); MATTHEW D. LASSITER & SUSAN CIANCI SALVATORE, NATIONAL PARK SERVICE, CIVIL RIGHTS IN AMERICA: RACIAL DISCRIMINATION IN HOUSING 3 (2021) (describing “the public policies and private forces that shaped housing discrimination in American history,” including those that “emerged after World War I . . . and then accelerated after World War II through government initiatives, such as the Fair Housing Administration”).

107. See Cheryl W. Thompson et al., *Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country*, NPR (Nov. 17, 2021, 5:06 AM), <https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination> (explaining how most of the covenants throughout the country were written to keep Blacks from moving into certain neighborhoods).

108. See generally *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding racially restrictive covenants to be unconstitutional); *Hurd v. Hodge*, 334 U.S. 24 (1948) (same). 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) (making it unlawful to “make, print, or publish” any statement related to the “sale or rental of a dwelling that indicates any preference, limitation, or discrimination” based on race, among other things); see also Thompson et al., *supra* note 108 (noting that, after the decision in *Shelley*, “things didn’t change overnight,” but also claiming that “[a]mending or removing racially restrictive covenants is a conversation that is unfolding across the country” as state legislatures begin to address the issue).

109. See *May v. Spokane Cnty.* 481 P.3d 1098, 1099 (Wash. App. 2021) (acknowledging how racist housing practices persisted for decades after the ruling of *Shelley v. Kraemer*); see also Thompson et al., *supra* note 108 (describing how, even though racially restrictive covenants are unenforceable, many properties “still have racially restrictive covenants in the books”).

110. See *Mason v. Adams Cnty. Recorder*, 901 F.3d 753, 756 (6th Cir. 2018) (noting that county recorders “are required . . . to furnish . . . documents [with restrictive covenants] to the public,” and recorders “have no statutory authority to edit documents after filing or while maintaining them”); see also Thompson et al., *supra* note 108 (highlighting a story of a lawyer who tried to remove the covenant through the county’s recorder office and learned the offensive language could not be removed).

recording office.”¹¹¹ The argument is that if it were possible for a county recorder to alter historical records in the chain of title, then prospective purchasers of property interests would have less confidence in the accuracy of the chain of title.¹¹²

On the other hand, leaving racially restrictive covenants “on the books,” even if they are unenforceable, is a painful reminder of the history of housing discrimination in this country.¹¹³ Racially restrictive covenants can also have an unconscious “steering” effect, making people of color feel unwelcome in a community containing such restrictions, thereby reinforcing the racial segregation that the racial restrictions were intended to create.¹¹⁴ Therefore, in recent years many states, including California, have taken steps to create a process whereby the racial language can be formally removed from the deed and chain of title.¹¹⁵ California and other states permit homeowners to file a “restrictive covenant modification” to formally excise the racial language from a deed, and under the recently passed AB 1466, California now requires recorders to take affirmative steps to remove such restrictions without waiting for homeowners to act.¹¹⁶

AB 721 uses the same mechanism of the “restrictive covenant modification” but in a slightly different way.¹¹⁷ It permits landowners to remove language in the deed that restricts residential use of the property in any way, and

111. *May*, 481 P.3d at 1101 (Wash. App. 2021) (explaining the county recorder’s argument against the claim that racially restrictive covenants should be physically erased from the chain of title).

112. *See, e.g.*, *Adams Cnty. Abstract Co. v. Fisk*, 788 P.2d 1336, 1339 (Idaho App. 1990) (noting that a county recorder has both a “duty to keep records” and “a duty of recording documents properly”).

113. *See* Thompson et al., *supra* note 108 (stating that “keeping [racially restrictive] covenants on the books perpetuates segregation and is an affront” to minority groups who were targeted through restrictive covenants).

114. *See May*, 481 P.3d at 1113 (Fearing, J., dissenting) (observing that “[t]he presence of the covenant may subtly encourage some homeowners to discreetly sell only to whites” and that “[b]lacks may be reluctant to purchase residences in a neighborhood that they learn retains scars from a history of racial territoriality”); *see also* Jason Stauffer, *How to Identify and Combat Racial Steering in Real Estate*, TIME (Mar. 31, 2021), <https://time.com/nextadvisor/mortgages/what-is-racial-steering-real-estate/> (defining “steering” as “a form of discrimination whereby a real estate professional influence’s someone’s housing decision based on their race, religion, or another protected characteristic covered by the 1968 Fair Housing Act”).

115. *See* Thompson et al., *supra* note 108 (describing several state and local initiatives, including ones in California, to allow for the removal of racially restrictive covenants); *May*, 481 P.3d at 1112.

116. *See* Assemb. B. 1466, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (discussing the process for filing a Restrictive Covenant Modification).

117. *See* Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

thereby renders such a restriction unenforceable, by filing a restrictive covenant modification with the county recorder, as long as the landowner covenants to develop the land for 100% deed-restricted affordable housing.¹¹⁸ Unlike its predecessors, AB 721 does *not* require that the offending deed restriction contain any express racial preference or dis-preference;¹¹⁹ it need only contain a restriction on residential use.¹²⁰

Nevertheless, the statute's authors very consciously tie AB 721 to the history of racially restrictive covenants and to recent efforts to excise such covenants from real property deeds.¹²¹ Both the preamble and the legislative history of AB 721 cite the legacy of racially restrictive covenants and draw a line between explicit racially restrictive covenants and facially race-neutral covenants that restrict housing development.¹²² One committee report on the bill discussed how, after the 1948 *Shelley v. Kraemer* case declared racially restrictive covenants to be unconstitutional, many developers and HOAs implemented covenants that restricted the residential use of property.¹²³ "Although race neutral on their face, these covenants had the practical effect of maintaining white, single-family hegemony in California's burgeoning post-war suburbs."¹²⁴

Framed in this manner, AB 721 tracks with recent developments in fair housing law, particularly the Supreme Court's decision in *Texas Department of Housing and Community Affairs v Inclusive Communities Project*.¹²⁵ Though the federal Fair Housing Act clearly prohibited explicitly racially

118. *See id.* (noting that the bill applies only to an "owner of affordable housing development" and to property which "qualifies as an affordable housing development"); *Hearing on Assemb. B. 721*, *supra* note 103, at 10 (noting that the bill requires that "100 percent of the units . . . be made available at affordable rent" for a property to qualify).

119. *See* Assemb. B. 721 § 2 (noting that the bill applies to covenants that include restrictions on residential use, rather than expressly discriminatory language).

120. *See id.* (stating that the bill only applies to restrictions on "the number, size, or location of residences that may be built on the property," or restrictions on the number of people who may reside on the property).

121. *See id.* § 1(c) ("Recorded covenants burdening real estate have historically been used to perpetuate discrimination and racial segregation in housing . . . and have hampered the effectiveness of efforts to expand the availability of affordable and supportive housing.").

122. *Id.*

123. *Hearing on Assemb. B. 721*, *supra* note 102, at 9 ("As racially restrictive covenants were banned, developers and neighborhood associations found new ways to subvert the *Shelley* ruling.").

124. *Id.*

125. *See generally* 576 U.S. 519 (2015) (holding that disparate-impact claims under the FHA are cognizable).

discriminatory housing practices such as the racially restrictive covenant, prior to *Inclusive Communities* the Supreme Court had never clarified whether the Act also prohibited practices that are facially race-neutral but have a disproportionate impact on certain racial groups, such as covenants that restrict the residential use of property without containing an express racial restriction.¹²⁶ Ultimately the Supreme Court held, in what was considered something of a surprise given the Court's conservative direction, that practices with a disparate impact on protected classes violate fair housing law because they detract from the law's goal of a racially integrated society, regardless of whether there is intentional racial discrimination.¹²⁷ The drafters of AB 721 clearly had disparate impact in mind, as the legislative history suggests that CCRs restricting affordable housing were "arguably" already a violation of state fair housing law.¹²⁸

However, while there is clearly a historical and logical connection between express racial deed restrictions and race-neutral deed restrictions with disparate racial impacts, AB 721's linkage of these two types of restrictions is somewhat misleading.¹²⁹ There is a very significant distinction between legislation permitting or requiring the removal of express racial deed restrictions and legislation like AB 721 that permits the removal of race-neutral

126. See Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 107–09 (2015) (noting that the *Inclusive Communities* case, because of its unique focus on disparate impact, "did not fit into any of [the] categories" of prior challenges to housing practices); see also *Fair Housing Act – Disparate Impact and Racial Equality: Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 129 HARV. L. REV. 321, 329 (2015) (commenting that prior cases "left many wondering how long [facially neutral practices with disparate racial impact] could withstand constitutional scrutiny," until the Supreme Court finally resolved this in *Inclusive Communities*).

127. See *Inclusive Communities Project*, 576 U.S. at 539–40, 546–47.

128. *Hearing on Assemb. B. 721*, *supra* note 103, at 4.

129. Cf. Press Release, Assemb. Member Richard Bloom, Assemblymember Bloom's Anti-Racism Bills Clear Senate Committee on Appropriations (Aug. 26, 2021), <https://a50.asmdc.org/press-releases/20210826-assemblymember-blooms-anti-racism-bills-clear-senate-committee> (comparing explicit racially restrictive covenants to "other vestiges of discrimination"—namely, facially neutral restrictive covenants—and noting that while the former has become unenforceable, the latter still pose issues for racial discrimination). Scholars have previously compared the legal treatment of explicit racially restrictive covenants to those facially neutral but effectually discriminatory covenants, noting that although comparable, the latter are generally still enforceable. See, e.g., Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1568 (2012) ("While the racially restrictive covenant has been repudiated as a formal matter . . . the policing of Black women . . . is analogous to the racially restrictive covenant.").

restrictions on affordable housing developments, a distinction that AB 721 completely obscures by conflating the two types of laws.¹³⁰ The former type of law is symbolic or expressive.¹³¹ Laws permitting or requiring the removal of racially restrictive covenants from deeds do not actually render racially restrictive covenants unenforceable, as racially restrictive covenants have been unenforceable since 1948.¹³² This legislation merely authorizes or requires the removal of deed language that is *already* unenforceable.¹³³ AB 721, on the other hand, not only authorizes the removal of language in a deed, but in doing so affirmatively *makes* previously enforceable race-neutral restrictions on affordable housing unenforceable.¹³⁴ As such, AB 721 has a much more significant *practical* effect on the ability of HOAs to enforce an exclusive, low-density, suburban lifestyle; however, that practical effect is obscured by the unusual mechanism of the “restrictive covenant modification,” which makes the law appear to be a logical progression from the more symbolic effort to remove racially restrictive covenants.¹³⁵

130. Cf. Thompson et al., *supra* note 108 (explaining various forms of legislation to remove racially restrictive covenants); Ocen, *supra* note 130, at 1553, 1581 (describing facially neutral covenants restricting affordable housing as “formally distinguishable” from explicitly discriminatory covenants, but noting legal processes that can be “used to outlaw judicial enforcement” of both forms of restrictive covenants (internal citation omitted)); Cristina Kim, *Do You Keep or Remove the Racially Restrictive Covenant Attached to Your Home?*, KPBS (Nov. 18, 2021, 1:18 PM), <https://www.kpbs.org/news/local/2021/11/18/keep-remove-racially-restrictive-covenant-attached-your-home> (comparing legislation allowing for removal of express racial deed restrictions with current issues surrounding covertly discriminatory covenants).

131. See, e.g., Will Jones, *New Illinois Law Allows Homeowners to Remove Racist Language from Home Deeds*, ABC 7 CHICAGO (Jan. 7, 2022), <https://abc7chicago.com/new-illinois-lawhome-deed-house-restrictive-covenant/11438834/> (quoting one political science professor’s view that removing discriminatory language from deeds is a “symbolic step”).

132. Cf. Thomas Shepherd, *A Shadow of Ohio’s Racist Past? Or A Lingering, Tangible Impact? An Examination of Unenforceable Restrictive Covenants*, 48 CAPITAL U.L. REV. 44, 55–56, 73 (2020) (arguing that, because racially restrictive covenants are already unenforceable, “relieving . . . negative emotional impact is the only goal . . . legislation [to remove such covenants] can hope to achieve,” and arguing that such legislation “gives a false sense of accomplishment at best”); see also Thompson et al., *supra* note 108 (stating how *Shelley v. Kraemer* made racially restrictive covenants unenforceable in 1948 but didn’t stop the language from appearing on deeds).

133. *Contra* Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (“The owner of an affordable housing development shall be entitled to establish that an existing restrictive covenant is unenforceable . . . that modifies or removes any existing restrictive covenant language.”).

134. See *id.* (stating that the bill “modifies or removes any existing restrictive covenant language to the extent necessary to allow an affordable housing development to proceed”).

135. See *Hearing on Assemb. B. 721*, *supra* note 103, at 10 (noting that AB 721 “models existing processes for recording real estate documents” and “proposes to adopt a nearly identical process for covenants restricting housing density or size” through use of the Restrictive Covenant Modification

E. AB 721's Political Gambit

There may be a political and rhetorical strategy behind AB 721's unique approach.¹³⁶ Previous housing supply bills in California have been very controversial because, despite the ongoing housing crisis, homeowners and local governments are enormously resistant to the prospect of increased housing density in suburban communities.¹³⁷ By leaning into a left-of-center framing of the housing crisis that emphasizes the intersection between regulatory restrictions on housing and systemic racism,¹³⁸ and couching the bill in the same terms as the largely symbolic efforts to remove racially restrictive covenants,¹³⁹ the authors of AB 721 may have neutralized potential opposition within California's mostly Democratic legislature, which likes nothing more than making wholly symbolic gestures to address discrimination. Notably, previous housing supply bills in California have tended to emphasize race-neutral arguments focused on the effects of the housing crisis on economic opportunities.¹⁴⁰ For example, recent amendments to the state's Housing Accountability Act, an important law that curtails the ability of local governments to deny projects, contain extensive findings regarding the role of the housing shortage in limiting economic opportunities but almost nothing about racial inequality.¹⁴¹

The way the law is framed matters because it affects the ideological and

process).

136. Cf. Press Release, Gov. Gavin Newsom, Governor Newsom Signs Legislation to Increase Affordable Housing Supply and Strengthen Accountability, Highlights Comprehensive Strategy to Tackle Housing Crisis (Sept. 28, 2021), <https://www.gov.ca.gov/2021/09/28/governor-newsom-signs-legislation-to-increase-affordable-housing-supply-and-strengthen-accountability-highlights-comprehensive-strategy-to-tackle-housing-crisis/> (stating that Newsom "signed a suite of bills to boost housing production across California," including AB 721, as part of a "housing affordability and homelessness package" and California's "comprehensive housing vision and . . . commitment to create more affordable housing").

137. See Stahl, *supra* note 1, at 180 ("Local governments are often beholden to local residents, especially homeowners, who vigorously oppose new development in their communities."); Einstein et al., *supra* note 47, at 30.

138. See Assemb. B. 721 § 1(d) (framing AB 721 as promoting "[t]he safety and welfare of the general public," especially "in areas that have historically excluded [affordable] housing").

139. Compare A.B. 721 (authorizing property owners to submit a "restrictive covenant modification document" in order to modify, remove, or make unenforceable a restrictive covenant), with Assemb. B. 1466, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (authorizing title companies, county recorders, and real estate brokers, among other agents, to file restrictive covenant modification forms).

140. See, e.g., CAL. GOV'T CODE § 65589.5(a) (West 2022).

141. See *id.*

political coalitions willing to support the legislation.¹⁴² According to a recent poll that tested both “racial justice” and “economic growth” messaging for land use reform measures, the economic growth framing polled a net ten percent better than the racial justice framing.¹⁴³ The difference was almost entirely attributable to decreased support among Republican voters with the racial justice framing—not entirely surprising considering the hostility of the current Republican Party to any kind of message that implies the existence of racism in American society.¹⁴⁴

Perhaps in part for this reason, previous legislation that focused more on supply and economic growth arguments garnered an interesting mix of support from left-leaning YIMBYs and some libertarian/business-friendly Republicans, and an equally surprising mix of opposition from left-wing anti-gentrification groups who oppose market solutions to the housing crisis and conservative defenders of the suburban status quo.¹⁴⁵ By leaning into the systemic racism angle and limiting the Bill’s application to affordable housing, AB 721 unified the Left in support and the Right in opposition—almost all Democrats in the legislature supported the Bill and almost all Republicans opposed it.¹⁴⁶

Politically, a framing strategy that unifies Democrats but repels Republicans is very useful in the state of California, which is of course overwhelmingly Democratic.¹⁴⁷ It does raise the question, however, of whether the racial

142. See Jerusalem Demsas, *How to Convince a NIMBY to Build More Housing*, VOX (Feb. 24, 2021, 10:00 AM), <https://www.vox.com/22297328/affordable-housing-nimby-housing-prices-rising-poll-data-for-progres> (“A new . . . poll suggest[s] voters increase support for building homes when presented with an economic case for it.”).

143. See Demsas, *supra* note 145 (“Zoning changes were net 10 percentage points more popular when paired with an economic case than with a racial justice argument, with fewer voters opposed.”).

144. See *id.* (determining that support for an affordable housing “proposal reached 47 percent and opposition dropped to 37 percent” primarily because republican voters are less supportive of racial justice framing compared to economic framing).

145. See, e.g., S.B. 50, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (receiving varied responses from the public); see Conor Dougherty, *California, Mired in a Housing Crisis, Rejects an Effort to Ease It*, N.Y. TIMES, <https://www.nytimes.com/2020/01/30/business/economy/sb50-california-housing.html> (Sept. 20, 2021); Liam Dillon, *The Revenge of the Suburbs: Why California’s Effort to Build More in Single-Family-Home Neighborhoods Failed*, L.A. TIMES (May 22, 2019, 5:00 AM), <https://www.latimes.com/politics/la-pol-ca-california-sb50-failure-single-family-homes-suburbs-20190522-story.html>.

146. See Assemb. B. 721, 2021–2022 Leg., Reg. Sess., (Cal. 2021).

147. See *Party Affiliation by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/party-affiliation/by/state/> (last visited Oct. 20, 2022) (estimating that

justice framing will carry weight in other states where Democrats are not as dominant as they are in California.¹⁴⁸

More importantly, the federal courts, and the Supreme Court in particular, are currently packed with Republican appointees who are extremely hostile to any legislation that attempts to remedy or even acknowledge systemic or implicit racism.¹⁴⁹ Moreover, the reconstituted Supreme Court recently signaled it may use the Constitution's Takings Clause far more aggressively than it has in the past to protect landowners against government regulation.¹⁵⁰ So, will the Court countenance legislation that takes away a homeowner's right to enforce a covenant in their deed relating to the residential use of neighboring properties for the purpose of addressing racial inequalities in the housing markets?¹⁵¹

III. PART II: THE CONSTITUTIONAL QUESTIONS

To date, there are very few published judicial decisions addressing the validity of CCR overrides, but that may be because overrides have historically been relatively modest and intruded fairly little into HOAs' core function of protecting property values and excluding undesirable land uses.¹⁵² However, the recent California legislation discussed in the previous section, especially AB 721, which overrides *all* restrictions on residential use if affordable housing is proposed for a parcel, is much more intrusive and cuts directly to the

49% of Californians are Democrats, 30% are Republicans, and 21% are non-leaning).

148. *See id.* (identifying twenty-two states with more registered Republicans than registered Democrats).

149. *See Current Members*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 20, 2022) (identifying that six out of nine Supreme Court Justices were nominated by Republican Presidents); *see also* Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp In Generations*, FIVETHIRTYEIGHT (July 5, 2022, 1:08 PM), <https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/> ("The court, meanwhile, isn't just polarized along partisan lines—its decisions also increasingly align with the views of the average Republican voter.").

150. *See generally* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (holding that a California law requiring farm owners to permit periodic access to union organizers was an unconstitutional taking).

151. *See infra* Part III (discussing the forecasted effect of legislated CCR overrides if appearing in front of the U.S. Supreme Court).

152. *See* discussion *infra* Section III.A.3.d (discussing relevant case law that dealt with the Contract Clause, but noting that none of the cases have taken the Takings issue particularly seriously).

core land use function of the HOA.¹⁵³ Therefore, it is a fair bet that the validity of CCR overrides will come before the courts in the near future.¹⁵⁴ The U.S. Constitution's Takings Clause in particular may pose a challenge to these recent overrides. The Contract Clause may also be an obstacle, although that is less likely.¹⁵⁵

A. *The Takings Clause*

The strongest argument against CCR overrides is probably that eliminating or blocking enforcement of private covenants intended to benefit a homeowner's property constitutes a "taking" in violation of the Constitution's Takings Clause.¹⁵⁶ The Takings Clause provides that the State may not take private property without just compensation.¹⁵⁷ In the case of CCR overrides, as elaborated below, homeowners who wish to enforce CCRs against their neighbors, but are prevented from doing so by state legislation, could argue that the state has taken their property right to enforce the CCR without providing any compensation.¹⁵⁸

The idea that one could have a property right in how a neighbor uses their

153. Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (prohibiting enforcement of all residential use restrictions for certain affordable housing parcels); *see also supra* notes 119–153 (discussing AB 721, its implications, and relation to other legislation).

154. *See Geier, supra* note 13, at 245 ("It can also be anticipated that some of the new bills will face opposition when applied to particular projects, and homeowners associations or property owners adversely affected by limitations on their right to enforce existing restrictions will resist the legislation by litigation.").

155. *See id.* at 246 ("When subjected to a Contracts Clause analysis, the argument that limiting building or occupancy restrictions to promote an important public objective (such as the development of housing) is an unjustifiable impairment of legitimate contract rights is doubtful."); *see also* discussion *infra* Section III.A (examining constitutional questions arising from the Takings Clause and the Contract Clause).

156. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021) (reasoning that since the central importance to property ownership is the "right to exclude," it falls within the "category of interests that the Government cannot take without compensation"); *Geier, supra* note 13, at 248 ("Cases involving the government's deliberate abrogation of private restrictions have sometimes found the action to be an unlawful taking, but the case law is not uniform.").

157. U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.")

158. *See generally* David W. Owens, *Regulatory Takings*, U.N.C. SCH. GOV'T (Jan. 2012), <https://www.sog.unc.edu/resources/legal-summaries/regulatory-takings> ("It is also important to note that a plaintiff in a regulatory takings challenge must establish that he or she had a property right to undertake the proposed development.").

land, and therefore that your property could be “taken” simply because your neighbor can use their property in a way you dislike, might seem absurd.¹⁵⁹ Indeed, the only appellate court to date to consider the applicability of the Takings Clause to state legislation overriding a CCR used exactly this reasoning to summarily reject the landowner’s claim.¹⁶⁰ But I don’t think the landowner’s claim can be dismissed so easily.¹⁶¹ Landowners often do have property rights in how neighbors use their land.¹⁶² For example, if a neighbor uses their property in a way that constitutes a nuisance—such as emitting very loud noises or odors—affected neighbors have the right to sue to abate the offensive activity, or at least obtain damages.¹⁶³ If that right were removed legislatively, the landowner could argue that their property was taken.¹⁶⁴ The

159. See generally *Barrett v. Dawson*, 71 Cal. Rptr. 2d 899 (Ct. App. 1998) (providing an example in which a party attempted to enforce a restrictive covenant prohibiting the operation of a day care facility in their neighborhood).

160. See *id.* at 903 (rejecting the “proposition that the *absence* of the enforcement of a particular restrictive covenant against *another* owner’s property amounts to a governmental expropriation of one’s *own* property”).

161. See *infra* notes 166–173 and accompanying text.

162. See generally Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004) (discussing property rights in the law of nuisance). See Christopher Essert, *Nuisance and the Normative Boundaries of Ownership*, 52 TUL. L. REV. 85, 87 (2016) (“Many cases of nuisance can, like trespass, be viewed as an ‘invasion’ of the plaintiffs’ land: in trespass the invading force is a person or physical object visible to the naked eye, whereas in nuisance, it is a smell, or smoke, or sound waves.”).

163. See Smith, *supra* note 165, at 999 (“[C]ourts have recognized different classes of nuisances . . . [including] tangible but non-trespassory invasions such as smoke, odors, [or] vibrations.”); Essert, *supra* note 165, at 99 (“The crucial point is that nuisance is about the reciprocity of rights, and reciprocity of rights is not reciprocity of harms. It is better understood in terms of the possibility of rendering consistent and systematic a right of owners such that all owners have a set of rights that allows them to interact with one another (and with non-owners) on fair terms. The thought would be that to be an owner is to have a kind of interpersonal normative control, to have the right to determine whether or not others may act in certain ways.”).

164. See *Bormann v. Bd. of Sup’rs In & For Kossuth Cnty.*, 584 N.W.2d 309 (Iowa 1998). The Iowa Supreme Court has squarely held that where the legislature removes a landowner’s common law right to sue to abate a nuisance, that constitutes a taking under the Iowa Constitution. *Id.* However, the court’s reasoning is highly questionable and has been roundly criticized by scholars and other courts. See, e.g., *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637, 646 (Idaho 2004) (declining to follow *Bormann*); Jennifer L. Beidel, Comment, *Pennsylvania’s Right-To-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN ST. L. REV. 163, 176–83 (2005) (criticizing *Bormann*). The *Bormann* court found the state’s “right to farm” law, which forbade nuisance lawsuits by neighboring landowners against farm owners where the farm use preceded the neighboring land use, to be an unconstitutional taking because it permitted farm owners to condemn an easement across neighbors’ property without just compensation. *Bormann*, 584 N.W.2d at 321–22. But there is very little support in modern property or takings law for the idea that a non-trespassory interference with property rights

Supreme Court has intimated that in the event the government commits or authorizes a nuisance that causes significant harm to the landowner, the landowner could indeed have a viable claim that the government has taken their property.¹⁶⁵ Likewise, a legislative override of a CCR could be considered a taking under the same logic.¹⁶⁶ The right to enforce a servitude is a property right in the same way that abatement of a nuisance is a property right.¹⁶⁷ Homeowners accept, and presumptively agree to, restrictions on their property referenced in their deeds and the recorded declaration of CCRs based on the understanding that neighboring homeowners will be similarly restricted.¹⁶⁸

should be considered an easement. See Kenneth E. Stahl, *The Trespass/Nuisance Divide and the Law of Easements*, 86 GEO. WASH. L. REV. 966, 988 (2018). In fact, the easement theory is inconsistent with the Supreme Court's firm distinction between trespassory invasions, which are generally considered "per se" or automatic takings, and non-trespassory interference, which is generally resolved under the *Penn Central* "ad hoc" test. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–25 (1978). To conceptualize right-to-farm laws as imposing an easement would blow up the trespassory/non-trespassory distinction entirely and lead to absurd results. See Beidel, at 178 ("[D]efining nuisance immunity as an easement creates a slippery slope whereby other essential property devices could be classified as easements."). As Beidel correctly observes, if a right to farm law imposes an easement on neighboring property, then the same could be said for municipal zoning ordinances, which burden landowners' property in order to confer a public benefit. *Id.* Zoning would thus have to be considered a per se taking. See *id.* Indeed, a trial court in Iowa did find a zoning decision to be an unconstitutional taking under *Bormann*, requiring the Iowa Supreme Court to step in and distinguish *Bormann* in a not entirely convincing fashion. See *Harms v. City of Sibley*, 702 N.W.2d 91, 95 (Iowa 2005). For that reason, and as discussed further, right-to-farm laws and other laws, such as CCR overrides that authorize non-trespassory interference with a landowner's property, should be evaluated under the *Penn Central* test. See *Cedar Point*, 141 S. Ct. at 2072 ("To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.").

165. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (hypothesizing that in the event the government substantially reduces a landowner's property by building a highway nearby, the landowner would be able to make out a takings claim under the *Penn Central* test).

166. See Geier, *supra* note 13, at 250 ("Some direct regulations superseding and preventing enforcement of building restrictions may have such an impact on nearby properties benefitted by the restrictions that they require compensation in order to be valid.").

167. See Charles D. Christopher, *The Equitable Servitude: A Basis for Just Compensation of Proximity Damages*, 10 CAL. W. L. REV. 628, 643 (1974) ("The reason for creating the equitable servitude was to protect property values. That it is not violative of public policy to protect property values from government action has been previously shown. These values could not have been protected without establishing a basis for compensation where none previously existed. In a sense then, the servitudes were established to collect compensation.").

168. See *supra* notes 59–60 and accompanying text (discussing the presumption that homeowners consent to restrictions when purchasing property).

Therefore, the state removing a restriction on neighboring land could be considered “taking” a property right.¹⁶⁹

But in the world of takings law, nothing is ever so clear.¹⁷⁰ Property rights are rarely absolute, and the government’s power to regulate land use is robust.¹⁷¹ Courts have struggled for years to strike the right balance between property rights and governmental power.¹⁷² For that reason, takings law is an absolutely incoherent morass.¹⁷³

Though there are no absolutes in takings law, a few general principles can be discerned.¹⁷⁴ Initially, the courts apply categorical “*per se*” rules to some types of cases not at issue here.¹⁷⁵ For example, where the state has authorized a physical occupation of the property or “wiped out” all of the property’s economic value, that is categorically considered a taking, with a few exceptions.¹⁷⁶ In those cases not governed by such a categorical rule, courts determine whether a taking has occurred using the “*Penn Central*” test, so named for the case of *Penn Central Transportation Co. v. City of New York*.¹⁷⁷ Under the *Penn Central* test, courts weigh the following three factors: 1) “the

169. See *supra* notes 160–171 and accompanying text.

170. See Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1312 (1989) (“The Court also has left unclear whether property for takings clause purposes is solely a creature of positive law.”).

171. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834–35 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ or what type of connection between the regulation and the state interest satisfies the requirement that the former ‘substantially advance’ the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.” (footnote omitted)).

172. See *generally* Geier, *supra* note 13, at 248 (“A Takings challenge to statutory preemption of development restrictions and other restrictive covenants is even more problematic than a Contracts Clause analysis.”).

173. *Id.* at 244 (“By definition, it is hard to anticipate all of the potential issues posed by the increasing legislative incursions on the right to maintain or enforce recorded development restrictions”).

174. *Cf. id.* at 248 (“Cases involving the government’s deliberate abrogation of private restrictions have sometimes found the action to be an unlawful taking, but the case law is not uniform.”).

175. See Beidel, *supra* note 167, at 180 (“Two categories of state action constitute *per se* takings that must be compensated. The first involves the permanent physical invasion of a property. The second involves regulations that deny the owner of a property of all economically beneficial use of his land.” (footnotes omitted)).

176. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (physical occupation committed or authorized by the state is a *per se* taking, subject to some exceptions); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022–23 (1992) (total economic wipeout is a *per se* taking, subject to some exceptions); see text accompanying *supra* note 167 (explaining how CCR overrides are not trespassory invasions and so are not subject to the *Cedar Point* analysis).

177. 438 U.S. 104 (1978).

character of the governmental action;” 2) the magnitude of the deprivation (*i.e.*, the financial impact on the claimant); and 3) the extent to which the regulation interferes with the claimant’s “reasonable, investment backed-expectations.”¹⁷⁸

Candidly, nobody really knows—especially the Supreme Court Justices—what any of these factors mean or how to apply them, but one thing that does seem clear is that it is very, very difficult for a challenger to prevail under the *Penn Central* test.¹⁷⁹ A recent study by James Krier and Stewart Sterk revealed that less than ten percent of *Penn Central* claims were successful, and that number was probably overstated.¹⁸⁰ Nevertheless, since none of the categorical rules apply to CCR overrides, opponents of such overrides hoping to make out a takings claim will have to run the *Penn Central* gauntlet.¹⁸¹

1. The *Penn Central* Test: Character of the Governmental Action

The first factor in the *Penn Central* test is the character of the governmental action.¹⁸² According to *Penn Central*, this factor is supposed to mean that a taking is more likely to be found if the governmental action involves or authorizes a physical occupation of the property, such as expropriating the property for use as an airport, or authorizing a private party to condemn an easement across the property.¹⁸³ A legislative abrogation of a CCR limiting

178. *See, e.g.*, Peterson, *supra* note 173, at 1317.

179. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 88 (2016) (concluding that the *Penn Central* balancing test, both empirically and practically, is difficult to apply).

180. *Id.* at 64.

181. *See* cases cited *supra* note 167 (discussing the reasons for why CCR overrides must be evaluated under *Penn Central* and not as a *per se* taking under *Cedar Point*); *Barrett v. Dawson*, 71 Cal. Rptr. 2d 899, 900 (Ct. App. 1998) (holding that not enforcing a restrictive covenant is not a government appropriation of property); *Cedar Point*, 141 S. Ct. at 2072 (holding that physical appropriation property is a *per se* taking, but in the absence of it, *Penn Central* applies).

182. *Penn Cent.*, 438 U.S. at 124 (creating the three-factor test for regulatory takings); Peterson, *supra* note 173, at 1317 (analyzing the *Penn Central* factors, beginning with character of government action).

183. *See* 438 U.S. at 124. In a signal of the conceptual incoherence of the Court’s takings jurisprudence, the Court later held that where the government action involves or authorizes a physical occupation, that action is an automatic or *per se* taking (subject to certain exceptions) regardless of how the other factors come out. *See Cedar Point*, 141 S.Ct. at 2074 (2021) (holding that physical occupation, whether permanent or temporary, is a *per se* taking, though carving out various exceptions);

residential use does not involve any kind of physical occupation, so this factor would seem to be inapplicable.¹⁸⁴ However, in other cases the Court has used this factor to evaluate the strength of the government's justification for its action.¹⁸⁵ For example, if the government is abating a serious harm, that will weigh more in its favor than if the government is attempting to confer a public benefit at the expense of a landowner whose use of the land is harmless.¹⁸⁶ The harm/benefit distinction has been widely criticized as incoherent, and the Court has attempted to bury it numerous times, but it always seems to reappear in one fashion or another.¹⁸⁷

As a matter of realpolitik, given the conceptual muddle of takings law, the Court generally places a thumb on the scale in favor or against particular governmental policies based on how those policies square with the ideological dispositions of a majority of the justices.¹⁸⁸ For instance, just two years ago in *Cedar Point Nursery v. Hassid*, the Supreme Court struck down a California law that required employers in the farm industry to open up their property periodically to labor organizers.¹⁸⁹ Although it had been established in previous caselaw that providing such access could be a legitimate condition on the issuance of a government permit, the Court found that union access provided an insufficient public benefit to justify the intrusion on the landowner's right to exclude.¹⁹⁰ There is little to distinguish what the Court sees as legitimate public benefits that would justify access requirements, such as minimizing

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that *permanent* physical occupation is a *per se* taking).

184. See *supra* note 167 and accompanying text (explaining why a CCR override would not be considered a trespassory invasion).

185. See Peterson, *supra* note 173, at 1318–19 (discussing cases where the Supreme Court used the governmental action factor to evaluate the government's justification for its action).

186. *Id.*

187. See *Penn Cent.*, 438 U.S. at 134 (attempting to minimize harm/benefit distinction); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024 (1992) (stating that the harm/benefit distinction "is often in the eye of the beholder").

188. See David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 412 (2018) (highlighting that the majority of Justices on the Supreme Court can impose their ideological views on the politics of the United States); cf. *Current Members*, *supra* note 151 and accompanying text (observing that six of the nine current Supreme Court Justices were appointed by Republican presidents).

189. 141 S. Ct. 2063, 2080 (2021).

190. See *id.*

traffic,¹⁹¹ providing beach access,¹⁹² or permitting health inspections,¹⁹³ from illegitimate public benefits such as labor peace, other than that the conservative Court majority is hostile to unions and does not see union activity as a public benefit.¹⁹⁴

This all suggests that the courts, and specifically the current Supreme Court, would view CCR overrides largely through an ideological lens. Therefore, the law's framing could make a difference.¹⁹⁵ As I discuss further below, to the extent overrides are couched in terms of economic growth and relieving supply restrictions, they are likely to pass muster.¹⁹⁶ Laws like AB 721 that are explicitly framed in terms of systemic racism are more vulnerable because they contradict the ideological thrust of the current Supreme Court.¹⁹⁷

2. The *Penn Central* Test: Diminution in Value

The second factor, diminution in value, is mostly a curiosity, and it is not clear that this is a real “factor” at all.¹⁹⁸ *Penn Central* itself and other cases have largely considered even a near-total deprivation of economic value as

191. *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (stating that preventing traffic congestion is a legitimate public purpose).

192. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841–42 (1987) (holding that California could use its taking power for the public purpose of providing beach access).

193. *Cedar Point*, 141 S. Ct. at 2079–80 (noting that temporary physical occupation for purposes of a health inspection would not constitute a taking).

194. *See id.* at 2089 (Breyer, J., dissenting) (asserting that labor peace is a sufficient justification to warrant the temporary physical occupation authorized by the statute at issue in the case).

195. *See Orentlicher*, *supra* note 191, at 413 (arguing that when Supreme Court decisions reflect the majority's ideological views, those decisions are determined by one side of the political spectrum).

196. *See infra* Section II.A.3.c (discussing how the state's arguments that CCR overrides increase housing supply and economic growth would likely pass the Court's scrutiny); *see also Barrett v. Dawson*, 71 Cal. Rptr. 2d 899, 902–03 (Ct. App. 1998) (discussing how ensuring adequate daycare is sufficient public policy); *Hall v. Butte Home Health, Inc.*, 70 Cal. Rptr. 2d 246, 254 (Ct. App. 1997) (holding that ensuring sufficient housing for the mentally disabled is a legitimate public policy interest).

197. *See infra* Section II.A.3.c (discussing the Supreme Court's ideological composition and its hostility to disparate impact liability that may negatively affect AB 721's chances of success in front of the Supreme Court).

198. *See Peterson*, *supra* note 173, at 1325 (noting that “the Court has been neither clear nor consistent in defining this factor”). While the diminution in value factor is “supposedly . . . just one factor to be considered,” the Court has also used it as an independent takings test. *Id.* (explaining “the Court has often suggested that this factor is an independent test for determining whether a taking occurred”).

irrelevant,¹⁹⁹ although some other cases hold to the contrary.²⁰⁰ Krier and Sterk's study found that almost zero successful *Penn Central* claims rested solely on diminution in value.²⁰¹

In addition, it's not clear exactly how much of a negative economic impact the abrogation of a CCR would have on a benefitted homeowner.²⁰² In fact, it seems likely that abrogating many CCRs would make homeowners *better off* financially.²⁰³ For example, if a homeowner were permitted to build denser housing on their plot of land than the CCRs would otherwise allow, that could substantially boost the value of the property (assuming the local zoning permits denser housing).²⁰⁴

On the other hand, one of the principal justifications for CCRs and single-family zoning regulations is that they protect property values by preserving the character of single-family neighborhoods against undesirable change.²⁰⁵

199. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 103, 131 (1978) (observing that a seventy-five percent diminution in property value would be insufficient to state a takings claim); *see also* Peterson, *supra* note 181, at 1327 (discussing related cases).

200. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that where a regulation completely deprives a property of *all* economic value, that regulation is normally a *per se* taking not subject to the *Penn Central* balancing test). However, the *Penn Central* test still applies to any regulation short of a one hundred percent economic deprivation. *Id.* at 1016–17 (discussing how total economic deprivation is needed to violate the Fifth Amendment); *see also* Peterson, *supra* note 181, at 1326.

201. *See* Krier & Sterk, *supra* note 182, at 67–68.

202. *See also* SHANE PHILLIPS, BUILDING UP THE “ZONING BUFFER:” USING UPZONES TO INCREASE HOUSING CAPACITY WITHOUT INCREASING LAND VALUES 19 (2022) (“While ambitious, broad upzoning does have important selling points that *could* ease its adoption.”) (emphasis added).

203. *See, e.g., id.* at 19 (“For one, it benefits both market-rate and income-restricted housing developers, reducing costs and eliminating the perceived competition over available land between the two groups”).

204. *See id.* 12–13 (reporting on significant increase in property value of several parcels as a result of upzoning in Los Angeles). Opponents of upzoning often mistakenly assume that because upzoning increases *land values*, it therefore also increases *home costs*; the opposite is true because upzoning allows more homes to be built on the land, thus spreading the increased value of the land across more homes. *See id.* at 8 (“[W]hen someone discovers how to build housing less expensively the beneficiaries are people who own land.”). Phillips reports on one example from Los Angeles where, after an upzoning, a developer paid about \$3.25 million for each of 16 parcels occupied with single-family homes, previously valued at \$1.5 to \$2.2 million each, and built 455 new homes, 11% of which are deed-restricted for affordable housing. *See* PHILLIPS, *supra* note 205, at 14. The land value greatly increased, but instead of a handful of million-dollar homes there are now hundreds of more affordable homes, not to mention the deed-restricted affordable housing. *Id.*

205. *See* EINSTEIN ET AL., *supra* note 15, at 117–18 (describing changing the neighborhood's character as a reason for resisting the invalidation of a CCR); *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365, 394 (1926) (discussing how zoning preserves family neighborhoods by preventing

Although it is dubious as an empirical matter whether homeowners actually benefit more financially from heavy-handed efforts to preserve neighborhood character than they would if they had the freedom to develop their property more densely, courts have long accepted without question the “property value” theory of single-use zoning, which posits that introducing apartments into single-family neighborhoods will essentially destroy the value of the neighborhood for single-family homes.²⁰⁶ For that reason, bills like AB 721 that override covenants and permit high-density, 100% affordable multi-family housing in communities previously restricted to single-family homes could theoretically be vulnerable on the “diminution in value” factor.²⁰⁷

3. The *Penn Central* Test: “Reasonable Expectations”

a. *Murr v. Wisconsin’s “Positivist” Inquiry*

Probably the most significant, but also the most mysterious, factor in the *Penn Central* analysis is the landowner’s “reasonable expectations.”²⁰⁸

apartments from being built and creating more traffic and noise).

206. See *Vill. of Euclid*, 272 U.S. at 394–95 (upholding the constitutionality of zoning ordinances excluding apartments from single-family neighborhoods, describing apartments as “parasite[s]” in single-family neighborhoods, and observing that the effect of introducing apartments into such a neighborhood is that “the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed”). In his classic, *The Zoning Game*, Richard Babcock describes this as the “property value” theory of zoning, which theorizes that zoning serves to protect homeowners’ property from devaluation as a result of externalities. See Richard F. Babcock, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 116–17 (1966).

207. See, e.g., *Vill. of Euclid*, 272 U.S. at 394 (concluding that allowing high-density apartment buildings alongside single-family homes would diminish the value of the neighborhood). This whole discussion assumes that the local zoning regulations permit greater densification; otherwise, any loosening of the CCRs is effectively toothless. See *supra* Section III.A.2. It could be argued that loosening the zoning itself constitutes a taking under *Penn Central*, but as I have argued previously, courts do not typically consider landowners to have any vested property rights in a regulatory regime such that deregulation would constitute a taking. See Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 B.Y.U. L. REV. 949, 960 (2013). CCRs, by contrast, are generally not considered “regulations” but common law property rights. *Id.* at 992–94 (explaining how the courts offer great deference in favor of protecting homeowners’ reliance interest and differentiate vested property rights from zoning enactments by local governments).

208. See Peterson, *supra* note 173, at 1324–25 (discussing the strength and ambiguity of the “reasonable expectations” factor of the *Penn Central* test). In *Penn Central*, the Court referred to “distinct investment-backed expectations.” *Penn. Cent. Transp. Co. v. City of New York* 438 U.S. 104, 124 (1978). But in subsequent cases, this factor was changed to “reasonable investment-backed expectations,” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18, 626–27, 633–36 (2001), and then simply

Traditionally, this factor has been used to determine whether a landowner reasonably relied to their detriment on an understanding that the government would not be able to treat their property a certain way.²⁰⁹ In many takings cases, this appears to be the determinative factor.²¹⁰ Krier and Sterk’s study found that the highest percentage of successful *Penn Central*-type takings claims were those that interfered in some way with pre-existing uses, although to be clear, this was still a very small percentage.²¹¹

In a relatively recent case, *Murr v. Wisconsin*, the Supreme Court offered some clarity on the meaning of “reasonable expectations.”²¹² The *Murr* Court held that a landowner’s reasonable expectations should be determined based on “the whole of our legal tradition” and made clear that both common-law property rules and governmentally enacted land use regulations form part of the legal tradition that shapes a landowner’s reasonable expectations.²¹³ While the acquisition of property after the enactment of a relevant restriction is not determinative, the Court observed that “[a] reasonable restriction that predates a landowner’s acquisition . . . can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.”²¹⁴ The central question appears to be whether a reasonable landowner would “anticipate that his holdings would be treated” a particular way.²¹⁵

In short, the reasonable expectations test is a strongly “positivist”

“reasonable expectations.” *Murr v. Wis.*, 137 S. Ct. 1933, 1945–46 (2017).

209. See Peterson, *supra* note, at 1320.

210. *Id.* at 1324 (stating that the reasonable expectations factor was dispositive in some takings cases).

211. See Krier & Sterk, *supra* note 182, at 67–68.

212. 137 S. Ct. at 1945–46.

213. *Id.* at 1945.

214. *Id.* Prior to *Murr*, it had been unclear whether legislatively enacted land use regulations could ever affect a landowner’s reasonable expectations under takings analysis, even if the landowner purchased the property after the enactment. See Palazzolo v. Rhode Island, 533 U.S. 606, 617–18, 626–27, 633–36 (2001). There was also some question as to whether a state court’s unpredictable interpretation of state common law could entrench upon a landowner’s reasonable expectations. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 703 (2010). *Murr* still leaves these questions partially open but makes clear that pre-existing state law, whether legislatively or judicially enacted, is relevant to determining a landowner’s reasonable expectations. See *Murr*, 137 S. Ct. at 1945–47 (adopting a test for “reasonable expectations” that considers state law and “weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property”).

215. See *Murr*, 137 S. Ct. at 1945.

question; it does not ask what rights a landowner *should* have but what rights reasonable landowners would believe they actually possess based on the way the state has historically treated their property.²¹⁶ In general, this factor operates more as a shield for the government than a sword for challengers—the state can easily prove that the landowner did not have a reasonable expectation because the challenged government action was foreseeable or predated the landowner’s acquisition of the property.²¹⁷

*b. What Are a Homeowner’s Reasonable Expectations When a CCR
Conflicts with Legislative Policy on Affordable Housing?*

When it comes to CCR overrides, specifically those dealing with affordable housing, what would a reasonable homeowner “anticipate?”²¹⁸ Would a reasonable homeowner expect that the legislature would override CCRs that interfere with housing affordability?²¹⁹

A good place to begin exploring a homeowner’s baseline expectations when it comes to CCRs is the classic case of *Nahrstedt v. Lakeside Village Condominium Association*.²²⁰ *Nahrstedt* involved a challenge to a CCR that prohibited homeowners from having pets.²²¹ Recall that CCRs are often permitted to be more restrictive than governmentally-imposed land use regulations because they are contained in a declaration recorded with the county.²²² The recordation of the CCRs is conclusive evidence that anyone purchasing an interest in the property is aware of the CCRs and presumptively consents to them by going forward with the home purchase.²²³ In *Nahrstedt*, the California Supreme Court upheld the pet restriction and held that CCRs contained in the recorded declaration of a common interest community are clothed with

216. *See id.* at 1947 (finding the challenged state law to be a legitimate exercise of state power “as reflected by its consistency with a long history of state and local [] regulations that originated nearly a century ago”).

217. *See Peterson, supra* note 173, at 1320.

218. *See discussion infra* Section III.A.3.b.

219. *See discussion infra* Section III.A.3.b.

220. 878 P.2d, 1288 (Cal. 1994).

221. *Id.* at 1277–79 (discussing a homeowner’s suit to prevent the homeowner’s associations from enforcing a restriction against keeping cats, dogs, and other animals in the condominium development).

222. *See supra* text accompanying notes 59–60.

223. *See supra* text accompanying notes 58–60.

a strong presumption of validity because the recorded declaration provides notice to burdened homeowners about the restrictions and also confers upon neighboring homeowners the reasonable expectation that they will be able to prevent neighbors from using their property in a manner that is prohibited by the CCRs.²²⁴ As the court reasoned: “[G]iving deference to use restrictions contained in a condominium project’s originating documents protects the general expectations of condominium owners ‘that restrictions in place at the time they purchase their units will be enforceable.’”²²⁵

Whatever may be said about homeowners’ expectations regarding neighbors having pets, homeowners challenging state legislation that overrides CCR restrictions on housing density would probably have an even stronger argument that they have a reasonable expectation, rooted in “the whole of our legal tradition,” to keep multi-family housing out of single-family neighborhoods.²²⁶ The idea that segregating single-family homes from other uses is necessary and desirable to protect single-family neighborhoods has been established since at least 1926 and arguably even earlier, stretching back to the common law of nuisance.²²⁷ While the wisdom of segregating uses was questioned almost from the start, and the doubts have grown louder over the years, arguably peaking in the last few years with the emergence of the YIMBY movement,²²⁸ I noted earlier that the expectations inquiry as articulated by the Court in *Murr* is almost entirely “positivist,” focusing on what a reasonable landowner would anticipate in light of the status quo rather than what is normatively correct or good public policy.²²⁹ In the CCR context specifically,

224. See 878 P.2d at 1285 (noting that covenants and restrictions recorded with the county recorder provide adequate notice to future grantees and thus are presumed reasonable and enforceable).

225. *Id.* at 1284.

226. Compare *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (describing how reasonable expectations “derive from background customs and the whole of our legal tradition”), and *Nahrstedt*, 878 P.2d at 1290 (finding a recorded pet restriction in a condominium as reasonable due to the recordation of the CCR providing notice).

227. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926) (upholding constitutionality of zoning ordinances excluding apartments from single-family neighborhoods).

228. See Cassidy Pearson & Jenny Schuetz, *Where Pro-Housing Groups Are Emerging*, BROOKINGS (Mar. 31, 2022) <https://www.brookings.edu/blog/the-avenue/2022/03/31/where-pro-housing-groups-are-emerging/> (discussing the emergence of “pro-housing groups” in response to the affordable housing crisis).

229. See discussion *supra* Section III.A.3.a; see also *supra* text accompanying note 219 (noting the reasonable expectations test focuses on what rights a reasonable landowner would believe they possess based on how the state historically treated their property rather than the rights a landowner *should* have).

there was some question early on about enforcing “affirmative” covenants that require homeowners to undertake acts such as paying assessments to an HOA, but restrictions on use and density have generally been upheld by the courts.²³⁰ So even if the wisdom of segregating uses is highly dubious, the fact that it has been enshrined in law for the last century works powerfully in its favor on the question of reasonable expectations.²³¹ For that reason, homeowners who bought homes containing deed restrictions that limit housing density could plausibly claim to have a reasonable expectation that they would be able to continue excluding multi-family housing.²³²

On balance though, homeowners would probably lose this argument.²³³ As a threshold matter, *Penn Central* claims based on “reasonable expectations” are extremely hard to win because this country’s history of extensive land use regulation makes it easy for the state to demonstrate that a landowner reasonably anticipated restrictions on their use of the property.²³⁴ The state’s task is made even easier by *Murr*’s instruction to evaluate a landowner’s expectations against “the whole of our legal tradition,” meaning the state need only find some historical precedent of relevant land use restrictions to make

230. See, e.g., *Cordogan v. Union Nat’l Bank of Elgin*, 380 N.E.2d 1194, 1198 (Ill. App. Ct. 1978) (“Restrictive covenants concerning the use of land are in a somewhat different category and . . . their violation will generally be enjoined by a court of equity.”); *Vill. of Euclid*, 272 U.S. at 387, 392, 397 (upholding a use ordinance and noting zoning regulations will generally be upheld if there is some connection to the public welfare).

231. See *Vill. of Euclid*, 272 U.S. at 392 (noting the benefits of segregating uses and establishing districts or zones such as increasing the health and safety of the community and reducing the congestion, disorder, and dangers often inherited in unregulated municipal districts).

232. See *Murr*, 137 S. Ct. at 1945 (noting when determining reasonable expectations, courts “should give substantial weight to the treatment of the land”).

233. See generally Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENV’T L. 239, 254 (2011) (describing the three relevant factors to the determination of a party’s reasonable expectations which make it difficult to bring a successful “reasonable expectations” claim). *But cf. Murr*, 137 S. Ct. at 1945. Despite homeowners’ reasonable expectation, it is possible for the courts to hold in favor of a government’s compelling interest. See DAVID N. MAYER, *LIBERTY OF CONTRACT* 26–27 (2011) (demonstrating a shift from Justice William Paterson’s observation “that ‘the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man’”). Mayer notes a “critical shift by the Court” regarding their “willingness . . . to disregard constitutional limitations . . . in order to allow government experimentation to meet changed economic circumstances.” *Id.* at 109 (footnotes omitted). Thanks to my colleague Tom Bell for directing me to this work.

234. See Peterson, *supra* note 173, at 1320 (“When the challenged governmental action involves a change in the law, the Court sometimes finds that the change in the law was foreseeable given the history of regulation of the industry.”).

the case that a landowner's reasonable expectations are limited.²³⁵

Under the positivist *Murr/Penn Central* test, any claim that a landowner has a reasonable expectation of enforcing a CCR limiting housing density, or otherwise, is very weak.²³⁶ The enforceability of CCRs at common law has always involved considerable uncertainty.²³⁷ Historically, courts used numerous doctrines to constrain the enforceability of servitudes, including the doctrines of privity, touch and concern, and prohibitions on affirmative covenants.²³⁸ In modern times, as observed in *Nahrstedt*, courts consider servitudes void if they are unconstitutional, illegal, against public policy, or unreasonably restrain the alienability of property.²³⁹ Likewise, *Nahrstedt* also noted that courts have the power to terminate covenants based on changed conditions where the burden of the covenant outweighs the benefit.²⁴⁰ According to the comment following the *Restatement (Third) of Property*, the test for determining whether a covenant should be invalidated on public policy grounds is “necessarily imprecise,” involving the weighing of “several conflicting policies” such as the intent and expectations of homeowners on one hand, and constitutional freedoms, encouragement of competition, and productive uses of land on the other.²⁴¹ And given the changed conditions doctrine, a CCR that is enforceable at one time may become unenforceable over time due to changing public policy considerations.²⁴² For example, while it was once thought that protecting single-family suburban neighborhoods from “invasion” by multi-family housing was consistent with public policy, it has become increasingly evident how suburban exclusion has caused a host of

235. See, e.g., *Murr*, 137 S. Ct. at 1947 (upholding the challenged law based on the state's history of similar regulations).

236. See *id.* at 1945 (discussing the “reasonable expectations” test); see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (discussing the “distinct investment-backed expectations” test).

237. Joan Youngman, *Easements, Covenants and Servitudes: Traditional Limitations and Future Trends*, LINCOLN INST. LAND POL'Y 4, 4 (2001) (noting “[p]art of the complexity of nonpossessory rights stems from the numerous and often ambiguous distinctions among them in the common law”); Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 *Cornell L. Rev.* 928, 928 (1988) (“[T]he law governing servitude devices is a mess.”).

238. See *id.* at 933-48 (listing and explaining the various servitude doctrines).

239. 878 P.2d 1275, 1286-87 (Cal. 1994).

240. *Id.* at 1287.

241. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. i (2000).

242. See *id.* § 7.1 cmt. a (describing the circumstances under which a servitude can be modified or terminated due to changed conditions).

social problems including racial segregation, homelessness, and housing unaffordability.²⁴³ Given the amorphous nature of the judicial inquiry into the validity of CCRs, a reasonable homeowner would expect some degree of uncertainty as to whether a particular CCR will be considered enforceable, especially where the CCR places significant limitations on the use of land.²⁴⁴ And homeowners should expect that the enforceability of covenants may change over time as public policy shifts.²⁴⁵

It could be argued that while a reasonable homeowner might expect a court to invalidate a CCR on public policy grounds, the homeowner would not anticipate the legislature doing the same.²⁴⁶ The Supreme Court does appear to make a distinction between legislatively enacted land use regulations and common-law decisions by state courts that affect a landowner's property rights.²⁴⁷ In short, while legislative action risks being considered a taking under the *Penn Central* test if it goes "too far" in regulating a landowner's property,²⁴⁸ the Court has never squarely held that a judicial common law decision can be considered a taking under the Constitution's Takings Clause.²⁴⁹ If we understand the common law as an evolutionary process in which the scope of property rights is constantly being clarified and defined by courts, then a judicial decision invalidating a covenant, for example, would not constitute a taking of a landowner's property rights because it would merely be *clarifying*

243. See *id.* (noting the changed-conditions doctrine is grounded in public policy considerations, such that circumstances might change in such a way that servitudes lose their utility).

244. See *id.* § 3.1 cmt. c (noting that some statutes providing for the enforceability of use restrictions are based on the interpretation of reasonableness requirements).

245. See *id.* § 3.1 cmt. f (noting that "[b]ecause policies change to meet changing conditions of society, it is not practicable to predict the policy assessments judges will make in the future").

246. See *id.* (noting "[p]olicies may be purely the product of judicial development, or they may be based on legislation, or on the provisions of state or federal constitutions").

247. See *id.* (noting "[c]ourts may apply the policies manifested by legislation more broadly than the legislation provides" but "[i]n the event of conflict between policies developed in the common law and policies declared by legislation, the legislation prevails").

248. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (striking down a regulation based on the "too far" approach that existed before the *Penn Central* test).

249. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (stopping just short of recognizing the possibility of a judicial taking). In *Stop the Beach*, a plurality of four justices acknowledged that a judicial taking could indeed occur when a court alters the common law to eliminate an established property right. *Id.* It seems likely in light of the radically changed composition of the Court since *Stop the Beach* that the conservative majority today would rule in favor of the idea of a judicial taking. See generally notes 151–152 and accompanying text (noting the recent differences in decision-making after a shift in the majority of the Court).

the contours of those property rights.²⁵⁰ By contrast, the state legislature's role is to prospectively make policy rather than to retrospectively clarify pre-existing rights, so the state legislature may not unilaterally reshape a landowner's property rights by legislation invalidating a previously enforceable covenant.²⁵¹ The Supreme Court seemingly endorsed this latter point in *Palazzolo v. Rhode Island*, holding that a takings claim is not necessarily defeated simply because a landowner purchases property after the enactment of a challenged land use regulation.²⁵² As the Court wrote: "The State may not put so potent a Hobbesian stick into the Lockean bundle."²⁵³ Under this logic, arguably, state legislation affirmatively changing a landowner's property rights is legally distinct from a common law decision that clarifies a landowner's rights.²⁵⁴

However, such a firm distinction between common law and legislation is inconsistent with the more nuanced state of takings law that has emerged since *Palazzolo*, especially in contexts like CCRs where, as we will see, the law is a hybrid product of common law rules and legislation.²⁵⁵ In the more recent case of *Murr v. Wisconsin*, the Court acknowledged that while a landowner's post-enactment acquisition of property does not immunize regulation against a takings challenge, legislative enactments nevertheless can play an important role in shaping a landowner's background expectations regarding how their property will be treated.²⁵⁶ In *Murr*, the Court found that state and local regulations regarding the merger of two parcels into a single parcel was a relevant

250. See e.g., *supra* note 99 and accompanying text (noting how the California legislature used statutory enactment to declare what public policy included and was a vehicle for invalidating CCRs); see also CAL. HEALTH & SAFETY CODE § 1597.40(a) (West 2020) (stating the intent of the Legislature in developing public policy surrounding daycare settings), and CAL. HEALTH & SAFETY CODE § 1597.41(a) (West 2020) (voiding provisions restricting use of property for a family daycare home).

251. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001) (noting that the argument that the State can "shape and define property rights and reasonable investment-backed expectations" by prospective legislation "ought not to be the rule").

252. *Id.*

253. *Id.* at 627.

254. See *id.* (stating that the right to improve property "is subject to the reasonable exercise of state authority," but in certain circumstances, the Takings Clause "allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation," thus distinguishing itself from common law).

255. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f (2000) ("Policies may be purely the product of judicial development, or they may be based on legislation, or on the provisions of state or federal constitutions.").

256. 137 S. Ct. 1933, 1944–45 (2017).

factor in determining whether the landowner had a reasonable expectation of using the two parcels separately.²⁵⁷ In another recent case, a conservative plurality of the Supreme Court endorsed the idea that a judicial taking may occur where a state court entrenches upon an “established right.”²⁵⁸ All told, the relevant inquiry is not whether the body enacting the regulation is a court or a legislature, nor whether the rule takes the form of a common law doctrine or a regulatory enactment, but whether reasonable landowners would anticipate that their property would be treated a certain way.²⁵⁹

The Court’s apparent recognition that legislation and common law doctrine cannot be treated separately for Takings Clause purposes makes a great deal of sense in the CCR context specifically.²⁶⁰ The law relating to CCRs, and thus establishing the “whole of our legal tradition” against which a reasonable homeowner’s expectations must be assessed, is a hybrid of common law doctrine and statutory law.²⁶¹ HOAs and CCRs have long been subject to a variety of federal, state, and local regulations, in part because they have a sort of quasi-public status and in part because their validity under the common law of servitudes was always somewhat uncertain.²⁶² All fifty states enacted enabling legislation for condominiums in the 1960s, and courts have generally treated HOAs as hybrid creatures of common law and statutory law ever since.²⁶³ Indeed, the *Nahrstedt* Court’s holding that the pet restriction at issue in that case was enforceable relied largely on the existence of a state statute declaring that CCRs contained in a recorded declaration of a common-interest community are “enforceable equitable servitudes, unless unreasonable.”²⁶⁴ Notably, the legislature partially overruled *Nahrstedt* by requiring HOAs to permit homeowners to keep at least one pet, regardless of any contrary

257. *Id.* at 1948.

258. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 715 (2010).

259. *Murr*, 137 S. Ct. at 1945.

260. *Id.* (noting the essential question is not whether the regulation is governed by common law or statutory law, but whether the activity aligns with the landowner’s reasonable expectations for their property).

261. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f (2000) (stating that CCRs may be governed by common law or legislation).

262. *See also* DWYER & MENELL, *supra* note 10, at 826–28; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. c (2000) (“Many federal, state, and local statutes and other governmental regulations prohibit or restrict the use of servitudes.”).

263. *See* DWYER & MENELL, *supra* note 10, at 826–28.

264. *Nahrstedt v. Lakeside Vill. Condo. Ass’n.*, 878 P.2d at 1285–86 (quoting CAL. CIV. CODE § 1354) (repealed 2014).

CCRs.²⁶⁵ The hybrid status of CCRs strongly suggests that a landowner's expectations regarding the enforceability of CCRs must be viewed in light of both common law doctrine and the regulatory environment established by the state legislature.²⁶⁶

The hybrid nature of the law in this area is exemplified by the common law doctrine that a covenant can be judicially invalidated if it is illegal, unconstitutional, or against public policy.²⁶⁷ An "illegal" covenant is literally a covenant that violates some statutory or regulatory law.²⁶⁸ Courts have indeed invalidated covenants where they conflict with applicable laws such as the federal Fair Housing Act or local zoning laws.²⁶⁹ Moreover, in determining whether a CCR should be invalidated based on a conflict with public policy, courts primarily look to the legislative branch to determine what public policy is.²⁷⁰ According to the *Restatement (Third) of Property*:

Courts may apply the policies manifested by legislation more broadly than the legislation provides, but they may not refuse to apply policies manifested by legislation in situations to which it clearly applies, except on constitutional grounds. In the event of conflict between policies developed in the common law and policies declared by legislation, the legislation prevails.²⁷¹

For all of these reasons, it would be highly illogical for the takings doctrine to hold that courts may adjust the validity and enforceability of CCRs through

265. See CAL. CIV. CODE § 4715 (West 2014) (formerly § 1360.5).

266. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (holding courts should consider a variety of factors, including looking to a landowner's reasonable expectations for their property); see also RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f (2000) (stating that policies may be governed by common law, legislation, or state or federal constitutions).

267. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000) ("A servitude created as provided in Chapter 2 is valid unless it is illegal or unconstitutional or violates public policy."); see also *Nahrstedt*, 878 P.2d 1at 1286 (Cal. 1994) (holding restrictive covenants that violate public policy are not enforceable).

268. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000) ("An illegal servitude within the meaning of this section is one that is prohibited by a statute or governmental regulation.").

269. See e.g., Lawrence Berger, *Conflicts between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 Neb. L. Rev. 449 (1964) (discussing the intersection of public and private land use devices and the problems that arise when they conflict).

270. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f. (2000) (stating that courts defer to the legislature's public policy determinations).

271. See *id.*

common law rulings regarding public policy, but legislatures may not.²⁷²

At the end of the day, a reasonable landowner would expect—in light of the whole of our legal tradition—the enforceability of CCRs to be weighed against various public policy concerns, and that as public policy evolves, the enforceability of CCRs may also change.²⁷³ Specifically, when it comes to the most recent round of CCR overrides dealing with residential use and density, a reasonable landowner would anticipate that if housing supply and affordability reached the crisis level they have in many states today, CCRs limiting the residential use of nearby properties would have to yield to urgent public policy considerations.²⁷⁴ Though recent state legislation overriding CCRs is more intrusive than in the past, the public policy is arguably weightier and more pressing, and a reasonable landowner could expect the nature and scope of the intrusion to vary with the nature and scope of the public policy at issue.²⁷⁵

*c. What Are a Homeowner’s Reasonable Expectations When a CCR
Conflicts with Legislative Policy on Addressing Systemic
Racism?*

To the extent the purpose of a state law is to increase housing supply and affordability during a severe housing crisis, the public policy considerations weigh heavily in favor of the state.²⁷⁶ But what about where, as in the case of AB 721, the law’s purpose is to address systemic racism?²⁷⁷ As we recall, AB 721 gives landowners the power to remove covenants from their deeds that restrict residential use of the property if the landowner intends to use the land for 100% affordable housing.²⁷⁸ Instead of straightforwardly invalidating such covenants, however, the law permits landowners to record “restrictive covenant modifications” to physically remove those covenants from the deeds, a mechanism modeled on similar laws that permit or require the

272. *Id.*

273. *Id.*

274. *Id.* § 3.1 cmt. i (listing “socially productive uses of land” as a public policy issue to be balanced in determining validity of a servitude).

275. *Id.* (noting that to resolve a claim that a servitude affects public policy, courts must assess if “risks of social harm outweigh the benefits of enforcing the servitude”).

276. *Id.* (discussing weighing the interest in enforcing the servitude with the risk of social harm).

277. Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

278. *Id.* § 2(j)(1)(A) (requiring one hundred percent of the housing to be affordable housing).

removal of racially discriminatory covenants.²⁷⁹ The language and legislative history of the law make clear that the legislation is intended to further the effort to root out racial discrimination in housing by remediating the racially disparate impacts of CCRs with residential restrictions.²⁸⁰ The law is a step beyond the removal of racially restrictive covenants because it addresses not only explicitly discriminatory covenants but also race-neutral covenants with racially discriminatory impacts.²⁸¹

Returning to the *Penn Central* inquiry, would a homeowner reasonably anticipate that a race-neutral covenant with racially discriminatory impacts could be deemed unenforceable on public policy grounds?²⁸² Keeping in mind that a homeowner's expectations, as clarified in *Murr*, must be assessed against the whole of our legal tradition, prohibitions on racial discrimination in housing have long been part of our legal tradition.²⁸³ Explicitly racially restrictive covenants have been illegal since 1948.²⁸⁴ Housing policies with a disparate impact on protected groups have been unlawful since the 1968 Fair Housing Act,²⁸⁵ and although the Supreme Court only recently confirmed that the Act proscribes laws with a disparate impact, the Court also observed that every appellate court that considered the question since 1968 agreed that the Act proscribed housing policies with a racially disparate impact.²⁸⁶ One could certainly conclude from this history that no homeowner has a reasonable expectation that a CCR with a racially disparate impact would be enforceable.²⁸⁷ Indeed, a court could invalidate such covenants as against public policy even without any legislative action, and courts have invalidated covenants that violated the Fair Housing Act.²⁸⁸

279. *Id.* § 2(b)(1) (permitting homeowner to record a restrictive covenant modification).

280. *Id.* § 1(c) (noting that covenants have historically been used to perpetuate discrimination and racial segregation).

281. *Id.* § 2(b)(1) (noting that there is no requirement that there be explicitly discriminatory language).

282. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–27 (1978).

283. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (emphasizing a landowner's reasonable expectations must be viewed in light of the whole of our legal tradition).

284. *See generally Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding unconstitutional covenants with explicit racial restrictions); *Hurd v. Hodge*, 334 U.S. 24 (1948) (same).

285. *See* 42 U.S.C. §§ 3601–31.

286. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project*, 576 U.S. 519, 531, 546 (2015).

287. *See Murr*, 137 S. Ct. 1933, 1945.

288. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000) (stating that courts have

On the other hand, AB 721's allusion to disparate impact may not be that useful in evading a takings challenge.²⁸⁹ For one thing, the Fair Housing Act does not proscribe all policies with a racially disparate impact.²⁹⁰ In such cases, once the challenger establishes the disparate impact, the burden shifts to the advocate of the policy to provide a legitimate, non-discriminatory reason for the policy.²⁹¹ The courts, and especially the Supreme Court in *Inclusive Communities*, have made clear that this is not an especially high bar.²⁹² Land use policies motivated by a desire to maintain property values, for example, have been considered sufficient to justify a disparate impact.²⁹³ Surely CCRs limiting high-density housing would survive based on such a justification.²⁹⁴ And therefore, homeowners could plausibly claim that they would *not* reasonably expect such a CCR to be invalidated based on a disparate racial impact.²⁹⁵

More importantly, AB 721's chances of success in the Supreme Court may actually be hurt more than helped by the law's reference to disparate impact.²⁹⁶ Today's Supreme Court is, to put it mildly, much more conservative than the Court that decided *Inclusive Communities* a few years ago.²⁹⁷ This Court is very hostile to any form of disparate impact liability, and undoubtedly if a case like *Inclusive Communities* came before the Court today, at least five justices would decide the case the other way.²⁹⁸ The Court recently gutted section 2 of the Voting Rights Act, which, like the Fair Housing Act, contains

discretion to invalidate a covenant if they find it is illegal, unconstitutional, or against public policy); *see also* *Broadmoor San Clemente Homeowners Ass'n. v. Nelson*, 30 Cal. Rptr. 2d 316, 317 (Ct. App. 1994) (holding a CCR invalid because it conflicted with the Federal Fair Housing Act).

289. Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

290. *See* 42 U.S.C. §§ 3601–3631.

291. *See Inclusive Communities*, 576 U.S. at 541.

292. *See id.* (stating that defendants in FHA cases have “leeway to state and explain the valid interest served by their policies”).

293. *See Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182 (9th Cir. 2006) (finding no FHA liability where the community's opposition to a low-income project was based on concerns over property values).

294. *See id.* at 1196 (finding no liability under the FHA when the governmental interest was based on property values and because of an arguable lack of need for the project in the first place rather than for reasons that were a sham or pretextual).

295. *See id.*

296. *See supra* notes 248–254 and accompanying text.

297. *See supra* notes 248–254 and accompanying text.

298. *See supra* notes 248–254 and accompanying text.

a disparate impact standard.²⁹⁹ This Court makes a very rigid distinction between facial racial classifications and laws that do not explicitly contain such classifications.³⁰⁰ When it comes to facially race-neutral laws, the Court is much more concerned that any kind of disparate impact test would inappropriately “introduce” race into a context where race is or ought to be absent as a consideration.³⁰¹

Ironically then, AB 721’s racial justice framing may doom the law should it come before the Supreme Court.³⁰² Nevertheless, this framing may be irrelevant because AB 721 also recites more conventional public policy arguments regarding the supply of affordable housing.³⁰³ The law’s preamble states: “The lack of available and safe affordable and supportive housing equitably distributed throughout California presents a crisis for Californians that threatens the health of California citizens and their communities.”³⁰⁴ Placed alongside other state legislation that contains comprehensive findings of fact regarding the state’s housing supply and affordability crisis, a court would probably conclude that a reasonable homeowner should anticipate that CCRs restricting affordable housing may be limited in this way based on the strong public policy considerations favoring an increase in affordable housing.³⁰⁵

On balance, considering the extremely weak protection the *Penn Central* test offers challengers in general, the weighing of the various factors, and the fact that the Takings Clause has rarely been invoked to protect landowners from offending uses of neighboring property, legislative CCR overrides even of the very aggressive variety (such as AB 721) are likely to survive judicial scrutiny.³⁰⁶ The “character of the government action” and “extent of economic impact” factors are practically moribund, and a homeowner’s

299. *See* *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338–39 (2021) (reducing disparate impact to one factor in a multi-factor test for liability under the Voting Rights Act and loosening the burden on jurisdictions to justify disparate impact with legitimate governmental purpose).

300. *See id.* at 2329, 2332, 2335 (explaining the differences in the Court’s analysis regarding explicit facial racial classifications and facially neutral laws).

301. *See id.* at 2327 (describing the Court’s reasons for hesitation when applying the disparate impact test to facially race-neutral laws).

302. *See id.* at 2326 (describing the majority’s framing of the law).

303. *See* Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

304. *Id.*

305. *See, e.g.*, S.B. 13, 2019–2020 Leg., Reg. Sess. (Cal. 2019); *see* discussion *supra* Section III.A.3.b.

306. *See* discussion *supra* Section III.A.1–3.c.

expectations regarding the enforceability of CCRs are strongly qualified by the longstanding principle that CCRs can be invalidated or terminated if they conflict with important public policies.³⁰⁷

d. The Contract Clause

The few published decisions that address legislative CCR overrides paid little attention to the Takings Clause, instead focusing most of their analyses on the Contract Clauses of the United States' and state Constitutions, which prohibit the government from "impairing" the obligations of contracts.³⁰⁸

These cases rest on a category error: CCRs are *not* contracts, they are property rights.³⁰⁹ The entire body of law governing CCRs, which has tortured law students for generations with nomenclature such as "vertical privity" and "touch and concern," exists to determine whether one property owner can bind another to a real covenant in the absence of a contractual relationship between them.³¹⁰ Indeed, a valid CCR can take precedence over an actual contract, barring a real estate transaction between a willing seller and buyer if the sale conflicts with a pre-existing covenant.³¹¹ For that reason, courts actually have the power to alter, amend, invalidate, or terminate covenants on grounds of public policy or changed conditions.³¹² Thus, the correct way to analyze CCR overrides is whether they deprive property rights under the Takings Clause, not whether they interfere with contracts.³¹³

307. See also WILLIAM H. PIVAR & ROBERT BRUSS, CALIFORNIA REAL ESTATE LAW 409 (Louise Benzer et al. eds., 5th ed. 2002). With recent decisions like *Nahrstedt*, courts may not enforce a restriction that "does not comport with public policy." 878 P.2d at 1286–87; see also *supra* notes 190–204 and accompanying text (discussing the Court's continued consideration of the distinction between the harm and benefit of overriding a CCR).

308. See generally *Barrett v. Dawson*, 71 Cal. Rptr. 2d 899 (Ct. App. 1998); *Hall v. Butte Home Health, Inc.*, 70 Cal. Rptr. 2d 246 (Ct. App. 1997); *Manning v. New England Life Ins. Co.*, 506 N.E.2d 870 (Mass. 1987); *Amana Soc'y v. Colony Inn, Inc.*, 315 N.W.2d 101 (Iowa 1982).

309. But see RESTATEMENT (THIRD) OF PROP.: SERVITUDES §3.1 cmt. a (2000) (referring to servitudes as both a property and a contract right).

310. SHELLEY R. SAXER ET AL., CONTEMPORARY PROPERTY 838 (5th ed. 2019) (commenting that it is "odd for the law" to bind future parties to a past promise by "acquiring some rights to real estate," when this usually only happens to contracting parties).

311. See Assemb. B. 721, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (noting the bill's purpose of preventing restrictive covenants from preventing the sale or transfer of land for affordable housing).

312. See PIVAR & BRUSS, *supra* note 310.

313. But see RESTATEMENT (THIRD) OF PROPERTY, (SERVITUDES), §3.1, cmt. a ("This section applies the modern principle of freedom of contract to creation of servitudes.") I appear to be in the

In any event, the decisions addressing CCR overrides under the Contract Clause all correctly concluded that the Contract Clause did not prevent the state from overriding the CCR in question.³¹⁴ As these decisions make clear, the Contract Clause is not a meaningful barrier to legislative overrides of CCRs.³¹⁵ Initially, the Contract Clause analysis proceeds under a three-part framework that considers the extent of the impairment, the significance of the public policy justifying the impairment, and the appropriateness of the means to achieve the public policy.³¹⁶ On its face, this framework is much less favorable for challengers than even the extremely weak *Penn Central* test. It strongly favors the government as long as the government can articulate a legitimate public policy interest and a reasonable connection between that interest and the means employed.³¹⁷ Under *Penn Central* the government cannot prevail by simply touting an extremely important public policy goal; it must also contend, at a minimum, with landowners' reasonable expectations regarding the future use of their property.³¹⁸ The overall weakness of the Contract Clause framework cements the view long held by scholars that the Contract Clause has effectively been a dead letter for generations.³¹⁹

The manner in which the courts have applied the Contract Clause framework to CCR overrides makes clear just how ineffectual the Contract Clause is. In one case, the court found a statute overriding CCRs prohibiting family day care centers was a significant impairment; however, it also found that the public policy interest in promoting family day care centers was weighty, and under a very loose means-ends test, the override was reasonably tailored to

minority in taking this view; even the most recent RESTATEMENT OF PROPERTY refers to servitudes as both property and contract rights. *Id.*

314. *See, e.g.,* Barrett v. Dawson, 71 Cal. Rptr. 2d 899, 900 (Ct. App. 1998) (finding the application of a law invalidating “covenants [that restrict] family daycare homes” did not violate the federal or state Contract Clauses).

315. *See, e.g., id.* at 902–03 (finding a “significant and legitimate public purpose” with ease in the law’s goal to increase daycares for working parents and ultimately upholding the law, even if it “might have been better tailored”).

316. *See id.* at 902.

317. *See, e.g., id.* at 903 (emphasizing that “ensuring adequate and local daycare for working parents is probably about as broad a public purpose as any that might be imagined in the regulatory universe” and finding the law reasonable, even if not narrowly tailored).

318. Peterson, *supra* note 173, at 1317 (describing the *Penn Central* factors, which include “the character of the governmental action,” extent of the diminution, and “interfer[ence] with the claimant’s reasonable, investment-backed expectations”).

319. MAYER, *supra* note 236, at 26–27, 109 (explaining the rise and fall of the Contract Clause).

achieve the goal.³²⁰ In another case, the court found that the override of a restriction on group homes for the disabled was insignificant, and in any event, the state's decision to override CCRs barring group homes for the disabled in residential communities was supported by the significant public policy goal of ending housing discrimination against the disabled (a goal supported by the Fair Housing Act).³²¹ It is very likely that CCR overrides targeting residential use and density for the purpose of increasing housing supply and affordability would survive scrutiny under this very deferential standard.³²²

III. CONCLUSION: THE POSSIBLE FUTURE OF HOA OVERRIDES

Assuming the recent round of legislative CCR overrides survives constitutional scrutiny, as I suspect it will, we may soon see more aggressive overrides.³²³ Even AB 721, the most far-reaching CCR override to date, is of relatively limited impact because it applies only to 100% affordable housing.³²⁴ Much of the recent housing legislation in California has focused on expanding the supply of both market-rate and affordable housing, in recognition of the fact that the housing crisis is largely driven by an overall lack of supply at all income levels and not just a lack of subsidies for affordable housing.³²⁵ The legislature has also been assertive about strengthening existing housing legislation over time to make it more effective.³²⁶

Of course, if CCR overrides do expand, they will run into increasingly

320. See *Barrett*, 71 Cal. Rptr. 2d 899, 903.

321. *Hall v. Butte Home Health, Inc.*, 70 Cal. Rptr. 2d 246, 252–54 (Ct. App. 1997).

322. See *id.* at 254 (accepting the Legislature's determination that preventing housing discrimination against the disabled is a "compelling governmental interest" because courts should "defer to legislative judgment as to the necessity and reasonableness of a particular" economic or social regulation).

323. See Geier, *supra* note 13, at 244 (arguing recent state laws in California "suggest that public decisionmakers . . . believe private occupancy, use, and development restrictions of all types are fair game for legislative revision").

324. Assemb. B. 721, 2021–2022 Leg., Reg. Sess., § 2(j)(1)(A) (Cal. 2021).

325. See, e.g., S.B. 9, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (permitting landowners to split lots and build duplexes on each lot); Assemb. B. 68, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (limiting local discretion to deny or regulate the construction and use of backyard cottages).

326. See, e.g., Dylan Casey, *Making Sense of This Year's ADU Legislation*, CALHDF (Sep. 13, 2019), <https://calhdf.org/2019/09/13/making-sense-of-this-years-adu-legislation/> (describing how after several years of attempting to reduce the authority of local governments to regulate ADUs, the state recently enacted very aggressive legislation authorizing homeowners to construct ADUs on residentially zoned land, regardless of local zoning laws and CCRs)

strong political and legal opposition.³²⁷ AB 721 passed easily precisely because it was limited to 100% affordable housing, and therefore would be unlikely to actually provide much housing.³²⁸ Because of the political power of anti-growth homeowners in California (often called “NIMBYs”), housing bills tend to be difficult to pass when they promise to increase housing supply; they generally have more success when they pay lip service to housing supply but include some poison pill that makes the production of housing more difficult.³²⁹ In the case of AB 721, since 100% affordable housing is difficult to finance, legislators could support the bill and symbolically signal their support for promoting racial justice without having to worry that much actual housing would be built.³³⁰ AB 721 was also strongly supported by “housing advocacy” groups such as the Western Center on Law & Poverty.³³¹ Despite calling themselves housing advocates, these groups devote much of their energy to opposing market-rate housing because they claim that such housing will promote gentrification.³³² Opposition from these groups has provided convenient progressive rhetoric for anti-housing legislators to hide behind when they kill supply bills.³³³

The question then is whether CCR overrides that more robustly promote the production of housing, including market-rate housing, will face more serious political opposition than AB 721 did.³³⁴ I think that is unlikely for this reason: CCR overrides really only matter politically where the local zoning has already been liberalized. CCRs cannot permit *higher* density than what

327. See generally Marble & Nall, *supra* note 15 (noting, regardless of political perspective, single-family homeowners disfavor the development of multi-family homes).

328. See Dillon & Poston, *supra* note 90 (describing the incredible per-unit cost of affordable housing, which limits the number of affordable housing units built).

329. See, e.g., Shantal Malmed, *Upzoning and How CA SB 9 May Fall Short of Changing the California Build Environment in 2022*, USC GOULD’S BUS. L. DIG. (May 18, 2022), <https://lawfor-business.usc.edu/upzoning-and-how-ca-sb-9-may-fall-short-of-changing-the-california-build-environment-in-2022/>. A recent example is S.B. 9, which authorizes homeowners on parcels zoned for single-family residential use to construct up to four homes on the parcel. *Id.* The bill was amended at the last minute to add an owner-occupancy requirement, which “would limit the single-family homes that can feasibly be converted into duplexes and quadplexes soon.” *Id.*

330. See Dillon & Poston, *supra* note 90 and accompanying text. Legislators may not have much concern because fully (100%) financing subsidized housing is extremely difficult to build. *Id.*

331. See *Housing and Community Stability*, W. CTR. ON L. & POVERTY, <https://wclp.org/affordable-housing/> (last visited Sep. 21, 2022) (describing the organization’s goals).

332. See *id.*

333. See Dougherty, *supra* note 147; Dillon, *supra* note 147.

334. See *supra* Section II.E. (discussing the political opposition to AB 721).

the applicable zoning allows.³³⁵ Therefore, most of the fighting over whether reforming land use regulations and increasing housing supply will further gentrification and harm neighborhood character will likely occur during the debate over loosening the zoning.³³⁶ CCRs typically apply on a much smaller scale than zoning regulations to specific blocks or neighborhoods rather than citywide. Zoning regulations are more likely to be visible and the subject of widespread political debate.³³⁷ Once that debate is over, liberalizing CCRs is something of an afterthought.³³⁸

So while equity groups may not be excited about bills extending AB 721 to market-rate housing, they probably wouldn't oppose it, which would make it harder for NIMBY groups to hide behind fake concerns over gentrification.³³⁹ The more serious question facing aggressive CCR overrides is what their fate will be in the courts. The *Penn Central* test is a question of balancing competing interests, and right now, the dire need to increase the affordable housing supply clearly outweighs the expectations of homeowners.³⁴⁰ But if legislators get bolder with CCR overrides and encroach more and more on homeowners' expectations, that scale may begin to tip the other way.³⁴¹

335. See *supra* note 135 (describing the density requirements of applicable zoning laws).

336. See Dillon, *supra* note 147 (discussing recent battles between pro-density “labor and business groups, environmentalists and developers, students and retirees,” and suburban homeowners and low-income tenants who oppose density and possible gentrification).

337. See Dougherty, *supra* note 147 (“While [State Senator Scott] Wiener has been pushing his zoning bills, the Legislature has passed several *less sweeping* but potentially significant measures that could add up over time.”).

338. See Chelsea Maclean et al., *California’s 2022 Housing Laws: What You Need to Know*, HOLLAND & KNIGHT (Oct. 13, 2021) <https://www.hklaw.com/en/insights/publications/2021/10/californias-2022-housing-laws-whatyou-need-to-know> (noting how AB 721, which “makes recorded covenants that limit residential development unenforceable,” was “one of the most under-publicized [housing] laws of the 2021 session”).

339. See, e.g., Dillon, *supra* note 147 (describing how “[s]uburban communities and neighborhood groups” teamed up with “low-income tenants” to oppose SB 50, because the tenants were concerned the bill would bring in “wealthier newcomers [who would push] out longtime residents”).

340. See Dougherty, *supra* note 147. Despite competing interests between liberal and conservative economists, there is broad consensus and general agreement that there is “a shortage of housing in general and a dearth of lower-cost housing in particular.” See *id.* Governor Newsom communicated a need for constructing “3.5 million housing units by 2025.” *Id.*

341. See Geier, *supra* note 13 (noting how “[t]he California Supreme Court has emphasized the importance of covenants, conditions, and restrictions[,] . . . settled expectations with respect to restrictive covenants governing such developments,” and suggested that legislative CCR overrides “outside the classic rubric of anti-discrimination laws may be vulnerable under the Contracts Clause . . . or the Takings Clause”).