STALE REAL ESTATE COVENANTS

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ABSTRACT

Since the 1970s, covenants running with the land have tethered a large majority of the new housing units produced in the United States. These private restraints usually continue for generations, until a majority or supermajority of covenant beneficiaries affirmatively vote to amend or terminate them. Covenants interact with public land use controls, particularly zoning ordinances. Zoning politics tends to freeze land uses in urban America, particularly in existing neighborhoods of single-family homes. This Article investigates to what extent covenants exacerbate the zoning freeze. It provides a history of the use of private covenants and suggests how drafters, judges, and legislators might address the risk that covenants will become obsolete.

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INTRODUCTION

Private restrictive covenants certainly may have benefits, but they reduce the dynamism of American real estate markets. When choosing to alter an existing land use, a landowner must comply with both a valid private covenant and a valid public enactment, such as a zoning ordinance.\(^1\) In other work, I have induced that the politics of local zoning tends to freeze land uses in urban America.\(^2\) The zoning straitjacket commonly is tightest in a developed neighborhood of single-family dwellings.\(^3\) Private covenants can add to the tightness. Many covenants undoubtedly generate value, particularly when a restricted development is young. As covenants age, however, they are likely to become outmoded. Both state courts and state legislatures have recognized the need to loosen the grip of covenants after decades have passed. This Article analyzes the problem of aging covenants and provides advice to the attorneys who draft covenants, the judges who decide covenant cases, and state legislators.

Covenants come in two basic forms: negative restrictions on the use of land and affirmative obligations to perform a duty, especially that of paying an assessment to a homeowners association. In 2018, the Community Association Institute (CAI) estimated that at least 61 percent of new dwellings produced in the United States came laden with covenants.\(^4\) That estimate included only dwellings in common-interest communities (CICs), that is, those in which covenants imposed a duty to pay an assessment.\(^5\) In some additional real

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3. See id. at 397.
5. See FOUND. FOR CMTY. ASS’N RSCH., supra note 4, at 11.
estate ventures, negative covenants restrict an owner’s choices among land uses.

Covenants restricting land uses first appeared in the United States in the early nineteenth century. During the first half of the twentieth century, they gained notoriety as a mechanism for the exclusion of households from neighborhoods on the basis of race and, less commonly, religion. In 1948, the Supreme Court famously held in *Shelley v. Kraemer* that courts could not enforce those particular sorts of restrictions. The Court’s decision, however, did not forbid covenants that limit an owner’s choices among land uses and building designs. Since *Shelley*, restrictions of those sorts have become ubiquitous.

I. Two Snapshots

In the United States, declarations of covenants lie in thousands of local land-records offices. This scattering has discouraged research into what the documents provide. To provide an overview of the modest amount of current knowledge, this Part first describes how covenants in Hancock Park, a famous subdivision in Los Angeles, generated what came to be known as the “Dead Mile.” It then briefly depicts prevailing covenant practices in the twenty-first century. Because I focus on the freezing of land uses in a residential neighborhood, I emphasize how long a negative or affirmative covenant can bind an owner of land.

6. See, e.g., ROBERT M. FOGELSON, BOURGEOIS NIGHTMARES: SUBURBIA, 1870-1930 (2005); Brady, supra note 1, at 1617-23.

7. See 334 U.S. 1, 20-23 (1948); see also Barrows v. Jackson, 346 U.S. 249, 251, 253, 260 (1953) (denying remedy of damages). The prior popularity of racial covenants, see generally TOM C. CLARK & PHILIP B. PERLMAN, PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS (1948); RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: Racially Restrictive COVENANTS, LAW, AND SOCIAL NORMS (2013) (arguing that racial covenants, even if unenforceable, might continue to affect who lives in a neighborhood).

8. These constraints also can exclude by race. See Lior Jacob Strahilevitz, Exclusionary Amenities in Residential Communities, 92 VA. L. REV. 437 (2006); Christopher Berry, Land Use Regulation and Residential Segregation: Does Zoning Matter?, 3 AM. L. & ECON. REV. 251 (2001) (finding no significant difference in residential racial segregation between Houston and Dallas, and attributing this result to potency of covenants in Houston).

A. Hancock Park: Los Angeles in the 1920s

Downtown Los Angeles, originally sited where its residents could readily access fresh water, lies fifteen miles east of the Pacific Ocean. One of Greater Los Angeles’s major thoroughfares, Wilshire Boulevard, runs due west from downtown towards the ocean beaches. During the 1920s, a decade in which the population of the City of Los Angeles doubled, G. Allen Hancock subdivided Hancock Park, a rectangular tract of almost one-square mile. The rectangle’s southern border was Wilshire Boulevard. Hancock sought to create a high-end neighborhood of houses. He imposed covenants that ran with each of the lots, restricting most of them to only single-family residential use and a minimum lot size of 15,000 square feet. As was common in California at the time, Hancock also banned residency by nonwhites. His covenants set an explicit expiration date, January 1, 1970. Hancock, unlike a handful of pioneering 1920s developers, did not establish a common-interest community (CIC) to govern Hancock Park. Many residents apparently now wish that he had. Competing neighborhood associations have arisen within Hancock Park, although none has the power to compel homeowners to pay an assessment.

As the decades passed, public works departments substantially widened Wilshire Boulevard. Lots abutting that thoroughfare became too noisy to serve as an ideal site for a single-family use.

10. More precisely, the south side of the Hancock Park rectangle abuts Wilshire Boulevard; the west side, Highland Avenue; the north side, Melrose Avenue; and the east side, Rossmore Avenue. See RUTH WALLACH, MIRACLE MILE IN LOS ANGELES: HISTORY AND ARCHITECTURE 34 (2013).


12. See Bolotin, 41 Cal. Rptr. at 377.


Owners of Hancock Park lots abutting Wilshire brought several lawsuits—some successful, some not—claiming that conditions had so changed that courts should no longer enforce the single-family-use restriction.15 Aware that the covenants would expire in 1970, some owners of vacant lots simply chose to wait until that year, in the hope that Los Angeles would then zone their lots for more intensive uses such as apartment buildings.16 Prior to 1970, thus evolved the Dead Mile on Wilshire, a stretch centered on Hancock Park.17 The nickname highlights the differences between this underdeveloped stretch and Wilshire’s so-called Miracle Mile, an auto-oriented commercial strip just to the west.18

15. Compare Bolotin, 41 Cal. Rptr. at 377 (reversing trial court and holding that conditions had not sufficiently changed to bar enforcement), with Hirsch v. Hancock, 343 P.2d 959 (Cal. Dist. Ct. App. 1959) (permitting an oil derrick to be used on Hancock Park lot).
17. See id. at 70-71.
18. See id. at 81-126.
Figure 1. Wilshire Boulevard’s Dead Mile in 1971, just after the covenants expired.  

How did Hancock’s covenants interact with the City of Los Angeles’s zoning? Los Angeles had designated “residence district[s]” as early as 1910, well before New York City’s more celebrated embrace of zoning in 1916. In 1920, Los Angeles also became the U.S. pioneer in the mapping of zones solely for single-family detached

19. Photograph of Undeveloped Lots on Wilshire Boulevard, in Los Angeles Times Photographic Collection (1971), https://digital.library.ucla.edu/catalog/ark:/21198/zz0002nhwc [https://perma.cc/9DEF-G62V], Los Angeles Times Photograph Collection, Special Collections, Charles E. Young Research Library, UCLA. The view in the figure is to the west. The high-rise building in the distance stood at Wilshire Boulevard and South Rimpau Boulevard.

20. On the interaction of demand for the two devices, see Ron Cheung & Rachel Meltzer, Homeowners Associations and the Demand for Local Land Use Regulation, 53 J. Reg’l Sci. 511, 531 (2013) (finding that a greater number of CICs is associated with more local land use regulation).

21. See Ex parte Quong Wo, 118 P. 714 (Cal. 1911); Gordon Whitnall, History of Zoning, 155 Annals Am. Acad. Pol. & Soc. Sci. 1, 10-12 (1931). New York City’s first zoning ordinance regulated building bulks, particularly heights, which Los Angeles’s initial ordinance did not. Id.
houses. Yet Hancock correctly envisioned that city zoning, by itself, would not create the high-end neighborhood that he wanted to offer. A century after Hancock dreamed of its creation, and long after his covenants had expired in 1970, the core of Hancock Park remains as he conceived it. In 2020, the City of Los Angeles was zoning most of the neighborhood for the sole use that Hancock’s covenants had permitted, a single-family detached house on a lot of at least 15,000 square feet. This minimum lot-size requirement was three times greater than what Los Angeles was requiring in the single-family neighborhood just east of Hancock Park.

In 2021, Trulia reported that a Hancock Park house on a lot of at least 15,000 square feet had a median asking price of around $7 million. Despite these astronomic values, market pressure to densify this now centrally located neighborhood is intense. The City of Los Angeles has responded by rezoning some of the edges of Hancock Park for commercial and multifamily uses. In 2020, these rezonings represented about 5 percent of the neighborhood’s total area. Along much of the neighborhood’s frontage along Wilshire Boulevard, zoning now allows commercial or multifamily uses.

22. Whitnall, supra note 21, at 12.
23. In the 1920s, Hancock also may have recognized that covenants were more reliable than zoning in furthering his goal of restricting occupancy by nonwhites. At the time, racial zoning was unconstitutional, but racial covenants were not. Compare Buchanan v. Warley, 245 U.S. 60 (1917) (holding that racial zoning unconstitutionally impaired property rights), with Corrigan v. Buckley, 271 U.S. 323 (1926) (holding private covenants did not entail state action). For Corrigan’s later demise, see supra note 7 and accompanying text.
26. In 2020, the city’s zone in Hancock Park, RE15, required a minimum house-lot of 15,000 square feet. See id. Arden Boulevard, one block east of Rossmore Avenue, Hancock Park’s eastern boundary, then lay in Los Angeles’s standard R1 zone, which required only 5,000-square-foot lots.
27. Search conducted on Trulia.com on December 1, 2021.
29. The estimate ignores the areas of the Wilshire Country Club and various schools.
typically in structures less than four stories in height. In sum, covenants originally shaped land uses in Hancock Park, but after they had expired in 1971, zoning largely took over the task of freezing 95 percent of the neighborhood.

B. The Rise of Common-Interest Communities

The developer of a common-interest community, which Hancock Park is not, compels each purchaser to become a member of a private homeowners association and pay a periodic assessment to that entity.30 In 1844, four purchasers of a Boston farm created the first CIC in the United States, Louisburg Square in the Beacon Hill neighborhood.31 In that instance, owners of twenty-eight townhouses abutting a small park agreed to pay mandatory fees to maintain the park. Louisburg Square endures as an institution, evidence that covenants may produce value for centuries.

Nationally known CIC developments of recent vintage include the New Urbanist communities of Celebration and Seaside in Florida, and Kentlands in Maryland.32 Residential structures in these communities vary and include detached single-family houses, townhouses, and higher-rise apartments and condominiums. Property owners, not tenants, elect the members of the executive board that governs the CIC association.33 Covenants typically empower the board to adopt and enforce rules governing member conduct, and to

30. The key judicial decision upholding the power of a CIC to impose mandatory assessments is Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank, 15 N.E.2d 793 (N.Y. 1938).

31. URB. LAND INST., THE HOMES ASSOCIATION HANDBOOK 40, 42 fig. 4-B (1964) (indicating the layout). A private trust, not a CIC, governs Manhattan’s Gramercy Park, established a decade earlier than Louisburg Square. See id. at 39.

32. See infra note 35 and accompanying text.

collect assessments to finance maintenance of the CIC’s common property, such as recreation facilities and open space.\textsuperscript{34} So thoroughgoing are board enterprises in Celebration and Seaside that residents in both have declined to incorporate as municipalities.\textsuperscript{35}

The Community Associations Institute represents CICs, which it claims contain a solid majority of new dwellings. CAI surveys assert that in 2017, as mentioned, CICs accounted for 61 percent of new housing units built in the United States.\textsuperscript{36} There have been few studies of what CIC covenants typically provide. Susan French and Wayne Hyatt, two noted legal experts, credibly assert that the “modern documents” of a CIC typically handle the issue of covenant life in the following manner.\textsuperscript{37} The declaration of covenants specifies an initial term, perhaps twenty-five to fifty years. The covenants then automatically renew for a shorter term, commonly ten years, unless opponents of renewal, by majority or supermajority vote, affirmatively vote to amend or terminate them. Specialists refer to this system as \textit{automatic renewal with opt-out}. This now-standard approach stacks the deck in favor of the continuation of covenants. Unless loosened, these restrictions, coupled with zoning restrictions and historic preservation regulations, threaten to freeze land uses in urban America.

\begin{footnotesize}
\begin{enumerate}
\item[36.] Found. for Cmt. Ass’n Res., supra note 4, at 11.
\item[37.] Wayne S. Hyatt & Susan F. French, Community Association Law: Cases and Materials on Common Interest Communities 503 (2d ed. 2008); see also Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. Cal. L. Rev. 1261, 1314 (1982).
\end{enumerate}
\end{footnotesize}
II. A History of the Use of Covenants

Covenants can impose social costs, as racial covenants unquestionably did. Nonetheless, as pioneering developers realized, private restrictions also can confer tangible social benefits. Especially prior to the advent of zoning in the 1910s, urban homebuyers were uncertain about what the future would bring. A next-door neighbor might install an industrial facility, funeral parlor, or high-rise apartment building that courts would not deem noxious enough to constitute a nuisance. In Chicago, for example, con artists used a “livery stable scam” to shake down neighbors. Some residential developers therefore began to employ covenants to assure buyers that a new development would be free of nonresidential uses. Many early developers, including Allen Hancock, went farther and imposed covenants to restrict land uses in their developments to single-family dwellings. In the 1920s, many public officials followed the same practice and mapped single-family-only zones, an approach that the City of Los Angeles invented.


40. Covenants permitted only single-family units in 63 percent of Monchow’s sample, and in 74 percent of Zile’s. See supra note 12, at 28-31; Zile, supra note 39, at 471. Prior to the mid-twentieth century, if a state court deemed covenants ambiguous, it tended to interpret them to permit multifamily dwellings. See, e.g., Johnson v. Jones, 90 A. 649, 650 (Pa. 1914) (“[A]ll doubts are to be resolved against the restriction and in favor of the free and unrestricted use of the property.”). The Pennsylvania court accordingly interpreted a covenant allowing a “dwelling house” to enable construction of an apartment building. Id. at 649-50. See generally Brady, supra note 1, at 1644-53.

41. See supra text accompanying note 22. A study that I carried out found that suburbs restrict 91 percent of their residentially zoned land only to single-family detached dwellings. Robert C. Ellickson, Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin, 42 Cardozo L. Rev. 1611, 1622 (2021).
A. The Crudeness of Early Covenants

During the 1920s, and sometimes even later, many state courts viewed covenants with hostility. They inherited this bias partly from English common law. English common law lacked a general system of land records. Its courts rightly worried that the spread of enforceable restrictive covenants would surprise many purchasers of burdened land. In the United States, by contrast, states have long mandated that local governments operate land records systems. The United States' recording system enables title-insurance companies to assure land purchasers against the sorts of surprises that had worried English courts. As the twentieth century progressed, most state courts overcame their initial hostility to covenants and increasingly warmed to their potential.

Even as late as the 1950s, the drafting of covenants tended to be amateurish. Two basic problems recurred. First, drafters of covenants tended to be casual in identifying both the lot owners bound by the restrictions and those entitled to enforce them. Instead of prerecording a general declaration of covenants, the developer of a large subdivision might include covenants only in some deeds. Some courts eventually tidied up these messes, perhaps unsoundly, by concluding, in some instances, that a "general plan" of covenants had burdened and benefited all lots. As the twentieth century progressed, this problem lessened. By mid-century, both state and

42. See, e.g., Johnson, 90 A. at 650.
44. See, e.g., Brandon v. Price, 314 S.W.2d 521, 523 (Ky. 1958) ("Under the modern view, building restrictions are regarded more as a protection to the property owner and the public rather than as a restriction on the use of property, and the old-time doctrine of strict construction no longer applies."); Dixon v. Van Sweringen Co., 166 N.E. 887 (Ohio 1929); see also Brooks & Rose, supra note 7, at 3.
45. Zigurds Zile concluded that the covenants he examined, mostly imposed in the 1950s, were generally poor in quality. Zile, supra note 39, at 483.
46. See Monchow, supra note 12, at 14-15.
local governments had greatly increased the formality of their subdivision regulations. Once more formal regulations existed, a developer's attorney could record, prior to the sale of the first subdivision lot, an overarching declaration of covenants that clarified the lots burdened and benefited.

Second, drafters of early covenants tended to be cavalier about how long the scheme of covenants would last. The approach that currently is predominant—automatic renewal with opt-out—was not concocted until the early twentieth century. Prior to its invention, drafters of covenants took a variety of approaches to covenant life. Some specified a fixed termination date, perhaps twenty-five or fifty years in the future. A few explicitly stated that the covenants were to be perpetual. Most commonly, however, a drafter would simply fail to address the issue of covenant length, thereby implying that the restrictions were to last forever. This sloppiness forced courts, as early as the late nineteenth century, to develop doctrines terminating covenants.

B. Key Innovators Who Shaped Covenant Practices

Three individuals and two institutions made major contributions to the evolution of U.S. covenant practices. The first was the little-heralded Edward H. Bouton of the Roland Park Company, a Baltimore land-development firm. For site planning, Bouton's company frequently hired the firm of the prominent landscape architect Frederick Law Olmsted, Jr. Between 1891 and 1931, Bouton used covenants at several notable Baltimore subdivisions, all of which evolved into common-interest communities. Bouton notably experimented with each of the four basic options for limiting the life of a covenant. He first tried perpetual covenants. Because human foresight plainly is limited, Bouton soon cast aside this approach,

48. See infra notes 50-61 and accompanying text.
49. See infra notes 127-48 and accompanying text.
51. URB. LAND INST., supra note 31, at 43. Olmsted, Jr. had a yet more famous father.
52. Id. at 43-46.
53. Id. at 43.
just as both courts and legislatures would come to frown on it. Next, Bouton tried fixed-term covenants. That approach required him to select a precise ending date, despite the uncertain nature of future events.\textsuperscript{54} Third, Bouton turned to authorizing purchasers in his developments, by plebiscite, to determine covenant length. He initially specified that the covenants were to terminate at a fixed date, but authorized lot owners to vote affirmatively to extend them. This approach assumed that, when covenants were valuable, members would be able to overcome the collective action problems that would make it difficult to keep them in place. In 1924, Bouton used a fourth approach at his Homeland development: covenants automatically renewed for successive periods of years unless opponents ever mobilized enough votes to end or amend them.\textsuperscript{55} As noted, this technique—automatic renewal with opt-out—has become standard.\textsuperscript{56}

Bouton's subdivision designs and artfulness with covenants influenced other American developers.\textsuperscript{57} Bouton mentored the second individual notable in the history of covenants, J.C. Nichols, someone twenty years younger. Nichols began development of Kansas City's Country Club District in 1905.\textsuperscript{58} The development proved a huge success, cementing Nichols's national prominence. In 1929, more than a decade after the advent of zoning, Nichols published a ringing endorsement of the continuing utility of covenant restrictions.\textsuperscript{59} Like Bouton, Nichols experimented with various

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  \item \textsuperscript{54} See French, supra note 37, at 1316 n.255 (referring to fixed time limits as “completely arbitrary”).
  \item \textsuperscript{55} URB. LAND INST., supra note 31, at 43.
  \item \textsuperscript{56} See supra text following note 37.
  \item \textsuperscript{58} URB. LAND INST., supra note 31, at 51-54; see also MCKENZIE, supra note 4, at 38-43 (discussing Nichols). At several developments, Nichols imposed covenants to bar occupancy or ownership by Black people. See MONCHOW, supra note 12, at 47, 50.
  \item \textsuperscript{59} “I believe practically all subdividers agree that zoning, as desirable as it is for cities as a whole, cannot, at least for the present, supplant all the advantages gained by the use of deed restrictions.” J.C. Nichols, A Developer's View of Deed Restrictions, 5 J. LAND & PUB. UTIL. ECON. 132, 142 (1929). \textit{But cf.} EDWARD M. BASSETT, ZONING 317, 324 (Nat'l Mun. Rev.
approaches to the lifespan of covenants.\textsuperscript{60} Several sources identify Nichols as the inventor of automatic renewal with opt-out.\textsuperscript{61} By the mid-1920s, both Bouton and Nichols were regularly employing the approach.

The 1930s saw the creation of two institutions that have greatly influenced covenant practices. The first was the Federal Housing Administration (FHA), a New Deal agency established in 1934.\textsuperscript{62} FHA provides mortgage insurance, protecting lenders from borrower defaults. Its underwriting policies have greatly influenced how covenants are used. During its early decades, FHA favored developments of single-family detached houses in low-density neighborhoods and frowned on the mixing of different land uses.\textsuperscript{63} By 1938, the agency was recommending that covenants have an initial term of at least twenty-five years.\textsuperscript{64}

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\textsuperscript{60} In some early subdivisions, Nichols’s company required lot owners to vote affirmatively to extend the prior term. See Strauss v. J. C. Nichols Land Co., 37 S.W.2d 505 (Mo. 1931) (sustaining legality of a vote-to-extend procedure). Nichols later switched to an opt-out, or vote-to-terminate, approach. See, e.g., Maurer v. J. C. Nichols Co., 485 P.2d 174, 176 (Kan. 1971) (involving 1924 covenants that required owner opt-out at least five years prior to the expiration of a term). Nichols later provided a rationale for why he had changed his mind:

With the greater protection to property through such automatic extension of restrictions, particularly if they cover an area of considerable size, the original restriction period need not be so long. Perhaps 25- to 30-year periods are long enough to give reasonable assurance and yet short enough to permit readjustment of restrictions to changing modes of life.

\textsuperscript{61} See Fogelson, supra note 6, at 108-09; Urb. Land Inst., supra note 31, at 51. But cf. supra note 60.


\textsuperscript{63} Enlightened opinion at the time favored the separation of different land uses. See Andrew Whitemore, How the Federal Government Zoned America: The Federal Housing Administration and Zoning, 39 J. Urb. Hist. 620, 626, 630 (2012) (noting that FHA policies had supported the segregation of land uses and had promoted low-density, single-family detached housing); see also Thomas Adams, The Design of Residential Areas: Basic Considerations, Principles, and Methods, in VI Harvard City Planning Series 89 (Henry Vincent Hubbard ed., 1934) (asserting that a detached house “is the best type for most people”).

\textsuperscript{64} Br. Hous. Admin., Underwriting Manual § 980(3) (1938). During the New Deal, FHA notoriously supported the use of racially restrictive covenants. See id. at § 980(3)(g) (favoring “[p]rohibition of the occupancy of properties except by the race for which they are intended”). In 1947, the agency dropped that explicit policy. Brooks & Rose, supra note 7, at 108-09, 170-71.
\end{footnotesize}
In 1936, J.C. Nichols helped found the Urban Land Institute (ULI), a nonprofit specializing in issues of development policy. In 1947, both the FHA and ULI explicitly endorsed automatic renewal with owner opt-out every ten years or so. In that year, both institutions published sample forms for covenants that included an identical paragraph on the issue of covenant length. ULI likely copied the FHA version. The federal agencies that regulate financial institutions encourage lawyers for developers to use boilerplate documents when creating covenants. During the postwar homebuilding boom, attorneys relied heavily on the FHA-ULI form. A Westlaw search in 2020 uncovered 115 reported judicial decisions, overwhelmingly by state courts, that quote the exact words that the two institutions had offered to govern the extension of covenants.


67. These Covenants are to run with the land and shall be binding on all parties and all persons claiming under them until January 1, 19[ten years minus twenty-five years], at which time said Covenants shall be automatically extended for successive periods of 10 years unless by vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part.

URB. LAND INST., supra note 66, at 167 (emphasis added). Footnote 1 reads, “some developers recommend not less than 25 years.” Id. The 1964 version of the ULI Handbook repeated the italicized words quoted above, but added the requirement that at least two-thirds of the membership approve any amendment to the covenant scheme. See URB. LAND INST., supra note 31, at 392.


70. The search, conducted on February 16, 2020, employed the phrase, “Covenants shall be automatically extended for successive periods of.” Of the 115 decisions, in 107, drafters had chosen ten years as the length of the renewal period, three had chosen less than ten years, and five had chosen either twenty or twenty-five years. The 1964 version of the ULI Handbook repeated the italicized words quoted in note 67, but added the requirement that
A third important individual in the history of American covenant law was Byron R. Hanke. Hanke served as FHA’s national Director of Land Planning from 1946 to 1972.\footnote{Who Is Byron Hanke?, FOUND. FOR COMMUNITY SCHOLARSHIPS, https://foundation.caionline.org/scholarships/recent-fellowship-recipients/hanke_bio/ [https://perma.cc/FP7P-8GLM].} In the decades after World War II, Hanke fought against then-popular subdivision practices, such as the creation of rectangular house-lots situated within a grid of streets.\footnote{Byron R. Hanke, Planned Unit Development and Land Use Intensity, 114 U. PA. L. REV. 15, 16 (1965).} He came to favor not single-use zones, but Planned Unit Development (PUD) zoning that would enable the mixing of different land uses.\footnote{Id. at 17-18. Hanke’s article appeared as part of a symposium on PUDs. See 114 U. PA. L. REV. 3-170 (1965). Publication of the symposium helped promote use of the PUD device, which lately has fallen into decline because some suburbs regard it as overly pro-development.} In the 1960s, FHA detailed Hanke to work for ULI. The upshot was the publication of ULI’s \textit{Homes Association Handbook} in 1964.\footnote{URB. LAND INST., supra note 31. The volume identifies Hanke, whose name appears first on the authors’ page, as “Study Director and Land Planner.” Id. The Handbook lists Jan Krasnowiecki, another major contributor, as “Legal Counsel.” Id. Krasnowiecki then was a member of the University of Pennsylvania law faculty.} This volume quickly became the bible of creators of mandatory-membership common-interest communities. After 1970, the number of CICs in the United States skyrocketed.\footnote{See Henry Hansmann, Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice, 20 J. LEGAL STUD. 25, 61-62 (1991).} The rising popularity of condominium ownership, an option generally not available in the United States prior to the 1960s, helped fuel the boom.\footnote{Richard Brooks and Carol Rose, authors of a book critical of racial covenants, agree that nonracial covenants potentially have utility. BROOKS & ROSE, supra note 7, at 92, 101-02; see also William T. Hughes, Jr. & Geoffrey K. Turnbull, Restrictive Land Covenants, 12 J. REAL ESTATE FIN. & ECON. 9, 19-20 (1996) (lauding potential of covenants); MONCHOW, supra note 31.}

III. COVENANTS HAVE VALUE, BUT DECLINING VALUE OVER TIME

The many supporters of covenants were clear-eyed about their benefits, but underplayed the downsides of aging covenants. Scholarly studies affirm that covenants can usefully constrain a landowner’s choices among land uses and building designs.\footnote{See Byron R. Hanke, Planned Unit Development and Land Use Intensity, 114 U. PA. L. REV. 15, 16 (1965).} In at least two-thirds of the membership approve any amendment to the covenant scheme. \textit{See URB. LAND INST., supra note 31, at 392.}
2019, economists Wyatt Clarke and Matthew Freedman, marshaling data almost national in scope, published one of the most notable contributions.78 Controlling for other variables, Clarke and Freedman found that the presence of a CIC increased the value of a house by about 8 percent when a development was new.79 The authors also found, however, that the premium decreased steadily over time and had disappeared, on average, once a development was forty years old.80 Three other studies support the plausible intuition that the value of covenants tends to erode over time.81 But only on average. Townhouse owners at Louisburg Square, established in 1844, today undoubtedly would favor perpetuation of their association.82

Why covenants can enhance property values, especially early on, is hardly mysterious. A landowner's choices among land uses commonly generate both negative and positive externalities on neighbors. A variety of mechanisms can internalize these externalities, including informal norms, nuisance litigation, and public regulations. Compared to these other alternatives, developer-imposed covenants potentially have several advantages.83 Builders can employ covenants to market communities with distinctive attributes, analogous to Tiebout competition among suburban municipalities.84 Allen Hancock, for example, perceived that there would be demand in Los Angeles for a high-end community of houses and, at Hancock Park, employed covenants to deliver that product.85 Covenants decentralize the creation of land use restrictions from a

note 12, at 78 (“[S]ubdividers and purchasers are familiar with this method of control and feel confident of its permanency and soundness.”).

79. Id. at 11.
80. Id.
82. See supra text accompanying note 31.
84. See generally Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956).
85. See supra note 23 and accompanying text.
monopolist—in that instance, the City of Los Angeles—to entrepreneurs such as Hancock who operate on a more fine-grained level. In the words of the Supreme Court of California, “common interest developments are a more intensive and efficient form of land use that greatly benefits society and expands opportunities for home ownership.”

Whether the Hancock Park covenants—even ignoring their odious racial exclusions—in fact would have survived a cost-benefit analysis, however, is far from clear. On the positive side, an analyst would include the enhancement of consumer choice among neighborhood ambiances. By establishing a CIC, a developer can credibly promise the availability of specific facilities. These include not only the commonplace, such as tennis courts and garden-like grounds, but also the exotic, such as bandstands and sculpture gardens. The resulting specialization of neighborhoods may enhance the bonding social capital of eventual residents. Enthusiasts of covenanted communities, such as Fred Foldvary and Robert Nelson, stress these potential upsides.

Covenants also, however, give rise to costs. Developers commonly employ them with the intent of excluding certain people. At Hancock Park, Allen Hancock wanted to keep out not only nonwhites, but also middle-income households of any race. The exclusiveness of Hancock Park might add to the bonding social capital of its residents, but simultaneously reduces bridging social capital across income groups in Los Angeles.

In most instances, however, exclusionary zoning is a far more serious problem than exclusionary covenants. Few covenant

89. See Strahilevitz, supra note 8 (emphasizing possible racial motives that may underlie a covenant scheme); Janet Furman Speyrer, The Effect of Land-Use Restrictions on Market Values of Single-Family Homes in Houston, 2 J. REAL EST. FIN. & ECON. 117, 128 (1989) (expressing concern for groups that covenants may economically exclude).
90. See supra Part I.A.
91. One leading analyst implies that bridging social capital is especially valuable. See Putnam, supra note 87, at 23, 358, 363; see also Lee Anne Fennell, Contracting Communities, 2004 U. ILL. L. REV. 829, 882-90 (discussing social capital in CICs).
schemes bind more than 1 percent of the area of a municipality.\footnote{92} In addition, as a symbolic matter, governmental pursuit of economic segregation is more offensive than private pursuit of the same goal.\footnote{93} Indeed, in a leading Pennsylvania decision striking down large-lot zoning, the court approvingly noted that landowners could employ covenants to assure that lots are large.\footnote{94} Covenants can give rise to other sorts of costs. This Article emphasizes the collective action problem that covenant beneficiaries may face when the restrictions become outmoded.\footnote{95} Covenants also limit a landowner’s freedom to choose among land uses and building designs.\footnote{96} Evan McKenzie, one of the severest critics of covenant communities, emphasizes another potential downside.\footnote{97} In his eyes, CICs, which allocate votes according to property ownership, tend to undermine traditions of democratic governance and reduce involvement in the affairs of local governments.\footnote{98}

Do the benefits of covenants exceed their costs? Clarke and Freedman, who did not give weight to covenants’ subtler social effects, assert that they increase home values, especially when they are young.\footnote{99} Clay Gillette, a centrist observer, acknowledges that covenants tend to foster homogeneous sorting. Partly in light of the widespread human impulse, within the constraints of fair-housing

\begin{itemize}
  \item \footnote{92} According to CAI’s numbers, in 2018, a CIC of average size governed about eighty housing units. See \textit{FOUND. FOR CMTY. ASS’N RSCH.}, supra note 4.
  \item \footnote{93} An owner of land may constitutionally make his property as large and as private or secluded or exclusive as he desires and his purse can afford. He may, for example, singly or with his neighbors, purchase sufficient neighboring land to protect and preserve by restrictions in deeds or by covenants inter se, the privacy, a minimum acreage, the quiet, peaceful atmosphere and the tone and character of the community which existed when he or they moved there.\footnote{94} See also \textit{GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES} 323-31 (3d ed. 2016).
  \item \footnote{95} Winokur, supra note 69, at 62-66.
  \item \footnote{97} McKenzie, supra note 4, at 21-23.
  \item \footnote{98} Clarke & Freedman, supra note 78.
\end{itemize}
legislation, to bond with others who are similar, however, he is unwilling to condemn covenanted communities across the board.99 I agree. The costs of exclusionary zoning, again, are far more serious than the costs of exclusionary covenants.

In 1982, I published an article that strongly supported the potential of CICs as a decentralized source of land use regulation.100 Since then, for two reasons, my enthusiasm has somewhat cooled. First, it has become increasingly evident that the popularity of CICs is not entirely market-driven. To placate fiscally selfish “homevoters,” a local government commonly insists that a developer create a CIC to provide services, such as street cleaning and trash collection, which the government provides without charge in older neighborhoods.101 This has come to be known as the “offloading” of costs to CICs.102 Second, as Lee Fennell and Paula Franzese have persuasively demonstrated, legal doctrines compel many CICs to be overly inflexible.103 A famous California decision, now a staple of legal education, held that a CIC could enforce a no-pets policy against a resident whose “indoor cats” were highly unlikely ever to bother a neighbor.104 In that instance, attorneys might have advised the CIC

99. Clayton P. Gillette, Courts, Covenants, and Communities, 61 U. CHI. L. REV. 1375, 1386, 1441 (1994); Fennell, supra note 91, also offers a centrist perspective.
100. See Ellickson, supra note 33; see also Ellickson, supra note 83, at 711-19.
103. Fennell, supra note 91, at 849-64, 891-95; Paula A. Franzese, Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community, 47 VILL. L. REV. 553, 555 (2002). A large literature develops this theme. See, e.g., Charles E. Fraser, Condo Commandos: An Abuse of Power?, in TRENDS AND INNOVATIONS IN MASTER-PLANNED COMMUNITIES 46 (1998) (asserting that male residents aged seventy and older have disproportionate power on CIC boards); McKenzie, supra note 4, at 41, 131-32; Nelson, supra note 88, at 118-21 (noting, however, at 121, that a 1999 survey found that only 8 percent of CIC members deemed their rules to be either “not appropriate at all” or “somewhat inappropriate”); Gerald Korngold, Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy, 22 U.C. DAVIS L. REV. 951, 951-55 (1989).
board that a failure to enforce the no-pets policy might lead to a judicial holding that it had waived the covenant. Today, indoor cats; tomorrow, pit bulls. I nonetheless continue to regard covenants, particularly when they are new, as potentially cost-justified land use controls.

IV. THREE ACTORS WHO CAN ELIMINATE STALE COVENANTS

When covenants benefit only a dozen or so landowners, beneficiaries are unlikely to have much difficulty in consensually agreeing to modify or terminate the restrictions. When covenant beneficiaries are more numerous, however, as they commonly are, stale covenants threaten to freeze urban neighborhoods.

Three distinct actors can address this potential rigidity. First, the attorneys who draft covenants at the behest of developers can explicitly anticipate the issue of staleness. Second, judicial bodies can create doctrines to limit the enforcement of outmoded covenants. Third, state legislatures, the chief creators of property law in the United States, have ample authority to prevent the enforcement of old restrictions. Each of these three actors is aware of the others' potential involvement. Susan French, a preeminent scholar of covenant law, served as the Reporter for the Restatement (Third) of Property: Servitudes. Her Restatement notes that attorneys drafting covenants might, instead of themselves addressing the termination issue, leave “the matter open, anticipating that the law would extricate their successors from intractable problems that might arise in the future.”

105. See Hyatt, supra note 34, at 164-65; infra text accompanying notes 145-48.
106. In Cordogan v. Union National Bank of Elgin, 380 N.E.2d 1194 (Ill. App. Ct. 1978), a developer had restricted lots in a small subdivision to single-family residences. Unable to sell the lots because of nearby commercial uses, the developer persuaded the City of Elgin to rezone the land to allow duplexes. Id. at 1196-97. The appellate court refused, however, to find a change in conditions and held the developer to the covenant. Id. at 1194. Eduardo Peñalver later discovered that the developer eventually had succeeded in buying out all the covenant beneficiaries. Robert C. Ellickson, Vickie Been, Roderick M. Hills, Jr. & Christopher Serkin, Land Use Controls: Cases and Materials 605 (4th ed. 2013).
107. On the unlikelihood of federal or state constitutional barriers to legislative reform, see infra text accompanying notes 166-71.
108. I served as an Adviser to this Restatement, a position far less influential than Reporter.
109. Restatement (Third) of Property: Servitudes § 7.10 cmt. a (Am. L. Inst. 2000); see
A. How Attorneys Drafting Covenants Have Historically Dealt with Issues of Amendment and Termination

There have been few studies of what covenants actually provide. Two scholars have assessed in detail how U.S. covenant schemes address issues of amendment and termination. Helen Monchow’s survey, published in 1928, and Zigurds Zile’s, published in 1959, each examined no more than one hundred declarations of covenants. Monchow found that most covenants had fixed lives of thirty to forty years. Zile reported that 58 percent of the covenants in his sample also had a fixed end date, with a median and mode of twenty-five years, but that 24 percent were perpetual. Zile also found that drafters of covenants were beginning to authorize plebiscites among benefited owners. He found that 16 percent embraced the current predominant approach, automatic renewal with opt-out. William Rogers, who briefly treated the question of covenant length in a more recent empirical study, found that owners were more likely to amend covenants than to terminate them root-and-branch.

Automatic renewal with opt-out, the system pioneered by Bouton and Nichols (and later endorsed by the FHA and the ULI), puts the burden of collective action on those who want to amend or terminate a covenant scheme, not on those who want to perpetuate it. This

also id. § 4.3 cmt. e.

110. Monchow examined eighty-four U.S. covenant schemes, mostly imposed in the 1920s, MONCHOW, supra note 12, at 27. Just over half originated in four states: California, Illinois, Massachusetts, and New York. Id. at 27-31. Zile’s study examined 100 covenant declarations in Waukesha County, Wisconsin, a locale identified in Part I of his article. Zile, supra note 39. Most of the covenants in Zile’s sample had been recorded in the early 1950s. Id.

111. MONCHOW, supra note 12, at 57-60.


113. Id. at 460.

114. See William H. Rogers, A Market for Institutions: Assessing the Impact of Restrictive Covenants on Housing, 82 LAND ECON. 500, 506 (2006). Rogers, who reviewed covenants in Weld County, Colorado, devoted only a few sentences to issues of amendment and termination: “Some covenants require 90% agreement to any amendment in the first 10 years and 75% afterwards. Out of 220 covenants, in Weld, since the summer of 2003 only ten have been terminated, while there have been almost 100 amendments.” Id. Rogers did not discuss the age of the covenant schemes he examined. Cf. NELSON, supra note 88, at 93 (mentioning a 1995 survey that found that 28 percent of CICs had tried to amend their covenants and had won owner approval in 67 percent of those attempts).

115. ULI’s 1964 Homes Association Handbook twice states that requiring owners to vote
approach often, but not always, has merit. It works to reduce the transaction costs of decision-making in a community disposed to renew its covenants. When no opponents appear, the covenants march costlessly on.

Automatic renewal with opt-out, however, overly protects the status quo. Researchers such as Clarke and Freedman have found that most covenants typically lose value after forty years. Individuals who favor perpetuation of existing covenants commonly control a CIC’s executive board. Especially in the face of a supportive board, owners who wish to amend or terminate a covenant scheme face heavy odds. First, a collective action problem, the temptation to free ride on the activism of others, is likely to bedevil them. Second, and as important, most individuals have an innate preference for maintaining the status quo. Owners, when confronting the question of the amendment or termination of a covenant, tend to underestimate their gains from removing the restrictions and exaggerate their losses. Even outmoded covenants therefore are too likely to march onward.

A drafter of covenants should consider other systems less biased in favor of the status quo. I start with two possibilities, both with the virtue of simplicity. First, a drafter could require, after the initial fixed term, that a majority of beneficiaries periodically affirm the covenants—that is, opt-in, as opposed to opt-out. Second, after forty or fifty years, the covenant scheme might prohibit specific performance of any negative covenant, thereby limiting an enforcer to the remedy of damages. The widespread adoption of either of these drafting reforms would help unfreeze American neighborhoods.

to renew covenants would be “extremely undesirable.” URB. LAND INST., supra note 31, at 212, 336. “Although most home owners would rather see the covenants continue, a majority vote to reinstate them may be difficult to marshall.” Id. at 212. Collective action problems, however, also beset opponents of stale covenants.

116. See supra text accompanying notes 78-82.
117. Cf. Fennell, supra note 91, at 841 n.56.
119. See infra text accompanying notes 149-54.
There also are numerous options of greater complexity. One is worth spelling out in detail. The drafter of covenants would specify an initial fixed term, say fifty years, and thereafter require that beneficiaries vote to amend or terminate every ten years. Unlike current practice, however, the drafter would periodically place the burden of affirming the scheme on covenant proponents. An affirmation after the end of the initial term and every thirty years thereafter might be appropriate. Under this revised approach, members would have to affirmatively vote to endorse continuation of the covenant scheme in year 50, year 80, year 110, and so on. Opt-outs would remain available to members in years 60, 70, 90, 100, and so on. Susan French favors this revised approach. Should a drafter fail to comply with this recommendation, a state statute could mandate it.

Any system of neighborhood voting invariably poses other issues. Should a vote to amend or remove stale covenants require a bare majority of owners, or some sort of supermajority? Leading authorities now recommend that either action should require a vote of at least two-thirds of the membership. The Restatement even sees no problem with requiring 99 percent of owners to assent to a change. When covenants have become long-lived, these extraordinary majority requirements are a mistake. A drafter of a covenant scheme would be wise to reduce, as the years pass, the supermajority required. At the end of the initial term, for example, no more than 60 percent of the electorate should have to favor change, and, after 80 years, no more than a bare majority. Given the damage that stale covenants can do to real estate markets, a state legislature could consider mandating these voting rules.

A related issue is how long prior to the end of the initial term, or the start of a renewal term, opponents have to act. ULI’s 1964

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120. In an e-mail message to me on February 20, 2020, she stated that she endorsed the procedure I propose, citing “our current struggles to build affordable housing.”

121. See URB. LAND INST., supra note 31, at 212; UCIOA § 2-117(a); id. § 2-118(a) (requiring 80 percent to approve a decision to terminate); see also ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS 633, 698-99 (1989) (providing a sample declaration that would require 75 percent of owners to agree to modify or terminate).

122. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.10 cmt. a (AM. L. INST. 2000) (“If the servitudes provide a means for modification or termination by agreement of less than 100 percent of the servitude beneficiaries, a court should rarely intervene.”).
Handbook favors forcing opponents to take action at least three years prior to the end of a term. J.C. Nichols, a stalwart proponent of covenants, advocated requiring (in some instances) mobilization five years in advance. Partly because many people are procrastinators, these approaches also help perpetuate existing restrictions. Especially for long-lived covenants, drafters should be less protective of the status quo. One or two years in advance normally would be sufficient.

Authors of form books for covenants should pay heed to the risk of straitjacketing neighborhoods. If drafters of covenants do not reform their ways, a state legislature could consider mandating some of the reforms just mentioned.

B. Judicially Created Doctrines That Weed out Stale Covenants

Richard Epstein has contended that the original developer should solely determine covenant length. In his view, the developer, when setting the lifespan of a restriction, can best consider all pertinent variables. Virtually no one, and certainly not the Restatement, agrees with Epstein’s analysis. Stewart Sterk highlights some rationales for limiting a developer’s freedom of covenant. Sterk stresses that covenants can impose negative externalities on outsiders and notes that a drafter may underestimate the transaction costs of later consensual modification.

123. URB. LAND INST., supra note 31, at 212, 392. The Handbook also would require that “written notice of the proposed agreement is sent to every Owner at least ninety (90) days in advance of any action taken.” Id. at 392.
124. See FOGELSON, supra note 6, at 109.
126. Another reform would reduce the number of owners entitled to enforce a covenant from the entire set of owners to a much smaller group, namely, the owners of properties near the site where the breach of covenants was in the offing. See infra text accompanying note 165. Both drafters and legislators could adopt this approach.
128. See, e.g., RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.10(a)-(b) (AM. L. INST. 2000) (advocating a mandatory changed-conditions doctrine).
129. See Stewart E. Sterk, Foresight and the Law of Servitudes, 73 CORNELL L. REV. 956,
As the next pages reveal, both courts and legislatures, contrary to Epstein's urgings, have taken steps to weed out stale covenants. These lawmakers assume that someone who knows how urban conditions actually have evolved may rightly be able to second-guess the developer's original judgment about covenant length. Attorneys who draft covenants, in fact, commonly draft them in the shadow of these judicial and legislative constraints, and do not assume, à la Epstein, that freedom of covenant is unfettered.

Many covenants created during the nineteenth century, and even thereafter, were explicitly or implicitly perpetual. Early on, courts provided relief to landowners burdened by allegedly outmoded restrictions. State judiciaries developed a number of common law doctrines to weed out stale covenants. Two warrant emphasis.

1. Changed Conditions

*Trustees of Columbia College v. Thacher*, a case that arose in mid-town Manhattan, gave rise to the most important ground for judicial relief: change in neighborhood conditions. In *Thacher*, an 1859 covenant had restricted uses at the corner of Sixth Avenue and 50th Street to dwelling houses. Two decades later, an elevated train was running along Sixth Avenue, with a stop at that exact corner. The highest New York court refused to order a landowner to honor the covenant on the ground that neighborhood conditions had changed sufficiently to make equitable enforcement inappropriate. The court noted, however, that the beneficiary arguably should be entitled to recover damages for breach of the covenant.

Subsequent case law sheds light on the sorts of neighborhood change that are particularly salient in the application of this common law doctrine. A leading decision by the Supreme Court of

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130. See supra text accompanying notes 48-49.

131. For more comprehensive treatments of grounds for covenant termination, see HYATT & FRENCH, supra note 37, at 426-53; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES ch. 7 (AM. L. INST. 2000).

132. 87 N.Y. 311 (1882) (unanimous).

133. Id. at 319.

134. See generally Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of
Nevada understandably gives more weight to changes in use patterns within the covenanted subdivision than on private lands across the street from it. Thacher held that a change in transportation options available on public streets might be sufficient to prevent covenant enforcement. This reasoning, however, is not sound in all instances. If courts were to deem the widening of Wilshire Boulevard to be a decisive change for lots abutting that thoroughfare in Hancock Park, that neighborhood’s covenant scheme might fall like dominos.

The Nevada decision also holds, on a knottier issue, that a decision of zoning authorities to rezone covenanted lands for more intense uses is not evidence of a change in conditions. For fresh covenants, this reasoning typically is sound. It enables lot purchasers to rely on the enforceability of the covenant scheme: controls that are independent of zoning. As covenants age, however, courts should be more open to accepting a rezoning as evidence that conditions indeed may have changed.

An Albuquerque, New Mexico, case illustrates the point. In that instance, applicable covenants had banned commercial uses in a residential subdivision. The declaration authorized the owners to amend the covenants after twenty years. Residents chafed at the absence of commercial uses. Twenty-four years after the developer had first imposed the covenants, 85 percent of the owners approved an amendment allowing commercial uses on two particular lots.
Importantly, the City of Albuquerque also had agreed to rezone both lots from single-family to commercial. The New Mexico Supreme Court nevertheless struck down the covenant amendment because it did not apply subdivision-wide. A more enlightened decision would have taken Albuquerque’s rezoning as a signal that neighborhood change would be beneficial.

A recent American Law Reports annotation includes almost 400 reported cases involving the issue of covenant termination for changed conditions. Case frequency has declined sharply, from about seventy per decade in the 1930s and 1940s, to seventeen per decade in the 2000s and 2010s. One reason may be drafters’ disinclinations to make covenants perpetual, and to favor automatic renewal with opt-out. More ominously, the decline may be evidence of the increasing ossification of U.S. suburban real estate.

2. Waiver

Suppose covenants imposed in 1920 had restricted uses in a neighborhood of 100 house lots to single-family detached houses. As time has passed, seventeen scattered lot owners—in violation of the covenants—have converted their houses to duplexes, and three have opened commercial businesses. A fact pattern of this sort commonly induces a court to terminate the covenants. Judges provide a variety of rationales. They may deem lot owners to have “waived” or “abandoned” the covenants. Given that the use changes were internal

141. See id.
142. In this case, an award of damages might have been sensible. See infra text accompanying notes 149-54.
143. See Mark S. Dennison, Annotation, Change in Character of Neighborhood as Affecting Validity or Enforceability of Restrictive Covenant, 76 A.L.R. 5th 337 (2000). As of January 23, 2020, this Annotation included 394 reported cases, including those in the supplements. During the 2000s and 2010s, the covenant challenger lost in nearly three-quarters of these cases.
144. One might expect that judges would be less likely to find changed conditions when the drafter had set an express termination date not far in the offing. The decisional law, however, is not especially supportive. See, e.g., Hirsch v. Hancock, 343 P.2d 959, 961, 966, 969 (Cal. Dist. Ct. App. 1959) (permitting, on account of changed conditions, violation of residential covenant eleven years prior to its termination date); Norris v. Williams, 54 A.2d 331, 334 (Md. 1947) (holding a restriction with an express life of fifty years terminated after thirty).
145. See, e.g., B.B.P. Corp. v. Carroll, 760 P.2d 519 (Alaska 1988) (holding that lot owners had abandoned covenant requiring removal of trees, but perhaps not covenant against
to the subdivision, a court also could hold that conditions had changed, a doctrine just discussed. However justified termination of these covenants might be ex post, this approach has a definite downside ex ante. The waiver doctrine tends to prompt homeowners associations to enforce all covenants strictly, forbidding “indoor cats,” for instance, under the aegis of a no-pets policy. Worried about judicial findings of waiver, J.C. Nichols himself had urged the strict enforcement of covenants. In the eyes of many commentators, this has made life in a covenanted community overly regimented.

3. The Advantages of a Damage Award for Breach of Covenant

As the Thacher court noted as early as 1882, courts have a way to split the baby when an owner breaches a covenant. In the Albuquerque case, Ridge Park Home Owners, the court considered only two options: either upholding or invalidating the covenant amendment that would have introduced commercial uses into a single-family neighborhood. The court instead could have held the sponsors of the new commercial uses liable in damages to the objecting neighbors for diminutions in the market values of their properties. This approach would have loosened the covenant straitjacket, which is what most of the Albuquerque homeowners wanted in that instance. It also would have acknowledged the special suffering of the owners of the houses abutting the new commercial uses.

view-blockage); Antis v. Miller, 524 So. 2d 71, 74-76 (La. Ct. App. 1988) (ruling that twenty-year failure to object to multifamily uses had resulted in abandonment of entire covenant scheme). But see Swenson v. Erickson, 998 P.2d 807, 814-15 (Utah 2000) (holding that installation of small storage sheds on nineteen of fifty-two lots did not prevent lot owner from enforcing restriction on location of a somewhat larger secondary structure). The Restatement prefers the term “abandonment” and, in comment b, offers a distinction between waiver and abandonment. RESTATEmENT (THIRD) OF PROPERTY: SERVITUDES § 7.4 (AM. L. INST. 2000).

146. See supra note 104 and accompanying text.
147. Nichols, supra note 58, at 139. In 1964, the ULI invoked this rationale to urge “prompt action” to enforce all covenants. URB. LAND INST., supra note 31, at 297-98. But see Fennell, supra note 91, at 849-64 (emphasizing the “problem of uniform rules”).
148. See supra note 103 and accompanying text.
149. See supra text accompanying notes 132-33.
150. See supra text accompanying notes 140-42.
Numerous commentators have urged courts, in appropriate cases, to use damages as the remedy for covenant breach. Yet courts rarely opt for this compromise. A review of changed-conditions cases between 2000 and 2019 indicates that attorneys seldom push for damages and that courts rarely award them. A Massachusetts statute, however, commendably recognizes the merits of damages as a remedy.

The standard measure of damages is diminution in the market value of a covenant beneficiary’s land. This formula fails to recognize the possibility that a complainant may have subjectively perceived a greater loss. A party who deliberately breaches a covenant intentionally inflicts damage. In some instances of this stripe, legislatures have used multipliers to increase damage awards. They might consider doing so in these cases as well.

C. Statutes That Limit Covenant Enforcement

A handful of state legislatures have taken decisive steps to terminate aged covenants. Charles Clark, the premier American legal scholar of covenant law in the first half of the twentieth century, favored the passage of a statute whose effects, contrary to his intentions, would have been ham-handed. He urged legislation...
to limit the life of a covenant to thirty years, or an even shorter period once the covenant had ceased conferring substantial benefits on beneficiaries. Clark asserted, “[t]he clog on titles which useless servitudes may offer is known to all, though, like the weather, we talk about it but do nothing.” Contrary to Clark’s analysis, Louisburg Square and many other developments illustrate that covenants can have value for more than a century. Minnesota mistakenly once followed Clark’s advice and limited covenant lives to thirty years. Georgia legislators made a similar error. In a statute now considerably modified, Georgia once limited the duration of a servitude to twenty years in areas governed by zoning laws. Although the Georgia enactment correctly detected the interrelationship between public and private land-use controls, it overlooked the advantages of authorizing developers to tailor their own long-lasting rules.

Massachusetts legislators have acted more soundly. They have restricted the life of a covenant to thirty years, but authorize 50 percent of the restricted owners to affirmatively vote to extend the term. This reform has two virtues. It recognizes that stale

156. See Charles E. Clark, Limiting Land Restrictions, 27 A.B.A. J. 737, 737, 739, 741 (1941). Clark’s proposed statute also would have limited the lives of most easements. A negotiation over easement termination, however, is far less likely to pose collective action problems.

157. Id. at 738.

158. See supra text accompanying note 31.

159. See MINN. STAT. § 500.20(2) (1980); Haugen v. Peterson, 400 N.W.2d 723, 725-26 (Minn. 1987). In 1982, Minnesota repealed this provision for CICs and certain other covenants. MINN. STAT § 500.20 (2020). But Minnesota continues, as Clark had suggested, to terminate covenants once they confer only nominal value. Id. § 500.20(1); cf. R.I. GEN. LAWS § 34-4-21 (2020) (limiting to thirty years the lives of virtually all covenants that are facially perpetual); Note, Touch and Concern, supra note 155, at 953 (urging that lives of covenants be limited to thirty years, but authorizing beneficiaries to unanimously extend or modify them).


161. See supra text accompanying notes 83-86.

162. MASS. GEN. LAWS ch. 184, § 27(b) (2020) (applicable only when the number of bound lots is four or more); see Sterk, Freedom from Freedom of Contract, supra note 129, at 658-59 (analyzing this statute and arguing that perhaps only 30 percent or 40 percent of the electorate should have to approve extension of a covenant term). But cf. Michael A. Heller, The Boundaries of Private Property, 108 YALE L.J. 1165, 1185 (1999) (criticizing voting rules that give excessive veto power to minorities of unit owners). Why reject majority rule in this context?
covenants indeed can impose significant costs and that status quo bias tends to perpetuate the familiar. Once covenants have become aged, a legislature is wiser to place the burden of collective action, as Massachusetts has, on covenant proponents, not covenant opponents. A second Massachusetts statute splendidly recognizes that an award of damages, especially after decades have passed, can be a useful compromise between the interests of those who want covenants to continue and those who want to be free of them.

James Winokur has suggested an alternative way to defang damage from overly restrictive covenants. He has proposed a statute that, after twenty years, would limit the number of lot owners entitled to enforce to the eleven closest to the site. This reform would shift enforcement powers away from the many, including the executive board, to a smaller group better able to work out a compromise. No state has taken up Winokur's innovative idea.

Constitutional issues lurk. A court conceivably might deem a statute that terminated covenants earlier than the drafter had intended to be an unconstitutional taking of the property of a covenant beneficiary. A state or federal court ruling of this sort is highly unlikely. Stale covenants freeze neighborhoods and potentially reduce housing supply.

163. See supra text accompanying notes 115-20. A Louisiana statute, when a covenant scheme has failed to provide procedures for modification and termination, authorizes owners of a majority of affected land to amend or terminate covenants fifteen years after their creation. LA. CIV. CODE ANN. art. 780 (2019). This provision sensibly recognizes the potential obsolescence of restrictions. Unlike Massachusetts, however, Louisiana places the burden of collective action on covenant opponents.


165. See Winokur, supra note 69, at 79-80.

166. See Blakeley, 313 N.E.2d at 917-21 (Quirico, J., dissenting).

167. If brought under the federal Constitution, the sole remedy of a successful takings claimant would be an award of damages, not invalidation of the offending statute. See First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

168. See French, supra note 37, at 1265.

169. Cf. Blakeley, 313 N.E.2d at 907-10 (rejecting dissenters' argument that failure to specifically enforce covenant had constituted a taking of property).
preempted not only zoning restrictions that impair the building of accessory dwelling units (ADUs), but also covenants that have the same effect. Some state statutes similarly have overridden single-family-only covenants that bar the opening of group homes. California and other states confronting a severe housing shortage might even consider across-the-board invalidation of single-family-only covenants. That step would foster, at least where zoning also was not a barrier, the construction of “missing middle” units such as duplexes. There is a partial precedent for this step. A 2019 Oregon statute overrode single-family zoning in the state’s most populous cities and suburbs. Oregon declined, however, to invalidate existing covenants that bar missing-middle housing. It chose to grandfather existing single-family-only covenants, but did prohibit developers from imposing new ones.

Texas has enacted various statutes that, instead of overriding covenants, affirmatively promote their use. Houston’s reluctance to adopt zoning may have prompted legislation of this sort. One Texas statute authorizes selected municipalities, among them the City of Houston, to deny a building permit for a commercial use that would violate a private covenant. This shifts covenant-enforcement costs from property owners to taxpayers. A second statute authorizes at least 75 percent of covenant beneficiaries in certain cities and counties, including Houston’s Harris County, to vote to extend, add to, or modify existing restrictions.


172. See Infranca, supra note 170, at 851-52.


174. See id.


176. TEX. LOC. GOV'T CODE § 214.161-.168 (2014); see Berry, supra note 8, at 262-63; Teddy M. Kapur, Land Use Regulation in Houston Contradicts the City’s Free Market Reputation, 34 ENV'T L. REP. 10045, 10050-51 (2004).

177. See TEX. PROP. CODE §§ 201.006(b), 204.003(b)(1) (2020); see also Kapur, supra note 176, at 10051-52. Compare Brandwein v. Serrano, 338 N.Y.S.2d 192, 196-97 (Sup. Ct. 1972) (refusing to allow extension of covenant term that sixty-two of seventy-three owners had
certainly can be useful tools, this second Texas statute is overly pro-

 Covenant. Imagine that California had an equivalent statute. In 

 upscale Hancock Park, where single-family-only covenants expired 

 in 1970, 75 percent of lot owners might well have voted to keep the 

 lots along Wilshire Boulevard “dead” for additional decades.\textsuperscript{178} 

 Massachusetts has addressed the problem of stale covenants far 

 more appropriately than Texas.\textsuperscript{179} This should puzzle political scien-

 tists. Exclusionary zoning has been vastly more prevalent in 

 Massachusetts than Texas.\textsuperscript{180}

**CONCLUSION**

Institutional arrangements, once adaptive, may become outmoded. A central historical example is the open-field village, predominant in most of Europe for the millennium after A.D. 800.\textsuperscript{181} In England and elsewhere, villagers eventually enclosed their open fields, either consensually or by act of Parliament. An enclosure permanently subdivided an arable open field into private parcels. In England, the promoters of enclosures typically emerged spontaneously, village by village.\textsuperscript{182} Although historians have hotly debated the fairness of the enclosure movement, most rural residents appear to have recognized the greater efficiency of the new arrangement.\textsuperscript{183}

Aging covenanted communities, like aging open-field villages, are ripe for institutional change. Urban economists find that, after as few as forty years, the costs of covenants commonly come to exceed

\textsuperscript{approved}, with LA. CIV. CODE ANN. art. 780 (2019). 

178. See supra Part I.A. 

179. See supra text accompanying notes 162-64, 175-77. A California statute mimics Texas by authorizing a majority of owners repeatedly to extend expired covenants, but only in a common-interest community. See CAL. CIV. CODE §§ 4265, 4270 (West 2020); see also RESTATMENT (THIRD) OF PROPERTY: SERVITURES § 6.10(1)(a)(1) (AM. L. INST. 2000). Because Hancock Park is not a CIC, this statute would not apply to it. 

180. See Infracana, supra note 170, at 855 (Massachusetts); Ellickson, supra note 41, at 1867-85 (Texas). 


183. See Ellickson, supra note 181, at 1392.
their benefits.\textsuperscript{184} Covenant enthusiasts—such as Edward Bouton, J.C. Nichols, and Byron Hanke—were innocent of these findings, discovered long after their lifetimes. Consider a Florida common-interest community established in 1980. By the year 2100, its aging buildings and land uses may both be obsolete. The attorneys who draft covenants, state courts, and state legislatures should anticipate this risk. They also should be aware that humans’ status quo bias tends to lock in institutional arrangements.

For two reasons, however, the covenant straitjacket is likely to prove not as constraining as the zoning straitjacket. In 2018, common-interest communities in the United States contained an average of eighty dwelling units, far fewer than most municipalities.\textsuperscript{185} A small community is relatively closely knit, abetting cooperation among members.\textsuperscript{186} Promoters of covenant reform in these communities are likely to emerge spontaneously, as they did in open-field villages. As in that case, the weeding out of an obsolete arrangement promises to enhance aggregate property value.\textsuperscript{187}

In addition, both state courts and legislatures, despite their spotty record on covenant issues, are likely to be more helpful than they have historically been on zoning issues. When a zoning reform is proposed, state institutions commonly succumb to suburbs’ concerns about infringements on local autonomy.\textsuperscript{188} Both state courts and state legislatures, by contrast, have less reason to sympathize with owners who are seeking to perpetuate outmoded covenants. The politics of exclusionary zoning tend to be far more challenging than the politics of stale covenants.

Nonetheless, the rigidity of land uses in much of urban America creates colossal problems. This inflexibility harms the national

\textsuperscript{184} See supra text accompanying notes 77-86.
\textsuperscript{185} See supra note 92.
\textsuperscript{186} See supra note 106 (recounting successful bargaining within a small subdivision).
\textsuperscript{187} There are shards of evidence that CICs indeed can succeed in revising their covenants. See supra note 114 and accompanying text; Rogers, supra note 114, at 506 (finding that around 40 percent of covenant schemes in Weld County, Colorado, had been amended).
economy, inflates housing costs, and inhibits internal migration.\textsuperscript{189} Although public land use controls have been the primary cause, private covenants unquestionably also have contributed. Lawmakers should recognize that covenants commonly have value while in their teens, but not in their dotage.\textsuperscript{190}


\textsuperscript{190} See \textit{supra} text accompanying notes 78-81.