HOUSING GRIDLOCK

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ABSTRACT

The housing crisis dominates much of political and economic life, and it is driven in large part by a lack of housing supply. Recognizing this, many commentators have called for the end of single-family zoning. And some jurisdictions have answered the call. But even if that groundswell grows, the housing shortage likely will persist. One underappreciated reason for that persistence is that a private network of restrictions stands ready to pick up where zoning leaves off. Specifically, restrictive covenants abound nationwide, and, just like zoning, they often cap how much housing can be built without regard to local or regional demand. The aggregate result of these covenants is what this Article calls "housing gridlock," a side effect of dispersed private ownership rights that prevents property from reaching its full potential in service of both the public good and economic productivity. This Article explores the legal, financial, and, above all, psychological forces that brought about gridlock and further its hold today.

This Article then proposes a solution. Drawing primarily on the psychological phenomena and financial incentives that entrench housing gridlock in the first place, it crafts a two-stage procedural and remedial mechanism to break that gridlock. Critically, that mechanism aims to minimize psychic harm to existing property owners while freeing up additional housing supply. It begins with a lump-sum opt-in mechanism for willing covenant beneficiaries located near a proposed housing project, and an action only for damages within a predefined range for any remaining beneficiaries. This Article describes the finer details of this proposal and

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explores its potential advantages over other options in the preexisting legal toolkit from economic and (again, especially) psychological perspectives. Accordingly, it provides an asset to the multifront struggle for housing availability.

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INTRODUCTION

The affordable housing crisis is well-documented: homelessness abounds;[1] those who live in homes spend a larger portion of their income on housing than in the past;[2] the rate of homeownership among young adults

1. U.S. DEPT. OF HOUSING & URB. DEV., THE 2022 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2 (2022), https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf [https://perma.cc/QX64-3LXY].

2. Katherine Schaeffer, *Key Facts About Housing Affordability in the U.S.*, PEW RSCH. CTR.

over the past several years is lower than it has been in much of recent memory.[3] At a basic level, it is no mystery why this is the case. We have a severe housing shortage. Freddie Mac estimates a shortage of 3.8 million housing units nationwide.[4] Though a simple model of supply and demand cannot tell the entire story, it can go far. More people competing for fewer homes means sellers or landlords can command higher prices.[5] Thus, many people are without homes, and those who secure housing pay more to do so.

Unsurprisingly, then, the majority of the population agrees that the U.S. needs more housing.[6] But that is where the consensus ends. What kind of housing? Where should it be located? How do we get more of it? These questions confound policymakers and prompt fiery reactions from people across the political and socioeconomic spectrums.[7]

One flashpoint in this contentious ordeal concerns zoning. Single-family zoning is perhaps "[a]s American as apple pie,"[8] but it and other restrictions with similar practical effects suppress the housing supply. It inflates prices and drives suburban sprawl, disproportionately harming racial

(Mar. 23, 2022), https://www.pewresearch.org/fact-tank/2022/03/23/key-facts-about-housing-affordability-in-the-u-s [https://perma.cc/K3T3-226D]; *Housing Affordability Index (Fixed)*, FED. RSRV. BANK ST. LOUIS (2023), https://fred.stlouisfed.org/series/FIXHAI [https://perma.cc/T9NH-JYMY].

3. Erik L. Hernandez & Christopher Mazur, *Homeownership by Young Households Below Pre-Great Recession Levels: Racial and Ethnic Disparity in Homeownership Continues Even Among Highly Educated*, U.S. CENSUS BUREAU (Nov. 17, 2022), https://www.census.gov/library/stories/2022/11/homeownership-by-young-households-below-pre-great-recession-levels.html [https://perma.cc/NXV7-UV8J].

4. *Housing Supply: A Growing Deficit*, FREDDIE MAC (May 7, 2021), https://www.freddiemac.com/research/insight/20210507-housing-supply [https://perma.cc/QA5T-ZAQ2].

5. *U.S. Housing Shortage: Everything, Everywhere, All at Once*, FANNIE MAE (Oct. 31, 2022), https://www.fanniemae.com/research-and-insights/perspectives/us-housing-shortage [https://perma.cc/G9WQ-PC4G].

6. Emily Elkins & Jordan Gygi, *Poll: 87% of Americans Worry About the Cost of Housing; 69% Worry Their Kids and Grandkids Won't Be Able to Buy a Home*, CATO INST. (Dec. 14, 2022), https://www.cato.org/survey-reports/poll-87-americans-worry-about-cost-housing-69-worry-their-kids-grandkids-wont-be#building-more-houses [https://perma.cc/6PAF-56AB].

7. *Id.*; *see also* Ros Coward, Opinion, *Nimbys Are Not Selfish. We're Just Trying to Stop the Destruction of Nature*, THE GUARDIAN (July 4, 2021, 10:34 EDT), https://www.theguardian.com/commentisfree/2021/jul/04/nimbys-nature-destruction-wildlife-developers [https://perma.cc/K67H-VZ9Q]; Sarah Holder, *NIMBYs Really Hate Developers When They Turn a Profit*, BLOOMBERG (Sept. 14, 2018, 6:42 AM), https://www.bloomberg.com/news/articles/2018-09-14/nimbys-really-hate-developers-when-they-turn-a-profit [https://perma.cc/Y66H-2JLT]; Cadence Quaranta, *Developer Has Abandoned Plans to Demolish Former Hampden Bookbindery and Bird Roost*, BALT. BANNER (Feb. 14, 2023, 8:00 PM), https://www.thebaltimorebanner.com/community/local-news/developer-has-abandoned-plans-to-demolish-a-former-bookbindery-in-hampden-32NVJTNSAZGBRPNDK2HKH3KBQY [https://perma.cc/4BUS-9Y8M]; Jerusalem Demsas, *The Next Generation of NIMBYs*, THE ATLANTIC (July 20, 2022), https://www.theatlantic.com/newsletters/archive/2022/07/the-next-generation-of-nimbys/670590 [https://perma.cc/LR9G-QJRS].

8. *See* Erin Baldassari & Molly Solomon, *The Racist History of Single-Family Home Zoning*, KQED (Oct. 5, 2020), https://www.kqed.org/news/11840548/the-racist-history-of-single-family-home-zoning [https://perma.cc/5NPK-SRRP].

minorities and lower-wealth Americans.[9] Indeed, racial animus likely motivated much of the initial push for single-family restrictions.[10] Today, then, single-family restrictions hoard opportunity on behalf of existing homeowners.

Anyone who keeps their ear to the ground in the world of housing policy, urban governance, or even national politics has heard calls to abolish single-family zoning.[11] It's not just chatter: multiple states and cities across the country, including Oregon,[12] California,[13] Maine,[14] and Minneapolis, Minnesota,[15] have passed laws to break single-family zoning's hold on housing development. These are welcome developments, but, of course, they alone are insufficient to solve the housing shortage.[16]

9. *See* Jillian McKoy, *White Neighborhoods Have More Greenery, Fewer Dilapidated Buildings and Multi-Family Homes*, B.U. SCH. PUB. HEALTH (Jan. 19, 2023), https://www.bu.edu/sph/news/articles/2023/across-the-us-white-neighborhoods-have-more-greenery-fewer-dilapidated-buildings-fewer-multi-family-homes [https://perma.cc/LM4T-K9MB]; *see also* Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/9393-MEVV]; Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market [https://perma.cc/QHX2-X9LH].

10. KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS 95, 137 (2020); *see also* Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 779–806 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4083588/pdf/nihms453809.pdf [https://perma.cc/9CHU-3RCJ].

11. Tom Coale, Opinion, *Opinion: Ending Single-Family Detached Zoning Benefits Everyone*, MD. MATTERS (May 26, 2021), https://www.marylandmatters.org/2021/05/26/opinion-ending-single-family-detached-zoning-benefits-everyone [https://perma.cc/3TUN-26TY]; Michael Manville, Paavo Monkkonen & Michael Lens, *It's Time to End Single-Family Zoning*, 86 J. AM. PLANNING ASS'N 106, 106–12 (2020), https://www.tandfonline.com/doi/full/10.1080/01944363.2019.1651216 [https://perma.cc/B2LA-3HN8]; Badger & Bui, *supra* note 9.

12. H.B. 2001, 80th Leg. Assemb., Reg. Sess. (Or. 2019), https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureDocument/HB2001/Enrolled [https://perma.cc/LV36-MFWV].

13. S.B. 9, 2021–22 Leg. Sess. (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9 [https://perma.cc/K2QM-4VHQ].

14. H.R. 1489, 130th Leg., 2d Reg. Sess. (Me. 2022), http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1489&item=1&snum=130 [https://perma.cc/7AG8-WSCK].

15. DEP'T OF CMTY. PLAN. & ECON. DEV., CITY OF MINNEAPOLIS, MINNEAPOLIS 2040 COMPREHENSIVE PLAN 105–07 (2019) https://lims.minneapolismn.gov/File/2018-00770 [https://perma.cc/AWG6-62DJ] (adopted by Minneapolis City Council Resolution No. 2019R-308 on Oct. 25, 2019).

16. A slowing housing market, high building costs, and many other economic influences play a major role too. C. Tsuriel Somerville, *Residential Construction Costs and the Supply of New Housing: Endogeneity and Bias in Construction Cost Indexes*, 18 J. REAL ESTATE FIN. & ECON. 43, 43–62 (1999), https://link.springer.com/article/10.1023/A:1007785312398 [https://perma.cc/BGG5-8793]; Kristian Hernández, *Rising Construction Costs Stall Affordable Housing Projects*, STATELINE (Apr. 25, 2022, 12:00 AM), https://stateline.org/2022/04/25/rising-construction-costs-stall-affordable-housing-projects [https://perma.cc/8VXD-4YAX]; Chris Arnold, *There's Never Been Such a Severe Shortage of Homes in*

This Article targets another legal factor that blocks many cities and regions from meeting housing demand: single-family restrictive covenants. Restrictive covenants are private arrangements attached to property deeds limiting how property can be used, for the benefit of certain surrounding properties.[17] The terms often apply for many decades to the burdened properties and automatically renew afterwards.[18] Covenants thereby can "run with the land" and do not merely bind specific parties to an agreement.[19] On the substance, restrictive covenants can limit property use in various ways.[20] One of the most prevalent covenant terms is one that restricts the burdened property to hosting one single-family home.[21] Other common restrictions include minimum square footage, minimum setbacks from lot lines, and height limits.[22] In other words, restrictive covenants, where they exist, often place the same lid on housing development through private rights as single-family zoning does through public regulation. And they often contribute de facto to the same racial segregation and wealth inequality that the now unenforceable racially restrictive covenants once pursued de jure.[23]

the U.S. Here's Why, NPR (Mar. 29, 2022, 7:00 AM), https://www.npr.org/2022/03/29/1089174630/housing-shortage-new-home-construction-supply-chain [https://perma.cc/3ZEY-P3BA].

17. Cunningham v. City of Greensboro, 711 S.E.2d 477, 485 (N.C. Ct. App. 2011).

18. *See id.*; *see also, e.g.*, Gardner v. Jefferys, 878 A.2d 259, 265 (Vt. 2005); Covenants, Conditions, and Restrictions for Meadowhaven Heights Phase II, Dallas, Or. ¶ 18 (Aug. 20, 1999) (on file with author); Declaration of Conditions, Covenants and Restrictions for Shadow Creek Estates Subdivision Phase II, Polk Cnty., Or. ¶ 15 (Sept. 13, 1997) (on file with author); Robert Ellickson, *Stale Real Estate Covenants*, 63 WM. & MARY L. REV. 1831, 1840 (2022).

19. Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1614 (2021) (citing *Covenant*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

20. Historically, the most infamous form was a racially restrictive covenant, which would restrict the property owner subject to the covenant from selling the property (usually a house) to a non-White purchaser. *See* Shelley v. Kraemer, 334 U.S. 1, 4, 18–19 (1948). The Supreme Court held all such covenants unconstitutional. *Id.* at 20–23. So, even though many remain on the books and attached to property deeds, they cannot be enforced through any formal legal means. Other sorts of restrictive covenants, however, more or less remain fair game. Cheryl W. Thompson, Cristina Kim, Natalie Moore, Roxana Popescu & Corinne Ruff, *Racial Covenants, a Relic of the Past, Are Still On the Books Across the Country*, NPR (Nov. 17, 2021), https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination [https://perma.cc/E7MF-SEKP].

21. 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 (1989); *see also, e.g.*, Jackson v. Williams, 714 P.2d 1017, 1018 (Okla. 1985); Double D Manor, Inc. v. Evergreen Meadows Homeowners' Ass'n, 773 P.2d 1046, 1048 (Colo. 1989); Jayno Heights Landowners' Ass'n v. Preston, 271 N.W.2d 268, 445–46 (Mich. Ct. App. 1978).

22. *See, e.g.*, Friends of Lubavitch, Inc. v. Zoll, No. 03-C-16-008420, 2018 Md. App. LEXIS 972, at *1–2 (Md. Ct. Spec. App. 2018); Richard R.W. Brooks & Carol M. Rose, *Racial Covenants and Segregation, Yesterday and Today* 4, 7 (Straus Inst., Working Paper No. 08/10, 2010), https://www.law.nyu.edu/sites/default/files/siwp/Rose.pdf [https://perma.cc/2ZQP-7XZY].

23. John Infranca, *Singling Out Single-Family Zoning*, 111 GEO. L.J. 659, 661 (2023). Indeed, there is evidence that their ancestors, nuisance covenants, were intentionally used toward such ends, albeit often unsuccessfully. *See generally* Brady, *supra* note 19 (discussing the history of attempts by wealthier property owners to rely on nuisance covenants to exclude apartment buildings and those who would dwell in them from locating nearby).

These covenants are incredibly and increasingly common.[24] So, even if zoning restrictions were lifted across the entire nation, a sizeable portion of single-family properties would still be frozen indefinitely, regardless of the demand for housing in that region. And not only that, but there is also reason to suspect that even where such restrictive covenants do not yet exist, homeowners may seek to implement them when faced with the fear, post "upzoning," that they will lose the "neighborhood character" they have grown accustomed to.[25] At the end of the day, policymakers could all get on board with unlocking more housing, but an extensive network of private legal apparatuses can still say no. If we care about finding real and lasting solutions to the housing crisis, we must explore freeing up property from longstanding private rights that often entrench inefficiencies and stand in opposition to the public good. At the same time, to avoid significant demoralization costs and psychic harm to property owners resulting from upended expectations in the short term (and to avoid certain political failure), we must find a path forward that seeks to honor owners' reasonable expectations.

The legal academy has given this problem limited attention. At a high level of generality, many scholars have commented on some of the problems associated with restrictive covenants and other forms of deadhand control over real property.[26] Additionally, a few scholars have noted that restrictive covenants could swoop in where single-family zoning leaves off.[27] More specifically, Robert Ellickson recently provided a helpful synopsis of the problem of "stale" restrictive covenants of all forms and of some potential paths forward for those burdened by them to free themselves.[28]

24. *See infra* Section II.A.

25. Stephen R. Miller, Opinion, *Ending the Single-Family District Isn't So Simple*, STAR TRIBUNE (Jan. 2, 2019, 5:53 PM), https://www.startribune.com/ending-the-single-family-district-isn-t-so-simple/503820202 [https://perma.cc/9F2V-XNFA]; Betsy McCaughey, Opinion, *McCaughey: Dems Targeting Suburban Homeowners*, BOS. HERALD (Feb. 13, 2023, 12:07 AM), https://www.bostonherald.com/2023/02/13/mccaughey-dems-targeting-suburban-homeowners [https://perma.cc/G5M2-5YCN]; Mark Weinter, *New York's Affordable Housing Plan Bypasses Local Zoning*, GOVERNING (Feb. 2, 2023), https://www.governing.com/community/new-yorks-affordable-housing-plan-bypasses-local-zoning [https://perma.cc/XFL4-VJSH]; Nordea Lewis, *'I Don't Want to See My Neighbors Pushed Out': Hampden Residents Voice Concerns on New Development*, WMAR2 BALT. (Oct. 27, 2022, 10:27 PM), https://www.wmar2news.com/news/local-news/i-dont-want-to-see-my-neighbors-pushed-out-hampden-residents-voice-concerns-on-new-development [https://perma.cc/QV9Y-AUTZ].

26. Julia Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 770, 778 (2002); Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1528–29 (2007). *See generally* James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1 (1989).

27. Brady, *supra* note 19, at 1681–82; Miller, *supra* note 25; John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 824, 874–75 (2019).

28. *See generally* Ellickson, *supra* note 18.

And, just this year, Gerald Korngold explored the likely prominence and harms of single-family covenants in the wake of zoning reform.[29] He evaluates whether invalidating such covenants might run afoul of the Takings Clause, and then urges courts to consider such covenants void as contrary to public policy under certain circumstances.[30]

But the literature has only just begun to explore the nature and the depth of the problem as it relates to the housing crisis. This Article attempts to do so. It makes multiple new contributions to the discussion on the housing crisis and private law. First, it explains how the abundance of restrictive covenants contributes to housing "gridlock," a scenario in which fragmented and dispersed ownership of private rights prevent productive and socially beneficial land use. Second, this Article employs an underutilized approach to both describe that problem and explore solutions. Building on the work of Stephanie M. Stern and Daphna Lewinsohn-Zamir, who have provided a general primer on the relationship between psychology and property law,[31] this Article reviews contemporary psychological research on ownership, possession, and subjective attachment. It then applies that research to, first, suggest why restrictive covenants' hold may be stronger and more damaging than some commentators have suggested and, second, to evaluate strengths and weaknesses of legal and policy tools to escape that hold. One of the primary insights this Article hopes to convey is that housing gridlock from restrictive covenants is a deeply psychological problem, and that any solution must account for the driving psychological phenomena.

This Article proceeds in two parts. Part I explains how restrictive covenants contribute to gridlock. It evaluates housing gridlock—how we got here—from legal, financial, and especially, psychological perspectives. Part II explores how to break out of that gridlock. It surveys potential paths forward from within the common law of property as well as certain regulatory or legislative approaches. Then, relying on common law, economic, and psychological principles, it constructs a new solution. That solution involves a statutory mechanism, with procedural and remedial components, that facilitates the bypassing of covenants when it would be efficient to do so. Finally, it aims to respect the preexisting interests of covenant beneficiaries along the way. In the process of explaining this proposed solution to housing gridlock, this Article explores the advantages—especially psychological—that the solution presents compared

29. *See generally* Gerald Korngold, *Repealing Single-Family Zoning Is Not Enough: A Proposal for Removing Existing Parallel Private Covenants for Violating Public Policy*, 89 MO. L. REV. 1 (2024).

30. *See generally id.*

31. *See generally* STEPHANIE M. STERN & DAPHNA LEWINSOHN-ZAMIR, THE PSYCHOLOGY OF PROPERTY LAW (2020).

to other options.

I. THE TRAGEDY OF THE HOUSING ANTICOMMONS

This Section describes the housing gridlock that restrictive covenants have helped usher in. Section I.A identifies the concept of the tragedy of the "anticommons" and explains why it applies to the modern housing market generally and residential restrictive covenants specifically. Section I.B explores three interrelated social-scientific explanations of how we arrived at housing gridlock—a legal one, a financial one, and a psychological one—and it explains why the psychological explanation is particularly important. This Article thereby draws in part, but not exclusively, on law & behavioral economics to describe the problem, with a special emphasis on underappreciated psychological forces at play.

A. GRIDLOCK AS A FEATURE OF THE MODERN HOUSING MARKET

Few concepts are more influential to the foundations of private property law than that of the "tragedy of the commons."[32] The basic idea is that when a resource (such as a freshwater lake that is useful for drinking and recreation) is unowned and subject to open access, each individual with access to it has a personal incentive to use it heavily and not limit themselves.[33] "Every other person might use it up first," the thinking goes, "so if I don't use it now I might never get any." So, even though it would be in everyone's interests to preserve the common resource for years and generations to come, the resource is instead spent or spoiled rapidly.[34]

Theorists traditionally have proposed two main solutions to avoid the tragedy of the commons.[35] The first is centralized control by a public or governing body, giving authority and power to a single entity to perhaps allow public access to the resource, but limiting such access as necessary to preserve it.[36] The second is privatization, allowing private individuals or

32. Numerous cases cite the concept. *See, e.g.* NRDC v. Costle, 568 F.2d 1369, 1378 (D.C. Cir. 1977); New York v. Evans, 162 F. Supp. 2d 161, 167 (E.D.N.Y. 2001); Mojito Splash, LLC v. City of Holmes Beach, 326 So. 3d 137, 143 (Fla. Dist. Ct. App. 2021); Verizon v. FCC, 740 F.3d 623, 666–67 (D.C. Cir. 2014) (Silberman, J., concurring in part). Numerous law journal articles do as well. *See, e.g.*, Shi-Ling Hsu, *What* Is *a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 76 (2005); Nathaniel Wolloch, *Before the Tragedy of the Commons: Early Modern Economic Considerations of the Public Use of Natural Resources*, 19 THEORETICAL INQUIRIES L. 409, 409–10 (2018); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 533–34 (2007).

33. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243–46 (1968).

34. *Id.*

35. *See* Sinden, *supra* note 32, at 533–34.

36. *Id. See generally* ELINOR OSTROM, GOVERNING THE COMMONS (1990).

entities to own all or portions of the resource.[37] Under such an arrangement, the owners theoretically have an incentive to use the resource productively without spoiling it.[38]

But there's another tragedy that is far less famous. Michael Heller called it "the tragedy of the anticommons."[39] While the tragedy of the commons describes an undesirable consequence of too much open access, the tragedy of the anticommons sits at the other end of spectrum as an undesirable consequence of, in a sense, too much private ownership.[40] Here's the idea: Certain public goods rely on the use of property. And, indeed, some of those goods cannot manifest unless either enough property is pooled together, or a smaller unit of property is utilized or developed to a substantial degree.[41] Think of public transportation corridors, large parks, or stadiums. But if property is divided among too many private owners, or if the rights concerning one unit of property are spread among too many owners, then for those greater public goods to manifest, more people must be willing to relinquish their right to exclude others from using their small slice of the pie.[42]

A fictional example can make this more concrete. Imagine a swimming pool that is not owned by one person or entity, but instead is owned by hundreds of different people in individual chunks. Each person owns around one square meter and has complete and total rights over their small space. If even a handful of the individual owners decide to fence off their small portion of the pool from anyone else, they could prevent all other people from swimming laps. Because ownership of the pool is fragmented across many parties, the resource—the pool itself—cannot reach its full productive potential.

Although the swimming pool example is farfetched, anticommons and gridlock can calcify under the radar in ways that shape the real world. Michael Heller points to biomedical patents.[43] Years ago, a large pharmaceutical company developed what looked to be a promising treatment for Alzheimer's Disease.[44] But the treatment never made it out of the lab because it wasn't financially feasible for the company to pay off all the

37. *See* Sinden, *supra* note 32, at 533–34. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (arguing that private property comes to exist so that individuals can internalize the externalities of their resource use).
38. *See* sources cited *supra* note 37.
39. MICHAEL HELLER, THE GRIDLOCK ECONOMY 1 (2008).
40. *Id.* at 1–9.
41. *Id.*
42. *Id.*
43. *Id. at* 4–5.
44. *Id.*

holders of patents of necessary component technologies.[45] The U.S. government developed the patent system to incentivize innovation in the world of biomedical technology. And it did. Driven by patents as rewards, we underwent a revolution in biomedical technology in the late 20th century.[46] But sooner or later it rings true that "there is nothing new under the sun"[47] and one must build with the materials that already exist. When too many people have the right to exclude others from using those building blocks, building a wall from the bricks can approach impossibility.

Hence the term "gridlock."[48] We might have the building blocks to assemble resources that would massively improve public welfare, but whether we reach our goal depends on whether assembling those building blocks is feasible or whether they will instead stick in place, widely dispersed. I argue that we are witnessing a tragedy of the anticommons in housing too. Dispersed ownership rights stifle the production of the housing necessary to meet demand and ensure greater affordability and stability for all.

The most well-documented source of housing gridlock is regulatory: specifically, zoning and related regulations.[49] Most cities are governed by a zoning code, which limits land use in different geographic areas to specific uses—such as single-family housing only.[50] And in most cities, a property owner who seeks to use their property in violation of the zoning restrictions may request a "variance": permission from the local government to, say, build a quadplex or small apartment building in an area otherwise restricted to single-family houses only.[51] Often, a variance request triggers an elaborate comment and review process;[52] even for the smallest proposed projects, house owners can voice their opposition and demand studies on traffic, environmental impact, water runoff or burden on public utilities.[53] Because this process is expensive and time-consuming for the property developer, often the result is either that housing is never built, or the end product contains fewer units at a higher selling price than originally planned.[54] That being so, gridlock and anticommons can follow from not only too many

45. *Id.*
46. *Id.*
47. Ecclesiastes 1:9.
48. *See generally* HELLER, *supra* note 39.
49. *See* Infranca, *supra* note 23, *passim*.
50. Scott Beyer, *Modern Zoning Would Have Killed Off America's Dense Cities*, FORBES (May 25, 2016, 4:05 PM), https://www.forbes.com/sites/scottbeyer/2016/05/25/modern-zoning-would-have-killed-off-americas-dense-cities [https://perma.cc/Z5JY-3CX9].
51. EINSTEIN et al., *supra* note 10, at 15.
52. *Id.*
53. *Id.* at 17.
54. *See, e.g.*, *id.* at 3, 24.

people owning pieces of what we'd typically think of as "property"—a piece of land, a patent or copyright, for example—but also from too many people or entities having the right and power to stop others' use of their property, demonstrating the fragmentation of property *rights*.[55]

However, loosening zoning restrictions will not necessarily suffice to escape gridlock. In many regions in and around metropolitan centers, restrictive covenants could pick up much of the slack. Imagine a developer buys a property and wants to build multifamily housing—a condo building, four townhouses, or even just a duplex. The property isn't subject to any notable zoning restrictions. But it is within the bounds of a homeowners association ("HOA"). And within the HOA's Covenants, Conditions, and Restrictions ("CC&Rs") is a provision stating that all properties may only be used for the operation of one residence.

In this case, however, there is no variance process. The developer could petition the HOA board to allow multi-family housing, but (1) the board, made up of other homeowners in the subdivision, has no interest in losing the single-family, detached-home character of their neighborhood;[56] and (2) in any event, CC&Rs often can be amended only by a supermajority vote of all property owners within the association,[57] so if the developer wanted the legal right to build even a duplex, numerous owners in the vicinity would have to agree to the change. The chances of succeeding are slim.

Perhaps that would strike some people as just fine. We are talking about a single-family neighborhood, so maybe the property owner should simply find somewhere else to build the condos, townhouses, or duplexes. And anyway, the restrictive covenants should come as no surprise, right? The developer should have known what it was getting into. But for at least three reasons, restrictive covenants have contributed to and will continue to produce housing gridlock—not only as to an individual piece of property here and there, but also for residential properties and housing supply at local, regional, and national levels.

First, HOAs and single-family covenants are common and even rising in popularity. Single-family homes are the most prevalent form in the United

55. *See, e.g.*, HELLER, *supra* note 39, at 145–48 (discussing closed storefronts in post-Soviet Russia).

56. EINSTEIN et al., *supra* note 10, at 13, 34.

57. *See, e.g.*, Declaration of Covenants, Conditions and Restrictions for Bradford Manor Subdivision, Walton Cnty., Ga. § 9.02(b) (Apr. 5, 2001) (on file with author) [hereinafter Bradford Manor CC&Rs]; Amended and Restated Declaration of Covenants Conditions and Restrictions for Westview Estates, Polk Cnty., Or. § 5.3 (Oct. 16, 2022) (on file with author) [hereinafter Westview Estates CC&Rs].

States housing stock, representing around two-thirds of all units.[58] And around a quarter of all single-family homes in the United States are subject to HOA governance.[59] That share is poised to increase in the coming years—over 60% of new, single-family homes are subject to HOA governance, and the number is over 80% for new homes constructed in subdivisions.[60] Moreover, because a single-family restriction is one of the most common covenant terms for HOAs,[61] it is reasonable to assume that the large majority of single-family homes under HOA governance are bound by a restrictive covenant to stay that way. The practical effect of HOAs' increasing popularity for single-family home developments, and the prevalence of single-family use restrictive covenants, is that it is increasingly difficult to purchase a home that could one day be expanded into multiple units.[62] And that is so even without taking into account the prevalence of other sorts of covenant terms that in practice allow only for single-family development—like minimum square footage requirements for each residence.[63] For this reason, I, like Lee Anne Fennell and James Winokur, am skeptical of arguments that decentralized governance by collections of private covenants could meaningfully provide for an open "market" of governance options for homebuyers.[64] Increasingly CC&Rs converge on this land-use uniformity and gobble up land as they do so.

Second, some people who own single-family homes either purchase them without recognizing that they are bound by a single-family covenant

58. *American Community Survey, Table DP04: Selected Housing Characteristics*, U.S. CENSUS BUREAU (2021), https://data.census.gov/table?q=DP04 [https://perma.cc/PZ27-S2GG].

59. FOUND. FOR CMTY. ASS'N RSCH., 2021–2022 U.S. NATIONAL AND STATE STATISTICAL REVIEW (2022), https://foundation.caionline.org/wp-content/uploads/2022/09/2021-2CAIStatsReview Web.pdf [https://perma.cc/FT65-6C4J].

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

61. Stephen R. Miller, *Dangerous Ideas for Land Use Laboratories #1: Preempt the Single-Family Residence Restrictive Covenant*, LPB NETWORK (Jan. 27, 2020), https://lawprofessors.typepad.com/land_use/2020/01/dangerous-ideas-for-land-use-laboratories-1-preempt-the-single-family-residence-restrictive-covenant.html [https://perma.cc/3BZK-NV9P]; Ellickson, *supra* note 18, at 1841 n.40.

62. Winokur, *supra* note 26, at 33 ("Further, as increasingly standardized servitude regimes proliferate, a marginal consumer will confront uniformity not only within developments, but among competing developments. Thus, the alternative sources of supply contemplated in the economic defense of form contracts evaporate for buyers within particular housing markets.").

63. Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 775 (2023). Covenant terms other than those explicitly limiting use to single-family residences can play a significant role in limiting housing production. This Article focuses primarily on explicit single-family restrictions because the connection between them and housing gridlock is more direct. But much of what the Article discusses and suggests could apply to any restrictions that are *de facto* single-family restrictions.

64. *See* Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 856–58 (2004); Winokur, *supra* note 26, at 56–60. *But cf.* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1520 (1982) (describing membership in HOAs as "perfectly voluntary"); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1379–82 (1994) (suggesting that HOAs could provide communitarian benefits without significantly harming broader public interests).

and the significance of that fact, or eventually come to want freedom from such a covenant when they stand to benefit from its removal.[65] Most people, we can assume, buy a home primarily because they like the home and its general location. And their awareness of HOA restrictions and amenities may not extend far past knowledge of the monthly or annual fee, as well as the access owners have to common areas, like a swimming pool.[66] Over time, research shows, homeowners often come to disfavor many restrictions governing their private land use.[67]

Third, an obvious but important fact: land is a scarce resource.[68] As some land gets developed, the overall share of available land shrinks—especially land well-connected to amenities. Every property and subdivision developed for single-family use accelerates land consumption and constrains the resources available for future housing development.[69]

Of course, these phenomena conspire to lock individual land parcels into perpetual hosts of one single-family home. But the aggregate effects could be substantial too. We have a housing shortage, but where new housing is being constructed, it's disproportionately single-family and subject to a covenant keeping it that way.[70] Such development, being less dense and involving excessive land consumption, contributes to suburban sprawl.[71] Radiating out from city centers, more and more large land agglomerations are "filled" with sparse housing; and because of covenants the gaps are not easily filled in later. That means that new housing necessarily stretches away from population centers rich in jobs, recreation, social services, and other amenities.[72] This phenomenon disproportionately burdens lower-wealth residents for whom greater transportation costs and longer commuting times are especially difficult to manage.[73]

65. Winokur, *supra* note 26, at 59–60.

66. *Id.*; *see also* Clarke & Freedman, *supra* note 60, at 2 (citing EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994)).

67. Winokur, *supra* note 26, at 59–60; *see also* Clarke & Freedman, *supra* note 60, at 2 (noting that some buyers are unaware of extensive restrictive covenants when they purchase a home).

68. *See, e.g.*, Eric F. Lambin & Patrick Meyfroidt, *Global Land Use Change, Economic Globalization, and the Looming Land Scarcity*, 108 P.N.A.S. 3465, 3466 (2011), https://www.pnas.org/doi/10.1073/pnas.1100480108 [https://perma.cc/F3TH-U3LW].

69. *See* Samuel Brody, *The Characteristics, Causes, and Consequences of Sprawling Development Patterns in the United States*, NATURE EDUC. KNOWLEDGE (2013), https://www.nature.com/scitable/knowledge/library/the-characteristics-causes-and-consequences-of-sprawling-103014747 [https://perma.cc/222C-U8KU]; Winokur, *supra* note 26, at 33.

70. *See, e.g.*, Clarke & Freedman, *supra* note 60, at 1, 7.

71. *See* Brody, *supra* note 69.

72. Infranca, *supra* note 23, at 661.

73. *Id.*; EINSTEIN et al., *supra* note 10, at 9.

And it likely will not improve on its own. Although covenant authors can specify that restrictions expire after a certain number of years, they usually do not do so.[74] Instead, restrictions often apply unless removed through an onerous process, in effect sticking to the corresponding land indefinitely. So, the more HOAs, the more single-family restrictions, and the more land is consumed by indefinite limitations on housing.

Thus, private rights can prohibit cities and surrounding regions from meeting housing demand.[75] A society filled with single-family land use may function well for a time. But that time is likely to be short if the regional population is to increase. Unused land is depleted, so would-be developers cannot simply buy another lot and build it up. The land that is already occupied is stuck in a web of private promises keeping it from being redeveloped to accommodate more people. Thus, gridlock is inescapable. Properties where the market would offer top dollars to purchase and convert into multiple housing units cannot budge. Too many people—most often HOA boards and members—have the unilateral right to say no.

B. WHY DID WE GET GRIDLOCK?

The previous Section explained housing gridlock and how restrictive covenants contribute to it. But there is a more fundamental, or at least chronologically prior, question: Why do we have so many HOAs and restrictive covenants? No one factor or force can explain it all, but this Section discusses three separate, yet related explanations: one legal, another based on financial considerations and incentives, and a third psychological. It explains why the psychological element is particularly critical to grasp.

1. The Legal Backdrop

Non-possessory rights in land date back several centuries.[76] In fifteenth-century England, much land that up until then had stood open for passage was enclosed, and so free travel became more difficult.[77] In response, the "easement" was born as a legal right of passage through land under private control.[78] However, for centuries, those non-possessory interests rarely extended to provide rights, allowing people to limit how others used other properties.[79]

74. Winokur, *supra* note 26, at 4.

75. Also, as residents move farther away from city centers and outside of municipal boundaries, cities miss out on part of their tax base.

76. Winokur, *supra* note 26, at 10–12; Korngold, *supra* note 26, at 1534–35.

77. Winokur, *supra* note 26, at 10–12.

78. *Id.*

79. *Id.*

Through the 1800s, the Industrial Revolution and corresponding urbanization brought people closer together and also presented a new array of land uses that could have unwelcome spillover effects on neighboring properties.[80] Non-possessory property interests that could be enforced to limit neighbors' land uses proliferated.[81] But even then, courts at first would apply such restrictions to the parties to the original agreement only.[82] That changed in the mid-1800s, when American courts began to enforce these restrictive covenants not only against the parties to the initial agreement, but also to successive owners of the relevant properties.[83] The thought at the time was to expand property markets, turning contract-created development rights and limitations into transferable commodities.[84] Such a framework, proponents thought, would help efficiently allocate land uses to properties where they were most suited.[85]

That history is our inheritance, and today the legal rules surrounding restrictive covenants make it quite simple to lock land uses into their present states for long periods of time. For a covenant to run with the land, one traditionally needs four things: (1) intent for a burden on the property to run to future owners; (2) horizontal privity (typically satisfied if the restrictions were placed when the properties were held in common and at an initial land conveyance or sale); (3) vertical privity (meaning a chain in conveyance of the property all the way back to the owners at the time the burden was created); and (4) touch and concern the burdened land (a notoriously fuzzy requirement, which for the purposes of this Article can be understood as a requirement that the burden somehow involves land use as opposed to a non-land-related restriction on owner behavior).[86]

To simplify, this standard generally means that if at the initial sale of a piece of property, the right people aim to restrict how the property can be used into the future, they just have to say so, and future owners will be bound in precisely the same way. If someone owns two adjoining lots and wants to sell one, they can simply agree with the first purchaser that the transferred lot can only be used for one single-family home, unless the owner of the

80. *Id.*
81. *See id.* at 13.
82. *Id.*
83. *Id.*
84. *Id.* at 14.
85. *Id.* And in some ways, the commodification and fragmentation of ownership rights did bring about desirable results. For example, they allowed for the birth and proliferation of condominiums, which made home ownership more affordable to many. *See Existing-Home Sales*, NAT'L ASS'N REALTORS, https://www.nar.realtor/research-and-statistics/housing-statistics/existing-home-sales [https://perma.cc/C94M-7E7E] (providing data to show that the price of condos and co-ops tends to be substantially cheaper than the price of single-family homes).
86. Neponsit Prop. Owners Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 795, (N.Y. 1938).

other property gives express permission to do otherwise. If that restriction is recorded with the deed to the sold property, then it can potentially stand for generations, even after all involved properties are sold again and again.

The most prominent source of single-family covenants today likely comes from HOA CC&Rs. Such restrictions are quite easy to create even though they can burden large collections of properties in one shot. The standard process is that a developer purchases a large piece of land, then subdivides it in accordance with local legal requirements.[87] In so doing, the developer, as the sole owner, has the right to set conditions on the properties' future use, and can establish that the properties will all be members of a common-interest community (for example, they may be governed by an HOA and perhaps share in some common amenities).[88] The developer can then outfit each subdivided piece with a house and all requisite utility infrastructure. The properties at that point are worth far more taken together than the large portion of land the developer initially bought.[89] So the developer sells each home. If the developer specified in the community's CC&Rs that each property is limited to single-family use, then each would-be purchaser must simply accept that restriction or look elsewhere.[90] And because the geographic areas where the developer acquires large chunks of land are often sparsely populated at the time and thus better suited to single-family homes, it is quite common for a developer to choose to include single-family covenants in a subdivision's founding documents. In the short term (which is what matters to the developer), there is a market for it.[91]

Once the developer has sold off all the properties, it no longer retains control over how each property is used. That authority, with the pre-drafted restrictions, typically transfers to the HOA or the community members when the last property is sold, if not before.[92] However, the restrictions tend to stick. There are many reasons for this, some of which will be explored in more detail below. But from a legal standpoint, the most important factor is that under the standard documentation for these common-interest communities, CC&Rs can only be amended through rather difficult means. It is typical for the restrictions to be amendable only by supermajority vote

87. Winokur, *supra* note 26, at 56–59.

88. *Id.*

89. *See* Clarke & Freedman, *supra* note 60, at 2 (discussing the "HOA premium"); *see also* JENNY SCHUETZ, BROOKINGS INST., TO IMPROVE HOUSING AFFORDABILITY, WE NEED BETTER ALIGNMENT OF ZONING, TAXES, AND SUBSIDIES 2 (2020), https://www.brookings.edu/wp-content/uploads/2019/12/Schuetz_Policy2020_BigIdea_Improving-Housing-Afforability.pdf [https://perma.cc/A6C9-65HP] (providing an example of the relative individual and aggregate costs of different housing structures).

90. Winokur, *supra* note 26, at 56–59.

91. *See id.* at 3.

92. *See, e.g.*, Bradford Manor CC&Rs, *supra* note 57, §§ 3.03(b), 8.01, 9.02; Westview Estates CC&Rs, *supra* note 57, § 1.

of the homeowners in the community.[93] It is not immediately obvious why in any given case the developer makes it so difficult to change restrictions. As discussed in Section I.B.2, *infra*, perhaps the developer suspects that buyers will pay more for the assurance that their neighborhood will not change in years to come. Or perhaps it is because such odious provisions are simply features of standard form CC&Rs today.[94] Either way, an entire new community is left with the restrictions, and it often takes nearly the entire community to be of the same mind to change the restrictions to even a single property.

In sum, the American legal system dove headfirst into commodification of fragmented land interests. In doing so, it made it quite simple for owners to restrict use of land for generations to come and to divide the power to restrict among many parties. And in the modern day, large developers use the same basic legal tools to cement indefinitely the single-family use of potentially hundreds of properties at a time—such that even when the developer is long gone, the law ensures that meaningful change is unlikely.

2. Financial Incentives

The financial considerations surrounding housing gridlock are essential but insufficient to understand the problem. Although they might partially explain why single-family restrictive covenants became so prevalent, they sometimes fail to explain why those covenants persist in certain locations. Basic financial considerations may suggest that restrictive covenants are eventually discarded when they expend their basic utility.[95] But that often does not play out in practice.

As the preceding Section suggests, financial incentives often encourage developers to mandate single-family use at the beginning of a new neighborhood's life. For developers with massive capital and hopes of substantial profit, the goal is to construct, and then sell, a lot of homes.[96] One option would be to buy one or multiple smaller plots of land in an urban center where demand for multi-family housing near preexisting amenities is high. Some developers do take that path. But if other developers have already

93. *See, e.g.*, Bradford Manor CC&Rs, *supra* note 57, § 9.02(b); Westview Estates CC&Rs, *supra* note 57, § 5.3.

94. *See* Winokur, *supra* note 26, at 58 (noting the proliferation of reliance on standard forms in servitude regimes).

95. *See* Ellickson, *supra* note 18, at 1848–51.

96. As a general rule, the more homes are constructed on a parcel, the lower the per-unit construction cost is, but the greater the total revenue from selling all of the homes. *See* SCHUETZ, *supra* note 89, at 2; *see also* Alex Baca, Patrick McAnaney & Jenny Schuetz, *"Gentle" Density Can Save Our Neighborhoods*, BROOKINGS INST. (Dec. 4, 2019), https://www.brookings.edu/articles/gentle-density-can-save-our-neighborhoods [https://perma.cc/AU7X-AVVE].

gobbled up city land for that purpose, or if local zoning provisions prevent a developer from building enough housing units to turn a large enough profit, then they might look elsewhere simply as a matter of necessity. In growing regions, that means looking to the open pastures of suburbs and beyond, where demand for housing is beginning to rise but land is still relatively cheap.[97] If they cannot build upward, they build outward.

That may partially explain why developers build so many single-family homes in expansive, sprawling subdivisions. But it does not necessarily account for why they restrict all the homes in the subdivision to single-family use. No one forces them to do so.

Although more research could be done as to why developers take that step, there are a couple of related possible explanations. First, and most importantly, there is reason to believe that, at least at the time the developer is first selling off the homes, single-family restrictions do not materially diminish the values of the properties they constrain. Most buyers of newly constructed single-family homes in sparsely populated areas are not interested primarily in an investment opportunity; they are looking for a place to live.[98] Thus, they perhaps do not care at the outset whether tomorrow or years from now they could be prevented from converting their home into a duplex, or from adding an accessory dwelling unit. Relatedly, buyers are not simply buying a home subject to a restriction; they are buying a home that is surrounded by other homes subject to a restriction. Someone looking for a home in a sprawling development in a sparsely populated region might prefer some assurance that their neighborhood character will remain stagnant.[99]

But there comes a time when land cannot keep up with demand. As the population increases in a region that was once comparatively empty, the public interest demands more homes. As urban centers fail to accommodate the housing needs of prospective residents, more people seek to move into outer ring suburbs.[100] If the land is already substantially filled in these areas

97. William Hawk, *Expenditures of Urban and Rural Households in 2011*, U.S. BUREAU LAB. STAT. (Feb. 25, 2013), https://www.bls.gov/opub/btn/volume-2/expenditures-of-urban-and-rural-households-in-2011.htm [https://perma.cc/BL2Q-HPAZ] ("In many rural areas, land is plentiful, so prices tend to be lower."); *see also* SCHUETZ, *supra* note 89, at 4 (explaining that "[l]and is most expensive in city centers").

98. *See, e.g.*, Sophie Kasakove, *Why the Road Is Getting Even Rockier for First-Time Home Buyers*, N.Y. TIMES (Apr. 25, 2022), https://www.nytimes.com/2022/04/23/us/corporate-real-estate-investors-housing-market.html [https://perma.cc/8JYG-79LL] (noting the struggle between first-time home buyers who seek to live in the purchased home versus corporate investors seeking to purchase properties to rent).

99. *See* sources cited *supra* note 25 and accompanying text.

100. Carlos Waters, *Suburban Sprawl Is Weighing on the U.S. Economy*, CNBC (Feb. 1, 2022),

by single-family homes on large lots, housing prices will climb.[101] Under such circumstances, developers could easily fill multiple housing units per lot.

Thus, once housing demand increases sufficiently, single-family covenants may come to *deflate* individual property values. As a general rule, per-unit construction costs decrease as the number of units in the structure increase.[102] Further, the more housing units that can be constructed, the more total revenue is up for grabs.[103] For those reasons, a property that can host twenty, ten, or even two units is typically more valuable than a property that can only host one.[104] That is the basic economic incentive for developers to meet higher housing demand. And although no comprehensive study has been done to measure the effect on a property's value of lifting a single-family covenant, there is analogous research regarding zoning.

Those numbers seem to point one way: "upzoning" increases property values where housing demand is high. This is especially true for single-family homes. One study found that in Minneapolis, the citywide upzoning initiative increased the value of single-family property by around 3%.[105] Another study found that in Chicago, properties near transit services saw a dramatic increase in value from upzoning—by 15–20%.[106] A study focused on Auckland, New Zealand also saw notable value increases.[107]

Why, then, does the gridlock persist? If properties tend to jump up in value when restrictions limiting them to single-family use are lifted, why do single-family restrictive covenants still dominate so much of our single-family housing stock? There may be several reasons, including the high transactions costs someone who wants to bypass a covenant would incur by

https://www.cnbc.com/2022/02/01/how-suburban-sprawls-single-family-home-zoning-limits-housing-supply.html [https://perma.cc/SG7H-JGYQ] (discussing how limited dense housing supply contributes to sprawl); SCHUETZ, *supra* note 89, at 3–5 (noting that housing tends to be more expensive in cities).

101. Charles Nathanson, Raven Molloy & Andrew Paciorek, *Would Housing Cost Less If It Were Easier to Build New Homes? Surprisingly, Not Much*, KELLOGG SCH. MGMT. AT NW. UNIV.: INSIGHT (Feb. 2, 2022), https://insight.kellogg.northwestern.edu/article/housing-costs-supply-demand-affordability [https://perma.cc/MU26-AL6X] (noting that one driver of high housing cost is low supply).

102. *See* Baca et al., *supra* note 96.

103. *Id.*

104. *See* SCHUETZ, *supra* note 89, at 4.

105. Daniel Kuhlmann, *Upzoning and Single-Family Housing Prices: A (Very) Early Analysis of the Minneapolis 2040 Plan*, 87 J. AM. PLANNING ASS'N 383, 391 (2021).

106. Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFFS. REV. 758, 758–89 (2020), https://journals.sagepub.com/doi/10.1177/1078087418824672 [https://perma.cc/G36U-VUAV].

107. Ryan Greenaway-McGrevy, Gail Pacheco & Kade Sorensen, *The Effect of Upzoning on House Prices and Redevelopment Premiums in Auckland, New Zealand*, 58 URB. STUD. 959 *passim* (2021), https://workresearch.aut.ac.nz/__data/assets/pdf_file/0010/535096/Effect-of-upzoning.pdf [https://perma.cc/2MGC-DYS7].

seeking waivers from all covenant beneficiaries. But from the perspective of all other parties involved, one of the potential causes is that those who would have to decline to enforce the covenant could in the short term suffer a drop in property value, or at least a drop in the subjective value they place on their property and on living in that neighborhood. In other words, although unlocking growth on a given parcel increases that parcel's value, surrounding parcels might not similarly benefit, especially if they remain restricted. That is one possible reason why even though upzoning a particular property tends to increase its value, properties that are part of an HOA subject to single-family restrictions are sometimes valued higher than comparable properties not within an HOA.[108] Multiple studies have concluded that constructing new multi-family housing on a particular piece of property tends to depress the rent of nearby properties.[109] This result is no surprise, and is in fact a core goal of upzoning's proponents.[110] Thus, adding to the housing stock tends to reduce, or at least slow the increase of, the price of housing units that would compete against the new housing for occupants. This is perhaps a laudable result for the public at large, but one that is unwelcome to local homeowners centrally concerned with their own property's value.

Yet, it is unclear whether such an effect holds true when looking at the value of surrounding homes that are not in the arena to compete for multi-family occupants, but that instead simply remain single-family properties. In theory, if enough potential buyers of a single-family home are dissuaded by the presence of multi-family housing nearby, then a home that remains a single-family property while its neighbors turn into multi-family homes might decrease in value. The evidence, however, struggles to show that such an effect plays out in practice. Again, borrowing from the zoning context, a survey of parts of the greater Raleigh, North Carolina area suggested that the upzoning of property had no significant effect, either positive or negative, on

108. Clarke & Freedman, *supra* note 60, at 2. Although the increase in value is perhaps a feature of the additional services as much as the restrictions. *See id.*

109. *See* Brian Asquith, Evan Mast & Davin Reed, *Local Effects of Large New Apartment Buildings in Low-Income Areas*, 105 REV. ECON. & STAT. 359, 373–74 (2023); EVAN MAST, W.E. UPJOHN INST. FOR EMP. RSCH., THE EFFECT OF NEW MARKET-RATE HOUSING CONSTRUCTION ON THE LOW-INCOME HOUSING MARKET 1 (2019) ("New construction opens the housing market in low-income areas by reducing demand."), https://research.upjohn.org/up_policybriefs/13 [https://perma.cc/AYN7-22GB]; Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?*, 22 J. ECON. GEOGRAPHY 1309, 1310 (2021).

110. *See* Nathaniel Meyersohn, *The Invisible Laws That Led to America's Housing Crisis*, CNN (Aug. 5, 2023), https://www.cnn.com/2023/08/05/business/single-family-zoning-laws/index.html#:~:text=Strict%20single%2Dfamily%20zoning%20regulations,opportunities%2C%20researchers%20and%20advocates%20say [https://perma.cc/SB74-39SD] (noting that "[s]trict single-family zoning regulations limited housing supply [and] artificially raised prices").

the value of *neighboring* properties.[111] Admittedly, it can be difficult to isolate the effect of upzoning and determine whether it alone tends to depress the value of neighboring properties. For one, demand for housing is often already quite high in those geographic areas (hence the upzoning decision). Also, upzoning and an increase in multi-family housing units may be accompanied by new amenities like restaurants or stores that can make the neighborhood more attractive to potential buyers.[112]

On the whole, then, single-family development with single-family restrictive covenants may make some financial sense at the time the covenants are first established. But as a general rule, whenever housing demand increases sufficiently, single-family covenants suppress the values of the properties subject to them. And although homeowners might assume that allowing other nearby properties to host multi-family development could suppress their own home's value, the actual evidence may not definitively support that theory. What the evidence does support is that if all owners within an HOA could free up their own properties for multi-family use, then they would likely see their property values rise.[113] But the restrictions persist. Not enough owners within an HOA get on board with the change. Given that this perpetual gridlock is not fully explained by the financial interests of the homeowners, another force must be at play. The next Section turns to it.

3. Underappreciated Psychological Forces

In general, owners of properties subject to a common single-family covenant stand to financially benefit by the lifting of that restriction. The fact that they do not take the plunge leads to a conclusion that is perhaps intuitive: owners who resist upzoning (and for the purposes of this Article, those who would try to enforce a single-family covenant if given the chance) do so not necessarily because they have calculated a quantifiable financial loss they might suffer, but at least in part because at a psychological level they have an aversion to the change in neighborhood character that the entry or proliferation of multi-family housing might bring about. This perceived

111. Conor Ryan, *The Impacts of Upzoning on Property Values in NC*, UNIV. N.C. SCH. GOV'T: CMTY. & ECON. DEV. (Sept. 1, 2021), https://ced.sog.unc.edu/2021/09/the-impacts-of-upzoning-on-property-values-in-nc [https://perma.cc/JMD3-XSF2].

112. *See generally* Henry S. Brown III & Lisa M. Yarnell, *The Price of Access: Capitalization of Neighborhood Contextual Factors*, 10 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 95 (2013) (finding access to certain food amenities increases property values); *Analysis from ATTOM Reveals Fresh Take on Grocery Stores Impacting the U.S. Housing Market*, ATTOM (Dec. 23, 2020), https://www.attomdata.com/news/market-trends/home-sales-prices/attom-data-solutions-2020-grocery-store-wars-analysis [https://perma.cc/E64Z-DAY4] (finding the same).

113. *See, e.g.*, Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RESERVE BANK N.Y. ECON. POL'Y REV., June 2003, at 21, 35, https://www.newyorkfed.org/medialibrary/media/research/epr/03v09n2/0306glae.pdf [https://perma.cc/8UBC-2ZGT].

change in quality of life can be a driving force even if it does not manifest in quantifiable financial harm. Because human psychology is potentially such a critical impetus behind the prevalence and enforcement of restrictive covenants, any solution to the resulting gridlock would benefit from a review of the relevant psychological principles. This Section serves that purpose.

Property ownership is not only a legal trait; it has deep personal implications to the owner and potential subsequent owners.[114] That being so, concerns that motivate the retaining, using, and transferring of property are not only financial; they are psychological as well. This Section reviews contemporary psychological research that can help explain why property owners may hold onto possessions and entitlements notwithstanding contrary financial incentives.

People develop psychological attachments to their possessions. From a philosophical standpoint, thinkers from Hegel[115] to Margaret Radin[116] have argued that owning property is a prerequisite for human freedom, because at a psychological level people begin to associate what they own with who they are. Objects become part of the subject; material things contribute to immaterial "identity." In other words, people need property to develop a fuller concept of self-personhood.

Psychological research supports this theory to a degree, particularly through two related key concepts: the "Endowment Effect" and the "Mere Ownership Effect."[117] Although the two concepts are not perfectly identical, they refer to a similar phenomenon—essentially, that people tend to place greater value on a thing they own or possess than on the exact same thing if they do not own or possess it.[118] This Article refers to the two concepts interchangeably. The classic methodology to measure these phenomena is to construct an experiment of randomly selected people assigned to either be a "buyer" or a "seller" of some item, such as a coffee mug.[119] The studies find that the "sellers" possessing the item assign the item a higher value than the

114. *See generally* Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (exploring connections between property ownership and conceptions of the self and personal identity).

115. M. Blake Wilson, *Personhood and Property in Hegel's Conception of Freedom*, 1 POLEMOS 68, 68–91 (2019), https://philarchive.org/archive/WILPAP-29 [https://perma.cc/CR5X-HJ46].

116. Radin, *supra* note 114, at 957–59.

117. *See* Matthias S. Gobel, Tiffanie Ong & Adam J.L. Harris, *A Culture-by-Context Analysis of Endowment Effects*, 36 PROC. ANN. MEETING COGNITIVE SCI. SOC'Y 2269, 2270–71 (2014); Jozef M. Nuttin, Jr., *Affective Consequences of Mere Ownership: The Name Letter Effect in Twelve European Languages*, 17 EUR. J. SOC. PSYCH. 381, 381–400 (1987); Michal Bialek, Yajing Gao, Donna Yao & Gild Feldman, *Owning Leads to Valuing: Meta-Analysis of the Mere Ownership Effect*, 53 EUR. J. SOC. PSYCH. 90, 91–92 (2022).

118. *See generally* Gobel et al., *supra* note 117 (explaining and measuring the Mere Ownership Effect); Nuttin, *supra* note 117 (same); Bialek et al., *supra* note 117 (same).

119. *See* Bialek, et al., *supra* note 117, at 94.

buyers not possessing the item do.[120]

The Mere Ownership Effect thus reveals that if we own or possess something, by that fact alone we will come to think of it as more valuable. The phenomenon applies to all sorts of "possessions," even nonphysical ones, like intangible entitlements.[121] And it applies even when a person has not had time to use or become more accustomed to the possession—merely being informed of possession or ownership is enough to trigger the effect.[122]

Extrapolating to the broader world of property law, the Mere Ownership Effect means that owners of property will tend to value their property above general market value. Thus, they will resist selling an item even if offered the highest value reasonable buyers might pay. The Mere Ownership Effect means, therefore, that the status quo is sticky. Property will tend to stay in the same hands even when buyers are willing to pay the value of the property's economic utility.

A related psychological principle is that "losses loom larger than gains."[123] Someone who stands to lose a possession is likely to think that they will lose more than another person would think they gain by acquiring that same possession.[124] And the fear of losing X amount of value is felt more acutely than being denied an opportunity to gain X amount of value.[125] Some researchers have suggested that this principle of "loss avoidance" is what gives rise to the Endowment Effect.[126] Whether or not that is true, research shows that people are bad predictors of the importance of preference satisfaction.[127] In other words, people tend to think that having their preferences frustrated will be worse than it actually is. Once someone gets attached to anything—an object, a right, or even an idea—then they tend to overestimate how much they need it, and how bad it will be to lose it.[128]

So, people tend to overinflate the value of anything they begin to conceive of as within their grasp. But perceptions of possession are not the only force that binds people to their things.

120. *Id.*
121. *Id.*
122. *Id.* at 4–6.
123. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341, 346, 348 (1984).
124. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 105; Carey K. Morewedge, Lisa L. Shu, Daniel T. Gilbert & Timothy D. Wilson, *Bad Riddance or Good Rubbish? Ownership and Not Loss Aversion Causes the Endowment Effect*, 45 J. EXPERIMENTAL SOC. PSYCH. 947, 947 (2009).
125. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 105; Morewedge et al., *supra* note 124, at 947.
126. *See* Morewedge et al., *supra* note 124, at 947.
127. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 61.
128. *See id.*; *see also* Bialek et al., *supra* note 117, at 91–92. Robert Ellickson also noted this phenomenon and tied it to restrictive covenants in a recent article. Ellickson, *supra* note 18, at 1854.

The more an owner associates a possession with meaningful memories and social relationships, the greater value the owner is likely to place on the possession.[129] This principle is intuitive—people subjectively value the sentimental. We value our close relationships with other people, and so we value the items that represent or remind us of those connections. Margaret Radin thus has argued that property law should place greater value on possessions like heirlooms, keepsakes, personal body parts, such as donatable organs, and the family home.[130] She calls these "personhood" property, possessions that are uniquely tied to the owner's conception of self-identity (for example, a person who identifies as a "parent" is likely to place greater-than-market value on a picture that their child drew for them).[131] Psychological research backs this up (although, interestingly, perhaps not as strongly for the family home as for some other possessions).[132] All in all, our possessions take on greater meaning, and thus greater subjective value, when we come to associate them with things that give life deeper meaning, like family and friendship.

Just as people tend to place greater subjective value on possessions that are associated with meaningful social connections, people generate the most subjective value of all from the social connections themselves.[133] How many movies resolve by reminding the characters and the viewers that family, friends, and so forth are most important? The trope exists because it resonates at a psychological level.

Take these psychological phenomena and combine them. Humans place a value premium on things they already own or possess. We fear losing something more than we would desire to gain that same thing if we did not already have it. We overestimate how much we will suffer from losing something. And of all the things we can own, we guard most fiercely that which we associate with social and relational ties. If all these phenomena are borne out in the psychological research, another conclusion flows naturally: if we hold a tool that enables us to stop or slow change to our neighborhood, we will value that tool dearly—more so than we would value the opportunity to get that tool in the first place.

At this point the connection to restrictive covenants is coming into focus, and we can begin to answer the big question: Why do people hold onto restrictive covenants, especially those mandating single-family use only, when relinquishing such a right could make the most financial sense and

129. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 58, 75.
130. *Id.* at 75; Radin, *supra* note 114, at 957.
131. Radin, *supra* note 114, at 957–61.
132. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 75.
133. *Id.* at 58.

when HOA restrictions are often unpopular among those subject to them?[134]

In part it is because we are wired to see what we have (for example, our neighborhood as it currently stands) as much more valuable than what we would pay to get it in the first place.[135] Our neighborhood is *ours*, so ipso facto it is more valuable.[136] Thus, the people who must consent to the reworking or circumventing of a restrictive covenant are the same people who are psychologically predisposed not to do so, *even if offered the equivalent of top market value to relinquish the right*. Homeowners who buy a home in an HOA with single-family use restrictions might or might not see the HOA restrictions as a selling point. But once the home, the neighborhood, and the restrictions become theirs, psychological forces cement the status quo.

II. UNLOCKING HOUSING POTENTIAL

What can be done to break the housing gridlock? Legal mechanisms and economic interests lay the groundwork for gridlock by blanketing vast swaths of land in single-family restrictive covenants. And later, when both financial incentives and the public interest dictate that a change might be needed, the entrenched collection of private property rights collaborates with features of human psychology to stifle that change. This Part explores various options for breaking the gridlock covenants wrought. It evaluates each option through economic and psychological lenses and ultimately arrives at a new solution: in areas without single-family zoning but limited by a single-family covenant (or other covenant with a similar effect like one prescribing minimum square footage per unit and setbacks from property lines),[137] a property owner seeking to build multi-family housing can take advantage of a new procedural and remedial mechanism provided by statute. The mechanism in its first stage would encourage covenant beneficiaries to waive their enforcement rights, and in its second stage would limit remaining beneficiaries to one specific remedy that would allow efficient bypassing of covenants while still giving effect to preexisting legal rights. After this Part scans and evaluates a catalog of other options to avoid single-family

134. Michele Lerner, *Why Homeowners Hate Their HOAs*, WASH. POST (Oct. 25, 2018), https://www.washingtonpost.com/business/2018/10/25/why-homeowners-hate-their-hoas/https://www.washingtonpost.com/business/2018/10/25/why-homeowners-hate-their-hoas [https://perma.cc/928T-ZM9K] (discussing the unpopularity of HOAs among HOA members).

135. Kahneman & Tversky, *supra* note 123, at 346; Morewedge et al., *supra* note 124, at 947–48. And, of course, that only addresses the mindset and position of covenant beneficiaries when posed with an opportunity to waive their right of enforcement. Other factors like the high transactions costs of negotiating such waivers might prevent even the builder from seeking freedom from the covenants in the first place.

136. *See generally* Bialek et al., *supra* note 117 (discussing the Mere Ownership Effect).

137. *See* Bronin, *supra* note 63, at 775.

covenants, it will explain this proposal in more detail and explain its advantages over other options, especially, but not only, from a psychological perspective.

A. PREEXISTING TOOLS FOR BREAKING GRIDLOCK

This Section explores some of the tools already available to private parties, courts, and policymakers for potentially bypassing the gridlock caused by restrictive covenants. It will evaluate the strengths and weaknesses of each from legal, economic, and psychological perspectives. Ultimately, it concludes that the standard toolkit likely will not be enough to accomplish the goal.

1. Private Bargaining's Limitations

The simplest (not necessarily the easiest) way to avoid a restrictive covenant is to obtain a waiver—to convince the relevant party or parties not to enforce the covenant. Someone who seeks to develop multiple homes on a property could offer money to the property owners who have the power to enforce a single-family covenant.[138] No doubt this approach could work sometimes. But one of the central points of the preceding Part is that it often will not. Housing gridlock means that too many people have the right to say no. This is especially true in HOAs that include dozens or hundreds of homes. If a restrictive covenant will stand unless the large majority of homeowners vote to get rid of it,[139] then all it takes is one or a small handful of holdouts who cannot be paid off to let it go. Psychological phenomena tell us that holdouts are likely.[140] So, many homeowners will require well above "market value" to relinquish a covenant, if they could name a price at all.[141] Only in cases in which the builder's expected profit is enormous will the builder successfully buy development rights from all the parties that can stop them.[142] If that were common, housing gridlock might not be a significant problem. But because psychological phenomena suggest that people will likely value and guard their covenant rights, the buyout method is unlikely to yield meaningful results on its own.

138. *See* Winokur, *supra* note 26, at 26–27.

139. *See, e.g.*, Bradford Manor CC&Rs, *supra* note 57, § 9.02(b); Westview Estates CC&Rs, *supra* note 57, § 5.3.

140. *See supra* Section I.B.3.

141. Owners of property tend to prefer in-kind compensation and suffer additional harm when coerced into parting with property even for market value. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 61, 111, 206–07.

142. *See* HELLER, *supra* note 39, at 4–5.

2. Broadscale Invalidation

Turning attention to the other end of the spectrum from free market to government control, the state or local government could simply declare single-family covenants invalid or unenforceable. Such an approach isn't merely hypothetical. California has done it—at least for certain special circumstances. In 2021, when the state passed a law removing single-family zoning statewide, it also targeted certain covenants. It declared that any restrictive covenants limiting "the number, size, or location of the residences that may be built on the property, or that restrict the number of persons or families who may reside on the property," are unenforceable against an owner or developer of "affordable" housing.[143] The language of the provision makes clear that it does not destroy all single-family covenants statewide, but instead only applies to those covenants that would restrict the construction or operation of housing that is subject to certain significant rent restrictions.[144] But in the sphere where the provision applies, its word is final. Any existing single-family covenants are powerless, no matter how longstanding they are or how many other properties purportedly benefit from them.

This total-abrogation approach has some benefits. It can cover many existing covenants all at once, providing numerous developers and landowners advance notice and assurance as to the (lack of) legal force those restrictions carry moving forward. It also, of course, completely bypasses the holdout problem. It does not matter whether all, or even any, property owners benefiting from the covenant can be persuaded to relinquish their hold. And relatedly, it perhaps does not directly cost the government or the builder anything.[145] The philosophy is simple: if the problem is that too many people have a private property right enabling them to say no to development, then remove the right entirely.

But total government appropriation is a blunt instrument. As such, it might bring the hammer down on the housing gridlock caused by single-family covenants while also rattling other interests that we would prefer to leave undisturbed. As described above, the primary harm from the loss of a covenant often is not so much financial as it is psychological.[146] And psychological research shows that being the subject of government coercion can be especially damaging.[147] Take a study regarding the use of eminent

143. Assemb. B. 721, 2021–22 Leg. Sess. (Cal. 2021).
144. See *id.* § 2(j).
145. The government can invalidate the covenants simply by saying so. But of course, there may be indirect costs to such action, as described in this Section *infra*.
146. *See supra* Section I.B.3.
147. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 92, 96, 111.

domain, which is similar in some ways to government invalidation of a covenant (in that it takes a property right or interest away from a private party). A study posed to its subjects multiple scenarios in which an owner parted with a parcel of land. In two scenarios, the owner agreed to sell it, and in the other, the land was confiscated by eminent domain in exchange for compensation.[148] But in all the scenarios subjects were informed that the owner of the parcel valued it at the same specified market value.[149] Nevertheless, subjects reported that the owner was worse off in the eminent domain scenario.[150]

Stern and Lewinsohn-Zamir call this the "coercion premium."[151] It represents the fact that people suffer some sort of harm from being forced to part with property that is separate from and in addition to the value of the property itself. From that premise, Stern and Lewinsohn-Zamir suggest that any use of eminent domain to which the Takings Clause applies should require "just compensation" *above* the property's market value.[152] The idea is that if what the owner lost is beyond market value, then *just* compensation is also more than market value.

This principle carries at least two implications for restrictive covenants. The first concerns the takings issue itself. Courts across the country appear split as to whether a restrictive covenant gives the benefitted properties the sort of interest such that they are entitled to compensation when the government extinguishes that interest through a taking—but many jurisdictions likely would say that it does.[153] So, any such proposal might run into significant constitutional challenges depending on where it is enacted.[154] In the jurisdictions that might find the extinguishing of a restrictive covenant to be a taking, the government could incur an expense—perhaps a substantial

148. Daphna Lewinsohn-Zamir, *Taking Outcomes Seriously*, 2012 UTAH L. REV. 861, 872–83 (2012).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Compare* Creegan v. State, 391 P.3d 36, 45 (Kan. 2017) (providing a list of cases and jurisdictions supporting the idea that restrictive covenants are a property interest protected by the Takings Clause), *with* Anderson v. Lynch, 3 S.E.2d 85, 87 (Ga. 1939) (holding that owners of adjacent lots did not have a compensable ownership interest in a residential-use restrictive covenant).

154. Robert Ellickson suggests that there might not be a significant takings problem because some states have successfully weakened covenants in certain contexts. Ellickson, *supra* note 18, at 1863. Based on the number of states that consider such property interests compensable when extinguished, I am not so sure. Ken Stahl considers the takings problem to be a serious issue, although he ultimately argues that such invalidations would likely survive Takings Clause challenges. Ken Stahl, *The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?*, 50 PEPP. L. REV. 579 (2023). Either way, the psychological factors described *infra* in this Section present their own problem, and the mere threat of substantial takings litigation could be enough to deter many government actors.

one—to destroy the covenants.[155] And whatever "just compensation" ultimately might be, the coercion premium makes it more likely that landowners would challenge the action in court, thus presenting another cost to the government from litigation.[156]

The second implication is that coercively terminating restrictive covenants will in itself inflict some level of psychic harm.[157] The precise amount of harm is perhaps impossible to quantify. But if the question of best policy turns on utilitarian considerations to any degree, the psychic harm must be part of the calculus nonetheless.[158] How much weight and credence it deserves is of course another question. Perhaps local or state policymakers would conclude that the benefit of more housing from terminating numerous single-family covenants is worth the cost of the psychic harm to single-family homeowners.

However, as that cost-benefit analysis shakes out, policymakers contemplating it should keep in mind two pillars of political participation: voice and exit.[159] These two forces drive much local (and, to an extent, state) policymaking. Voice refers to residents' ability to give their input, either through detailed communication of some kind or, most significantly, through voting.[160] If enough people are fed up with policymakers' decisions, they can vote them out. If that happens, then the officials that fill the vacancies might be more amenable to the homeowners' interests (and therefore might try to undo the undoing of the covenants, leading to an end result that is worse than before—a reestablishment of the conditions that led to gridlock *and* new government leaders who might be more anti-housing on the whole).

The related force, "exit," refers to residents' ability to vote with their feet by moving away from jurisdictions with policies they disfavor and into jurisdictions with policies they favor.[161] Exit casts a shadow over local and state government decision-making because when residents exercise it, the

155. On top of that, the termination would likely turn out to be overbroad and thus unnecessarily expensive for the government. It would give every property owner benefitting from a covenant the right to sue for just compensation, even though only a small fraction of those owners would actually experience new housing construction in violation of the covenant in the near future.

156. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 111.

157. *Id.* at 92, 108–11.

158. Dmytro Taranovsky, *Utilitarianism*, MASS. INST. TECH. (Feb. 7, 2003), http://web.mit.edu/dmytro/www/Utilitarianism.htm [https://perma.cc/9M9W-TSJ8] (explaining that utilitarian considerations involve psychological distress).

159. *See* Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1352 (2013); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 626 (2002). *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

160. *See* sources cited *supra* note 159.

161. *See* sources cited *supra* note 159*; see also* Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, 55 FEDERALISM & SUBSIDIARITY 83, 83–90 (2014).

jurisdiction loses economic activity and housing demand, and so the tax base and revenue diminishes.[162]

Voice and exit are of particular concern when the displeased demographic is homeowners. For one, homeowners tend to be especially active in local politics,[163] so any new policy or law that disfavors them is sure to garner strong opposition. Also, because homeowners (especially of single-family homes) tend to be wealthier than the average citizen,[164] their exit can be distinctly harmful to localities' short-term fiscal goals.

But it is possible that in the long run these bogeymen of voice and exit would not prove catastrophic to the jurisdiction seeking to "take" the covenants. As for voice, if lifting single-family covenants creates room for enough new people to move into the jurisdiction early enough, then perhaps some of the strength of an anti-new-housing voting bloc can be diluted by new participants in public life. And as for exit, perhaps the exit of wealthy homeowners who prefer freezing neighborhoods as single-family only would not be that harmful to the jurisdiction if the removing of covenants unlocked trapped property value and increased the number of taxable housing units in the base.[165]

Overall, then, if a local or state government chose to address housing gridlock simply by destroying single-family covenants, it would have to be ready for some negative economic and political backlash. And although it may turn out that destroying the covenants is worth the backlash on the whole, the coercion premium brought about by such actions should give decisionmakers pause and reason to evaluate less heavy-handed legislative options. Robert Ellickson recently surveyed some such options, such as statutory provisions limiting the lifespan of covenants to two or three decades.[166] He disfavors such restrictions because, if set on too short a timeline, they may terminate covenants before the covenants have expended

162. *See* sources cited *supra* note 159*; see also* Somin, *supra* note 161, 83–90.

163. Jesse Yoder, *Does Property Ownership Lead to Participation in Local Politics? Evidence from Property Records and Meeting Minutes*, 114 AM. POL. SCI. REV. 1213, 1213–18 (2020).

164. Neil Bhutta, Jesse Bricker, Andrew C. Chang, Lisa J. Dettling, Sarena Goodman, Joanne W. Hsu, Kevin B. Moore, Sarah Reber, Alice Henriques Volz & Richard A. Windle, *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 FED. RSRV. BULLETIN, Sept. 2020, at 1, 22, https://www.federalreserve.gov/publications/files/scf20.pdf [https://perma.cc/GJ3C-XFX6]; Baca et al., *supra* note 96 (supporting the assertion that single-family units tend to cost more than multi-family).

165. Even if cities saw a momentary dip in demand because of the new policies—and thus a momentary dip in property values and economic activity—eventually the construction of new housing units could presumably provide enough economic activity and properties from which to levy taxes that the locality ends up ahead on net.

166. Ellickson, *supra* note 18, at 1861–62.

their value to those directly benefited.[167] I would also be wary of them because of the flipside of the coin: If set on too long of a timeline, they might allow harmful covenants to maintain their hold for too long. In other words, such provisions may sometimes prove beneficial but fail to narrowly tailor to problem sources.

3. Traditional Common-Law Tools

Although covenants are supported by strong legal backing, the common law provides some principles to escape them in special cases. The two most obviously relevant here are the changed-circumstances doctrine and voiding as contrary to public policy.[168] The changed-circumstances doctrine in some ways comports with the psychological underpinnings of possession and attachment. But both that doctrine and the principle of voiding as contrary to public policy are unlikely sufficiently accessible from a legal standpoint to make much difference in the aggregate.

Under the common law, the changed-circumstances doctrine holds that a party owning a property burdened by a restrictive covenant can escape its enforcement if local conditions have changed so that the covenant no longer serves its purpose and no longer benefits the once-benefited property.[169] For example, consider if one property (hosting one house) was in covenant with another (also hosting one house) to never have loud parties, but years later the benefited property is purchased and converted into an industrial site. A court could determine that the purpose of the covenant, presumably to ensure peace and quiet for whoever lived in the home on the benefited parcel, can no longer be carried out because that property no longer hosts a home. The party can go on.

Relying on the changed-circumstances doctrine has some intuitive appeal for voiding single-family covenants. Imagine that six homes on one street were under a covenant for single-family use only. But twenty years after the establishment of the covenant nearly all of the other homes on the street and the surrounding area have been converted to duplexes, quadplexes, or small apartment buildings. If the purpose of the covenant was to do what

167. *Id.*

168. Some other bases for terminating covenants under the common law include release, merger, abandonment, acquiescence, and laches. Aladar F. Siles, *Methods of Removing Restrictive Covenants in Illinois*, 45 CHI.-KENT L. REV. 100, 101–06 (1968). Other than release, which I discuss extensively from various angles in this Article, I do not discuss most of these. With a common-interest community like an HOA, in which dozens or hundreds of individual property owners have the right to sue any other owner to enforce covenants, most of these methods are unlikely to pan out.

169. Davis v. Canyon Creek Ests. Homeowners Ass'n, 350 S.W.3d 301, 309 (Tex. Ct. App. 2011); Cnty. Club Dist. Homeowners Ass'n v. Cnty. Club Christian Church, 118 S.W.3d 185, 194 (Mo. Ct. App. 2003); Cordogan v. Union Nat'l Bank, 380 N.E.2d 1194, 1197–99 (Ill. Ct. App. 1978).

could be done to preserve the single-family character of the entire surrounding area, and (so the owners thought) to preserve property values, perhaps the covenant can no longer serve its purpose. Psychologically, the feeling of loss the owners might experience by seeing the covenant dissolve would probably be diluted, because the neighborhood had already been changing for years. And if it was once financially beneficial to lock in single-family use, perhaps increased housing demand in the area (signaled by all the new construction) makes it so that the properties would be worth more if not so limited.

But the problem with the changed circumstances doctrine is that courts employ it only in rare cases.[170] As a general matter, courts hesitate to find changed circumstances unless there is no reasonably conceivable benefit to the covenant.[171] In the context of single-family covenants, that would be incredibly hard to show. At least theoretically, ensuring that a neighboring property or properties remains single-family could benefit the surrounding properties' values, because it suppresses local housing supply. The purpose of the covenant may not be economically efficient, but as long as the court finds *a* purpose, it likely will stand.[172]

And the fact that such covenants often appear as part of the regulations of an HOA with dozens or more properties make the changed-circumstances doctrine an even weaker tool. If an HOA with a single-family covenant covers a sufficiently large swath of land, then it necessarily will insulate the properties within it from much neighborhood change. Instead, the entire subdivision or several blocks of the neighborhood remains a single-family enclave, and the areas beyond the HOA's bounds are the spaces that might change. Of course, proliferation of multi-family housing outside of the bounds of the HOA is more than likely a primary reason why HOA members would want the single-family covenant to persist. The covenant's purpose is to preserve the area as distinct from its surroundings.

So, although declining to enforce single-family covenants because of changed circumstances makes sense from a psychological standpoint and is probably less likely than other approaches to elicit backlash from psychic harm to homeowners, in practice under current common-law rules it is unlikely to be a powerful tool to break housing gridlock on any meaningful scale.

170. Robert Ellickson discusses the changed circumstances doctrine as a potential mechanism for handling "stale" covenants, but ultimately the legal background he discusses instills little confidence in such efforts proving fruitful. Ellickson, *supra* note 18, at 1857–59.

171. *Cordogan*, 380 N.E.2d at 1199–200.

172. *Id.*; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (AM. L. INST. 1999).

Declaring such a covenant invalid as contrary to public policy is potentially more powerful, but ultimately suffers from a similar weakness. Under the Restatement approach, a covenant is invalid if it is contrary to public policy.[173] It is rare that a court concludes a covenant is contrary to public policy.[174] But when it does happen, often it is because a state (or sometimes even the federal government) has made clear through enacted statutes or other written law that what the covenant aims to accomplish is specifically disfavored, or that it stands directly opposed to a goal codified in state law.[175] In the context of restrictive covenants, the public policy exception closely adheres to the unique principle that a court's enforcement of certain restrictive covenants constitutes "state action."[176] Thus, when a court is faced with a request to enforce or invalidate such a covenant, it must keep in mind whether doing so would contravene the explicit goals expressed in the state or federal constitution, or any other law such as one passed by a legislative body.

If a court concluded that enforcing a single-family covenant was contrary to public policy, then that would be a powerful tool to break apart some of the housing gridlock. The result of such a decision would completely bypass the covenant and thus free up the land for more productive residential use. But it is unclear what it would take to prove that enforcing a single-family covenant is against public policy, and even that inquiry could vary substantially by state. There are some easy cases. Take California, for example. There, again, the state passed a law declaring that any single-family covenant is unenforceable against a developer or operator of "affordable housing."[177] Quite plainly, then, there is a public policy against single-family covenants blocking the development of affordable housing. But that is an easy case because the statute already does all the work—the statute by its own enactment guts all such covenants, so the "public policy" exception on the judicial side of the equation is unnecessary.

And there are easy cases on the other end of the spectrum, when enforcing such a covenant would clearly not violate public policy. If the government actor has already zoned large portions of similar land for single-family use only, then it would be hard to credibly assert that the government has any discernible public policy against private agreements that would do the same.

173. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 (AM. L. INST. 1999).

174. See Korngold, *supra* note 29, at 49.

175. *Id.* at 51–52.; Viking Props., Inc. v. Holm, 118 P.3d 322, 329–30 (Wash. 2005); Westwood Homeowners Ass'n v. Tenhoff, 745 P.2d 976, 980–81 (Ariz. Ct. App. 1987); Terrien v. Zwit, 648 N.W.2d 602, 608 (Mich. 2002).

176. *See* Shelley v. Kraemer, 334 U.S. 1, 18–19 (1948).

177. *Supra* notes 143–44 and accompanying text.

But there are cases between these two extremes that are trickier. Take for instance any of the jurisdictions that have effectively eliminated single-family zoning on the public side of things, but unlike California have said nothing about private covenants.[178] On the one hand, one could argue that a jurisdiction that took the affirmative step of freeing all land from the constraints of government-induced single-family restrictions would likewise oppose private arrangements that constrained property in a similar way. On the other hand, one could also argue that if the government wanted to touch private covenants, it could have said so more explicitly. And in any event, a government could reasonably want to loosen government constraints but remain agnostic on what private entities and private rights accomplish in the same subject area.

In an article released this year, Gerald Korngold specifically argues that the public policy doctrine is a viable method for voiding many single-family covenants.[179] He rightly notes that occasionally courts in some jurisdictions have viewed the doctrine more broadly, applying it even without explicit enacted guidance from the legislature on the issue.[180] I would welcome extending that approach to the issue of single-family covenants. But because it appears that such an approach would mark a stark departure from how courts in many states have approached the public policy doctrine, I think it profitable to seek another solution.

In sum, I believe that the void-as-contrary-to-public-policy approach likely is not a reliable mechanism for breaking gridlock moving forward under the current state of the law. At the very least, in many jurisdictions it would potentially require the jurisdiction to already have eliminated single-family zoning, and so far, that has happened only in a handful of cities and states. And even in those jurisdictions, it is likely that some other specific expression of a policy against restrictive covenants operating to constrain housing supply would be required.

B. A HYBRID SOLUTION

This Section first briefly identifies a potential multi-step solution to escaping housing gridlock while limiting negative externalities and psychic harm to property owners. It then explains each component of the solution in more detail and explores why it presents some advantages to other approaches from legal, economic, and especially psychological standpoints.

178. These would include Oregon, Maine, and Minneapolis. *See supra* notes 12–15 and accompanying text.

179. *See generally* Korngold, *supra* note 29.

180. *Id.* at 51–53.

1. The Two-Stage Solution to Escape Gridlock

This Section gives an overview of a procedural and remedial solution to housing gridlock that single-family covenants (and covenants with a similar effect) helped bring about. The first stage of the solution involves a new legal mechanism created by statute. It would be available to any property owner subject to such a covenant in an area without single-family zoning. If the property owner (I will call this entity the "builder" for clarity) wants to construct multi-family housing on its property, it can force a decision of each beneficiary property on whether to decline to enforce the covenant. The builder would submit to the HOA members a rough plan for the development, such as whether it intends to create a duplex, add an accessory dwelling unit, or build an apartment or condo building, as well as the estimated size of the structure. Along with the rough plan, it would submit a lump-sum monetary offer—the amount the builder is offering to the property owners collectively to not oppose the development. The beneficiary property owners (most often this will include all other members of the HOA) then can individually decide whether to "opt in" to the offer. Those who do so will be entitled to a pro rata share of the total sum.

The second stage of the solution acts as a backdrop. Whether or not a majority of interested property owners opt in to receive a pro rata share of the monetary offer, the construction can go forward. But for those who did not opt in, a legal action for damages will still be available once the structure is completed to a habitable state. They cannot sue to block the development or require it to be torn down if it is already built; but they will be entitled to damages of some amount. There would be no need to determine liability—the builder's violation of the covenant would be open and undisputed. The action, if it does not result in settlement, will proceed to a trial or hearing on the issue of harm alone. At that proceeding, the property owner would be entitled to a jury determination of damages within statutorily defined ranges, which could rest not only on evidence of the market value of enforcing the covenant in that instance, but also on any sort of harm (financial, psychological, or otherwise) the suing property owner suffered from the new construction.

The following Sections explore each component of the proposed solution in more detail and discuss the comparative advantages over other approaches from legal, economic, and especially psychological perspectives. They address the damages backdrop first since that component is more central to the overall scheme, and then address the initiating offer second.

2. Why Damages?

By now the stickiness of restrictive covenants is evident. They are hard to get rid of without express agreement by most benefited property owners.[181] Broad coercive action by governing authorities might achieve the primary goal of breaking gridlock, but in the process it might generate various negative externalities rooted in the psychic harm that research suggests it would cause.[182] And the common-law mechanisms limiting the perseverance of such rights are narrow and apply rarely.[183] But courts and the common law can contribute another tool: remedies. It is one issue what private rights parties possess; it is another issue which way a court will operationalize the right.[184] At the simplest level, sometimes a court can issue an injunction protecting a right, while other times it can order damages as payment for violating the right.[185]

A promising tool for breaking the hold restrictive covenants have on housing supply would be—to use the classifications made famous by Calabresi and Melamed's foundational work—converting the right provided by such a covenant from a property rule to a liability rule.[186] In other words: enforcing covenants only in such a way that the beneficiary of the covenant can receive payment for its violation, but cannot by force of law keep the burdened property in compliance. In a recent article, Robert Ellickson briefly suggested a damages approach and commended one state, Massachusetts, which has provided for it by statute in some special instances.[187] This Section explores a damages approach for single-family covenant violations from legal, economic, and psychological viewpoints. It then discusses the finer details of how such an approach could be implemented from a practical standpoint.

181. *See supra* Section II.A.1.

182. *See supra* Section II.A.2.

183. *See supra* Section II.A.3.

184. *See, e.g.*, Daphna Lewinsohn-Zamir, *Do the Right Thing: Indirect Remedies in Private Law*, 94 B. U. L. REV. 55, 56 (2014) ("Private law provides diverse remedies for right violations: compensatory and punitive, monetary and nonmonetary, self-help and court awarded.").

185. *See id.*

186. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."); *see also id.* ("Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.").

187. Ellickson, *supra* note 18, at 1860–61; *see* MASS. GEN. LAWS ch. 184, § 30 (2023); *see also* Winokur, *supra* note 26, at 83.

i. The Legal Landscape

From a legal perspective, damages are the preferred remedy across much of the common law.[188] Even for property rights (which one would rightly assume are often protected by a "property rule"), courts often require the plaintiff seeking to enforce its right to show why equitable relief like an injunction is appropriate. For intellectual property, electronic property, chattel, and sometimes even real property, a plaintiff must show that damages cannot adequately compensate them and that they will suffer irreparable harm without an injunction.[189] And even after all of that, a court might decline to issue an injunction if it finds it inequitable to do so based on the interests both of parties to the lawsuit *and* of third parties.[190] Thus, at a high level of generality, it comports with common-law remedial principles to presume that damages are a proper remedy when a restrictive covenant is violated.

In practice, however, most jurisdictions will enforce restrictive covenants by injunction.[191] A covenant is a property interest and so, the thinking goes, an injunction to protect against its violation is presumptively appropriate.[192] Injunctions are often available simply on a showing that a covenant was violated, without any necessary demonstration of harm by the complaining party.[193] And indeed, an injunction in some circumstances might even require a property owner to tear down a structure that was erected contrary to the covenant.[194] For restrictive covenants specifically, many courts favor injunctions to enforce them precisely because it is challenging to quantify the harm from violating them.[195] From a historical perspective, this practice follows from a unique turn of events in Anglo-American law

188. RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. L. INST. 1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party."); eBay v. MercExchange, LLC, 547 U.S. 388, 391 (2006) (explaining that typically for a plaintiff to be entitled to an equitable remedy instead of a legal one like damages, "[the] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction").

189. *eBay*, 547 U.S. at 391 (intellectual property); Intel Corp. v. Hamidi, 71 P.3d 296, 303 (Cal. 2003) (electronic property); Wiggins v. City of Burton, 805 N.W.2d 517, 534–35 (Mich. Ct. App. 2011) (stating the general rule favoring damages for real property).

190. *See* cases cited *supra* note 189; *see also* Blakeley v. Gorin, 313 N.E.2d 903, 912 (Mass. 1974).

191. *E.g.*, 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* § 102 (2024); 12A CARMODY-WAIT 2D *Injunctions* § 78:87 (2023); 43A C.J.S. *Injunctions* § 186 (2023).

192. *See* sources cited *supra* note 191.

193. *See* sources cited *supra* note 191*; see also* 15 STANDARD PA. PRAC. 2D *Injunctions* § 83:43 (2024).

194. Tanglewood Homes Ass'n v. Henke, 728 S.W.2d 39, 47–49 (Tex. App. 1987); Heath v. Uraga, 24 P.3d 413, 422–23 (Wash. Ct. App. 2001).

195. *See* sources cited *supra* note 191.

that lowered the bar for what a restrictive covenant beneficiary would have to show to obtain equitable relief. Traditionally, covenants could be enforced against successors in interest only when the original covenanting parties were in horizontal privity; but eventually courts placed restrictive covenants under the umbrella of a new form of nonpossessory interest known as an equitable servitude, which more freely allowed for enforcement by injunction.[196]

Yet in most jurisdictions courts still ultimately retain remedial discretion, and thus need not enforce a covenant through an injunction if doing so would be inequitable.[197] In *Blakeley v. Gorin*, a property owner planned to construct a large hotel and apartment building that would connect to the neighboring property at the rear via a large, elevated bridge.[198] But a covenant required property owners to leave a sixteen-feet-wide space behind their buildings at the rear of the property.[199] The restrictive covenant was over a century old and originally served to preserve a cart path.[200] Even though the court noted that cart paths are now mostly obsolete, it explained that the covenant still served the valuable purpose of preserving light and air for surrounding properties.[201] Thus, the court held that the covenant should be enforced.[202] However, the court chose damages instead of an injunction to do so.[203] In its view, the harm to surrounding properties from reduced light and air was minimal compared to the benefit to the developer and the public from the more productive use of the land.[204]

Likewise, sometimes courts specifically conclude that damages are an adequate legal remedy for the violation of a restrictive covenant. In *Crossmann Communities, Inc. v. Dean*, a builder violated a setback covenant by beginning to construct a house too close to the property boundary line.[205] A neighboring property owner within the planned community sued to enjoin the construction.[206] The Court of Appeals of Indiana held that although the covenant was enforceable, damages were an adequate remedy because "[a] restrictive covenant constitutes a compensable interest in land."[207]

196. *See generally* Tulk v. Moxhay (1848) 41 Eng. Rep. 1143.
197. Hall v. Gregory A. Liebovich Living Trust, 731 N.W.2d 649, 652–53 (Wis. Ct. App. 2007).
198. Blakeley v. Gorin, 313 N.E.2d 903, 906 (Mass. 1974).
199. *Id.* at 906–07.
200. *Id.*
201. *Id.* at 911–12.
202. *Id.* at 912.
203. *Id.*
204. *Id.*
205. Crossmann Cmtys., Inc. v. Dean, 767 N.E.2d 1035, 1038 (Ind. Ct. App. 2002).
206. *Id.*
207. *Id.* at 1042 (quoting Dible v. City of Lafayette, 713 N.E.2d 269, 273 (Ind. 1999)) ("Because

When it comes to single-family covenants, though, courts almost never elect damages instead of injunction.[208] Why? It is not necessarily because they walk through the standard equitable considerations and determine an injunction is necessary. Instead, courts typically note that for violations of such covenants, plaintiffs are not limited to damages they can prove.[209] Essentially, the court simply states that an injunction is allowed in the face of a violation and goes on its way.[210]

That approach would be misguided in many cases dealing with proposed or completed multi-family housing development. If restrictive covenants were treated like most other private legal rights, then a plaintiff would have to affirmatively show that an injunction is necessary to safeguard their interests and that such relief is equitable considering all parties affected by it.[211] In many cases, a property owner benefiting from a single-family restrictive covenant may have a very difficult time making such a showing. As described above in Section I, presumably from a homeowner's perspective, the main reason to cherish a single-family covenant is that it preserves property values, both by suppressing nearby housing supply and by preserving "neighborhood character." But, again, the evidence is tenuous that removing such a covenant significantly harms surrounding property values.[212]

Regardless, if there is some measurable harm to property value by terminating the covenant, then damages could conceivably compensate for it because it would be financial loss.[213] And if there is no measurable harm to property value, that likely means the harm is not so much financial as psychic. Assuming psychic harm provides the foundation for a cognizable legal interest, it is true that damages might not always perfectly compensate for it. From a psychological standpoint, people prefer in-kind redress over

the violation of the restrictive covenants constitutes a compensable interest and because Dean's subjective concerns are directed to the possibility of a future injury, we find that Dean has an adequate remedy at law for monetary damages that can be corrected at the final judgment.").

208. *See* Golston v. Garigan, 265 S.E.2d 590, 592 (Ga. 1980); Cordogan v. Union Nat'l Bank, 380 N.E.2d 1194, 1198 (Ill. Ct. App. 1978); Bob Layne Contractor, Inc. v. Buennagel, 301 N.E.2d 671, 681 (Ind. Ct. App. 1973). *But see* Dible v. City of Lafayette, 713 N.E.2d 269, 273 (Ind. 1999) (explaining that a restrictive covenant is a compensable interest in land).

209. *See* Golston, 265 S.E.2d at 592; Cordogan, 380 N.E.2d at 1198; Buennagel, 301 N.E.2d at 681.

210. *See* cases cited *supra* note 209; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 cmt. b (AM. L. INST. 2000).

211. *See* Reynolds v. Amerada Hess Corp., 778 So.2d 759, 765–66 (Miss. 2000); Saint John's Church in the Wilderness v. Scott, 194 P.3d 475, 480–81 (Colo. App. 2008).

212. *See supra* Section I.B.2.

213. Crossmann Cmtys., Inc. v. Dean, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002) (explaining that because restrictive covenants are compensable interests in land, damages may serve as an adequate remedy for their violation).

monetary redress, even when the loss they suffered is of a fungible asset.[214] Extrapolating to the context of psychic harm, it is reasonable to assume that if there is real psychic harm from terminating a covenant, damages might not completely compensate for it. That may be one of the reasons the *Restatement (Third) of Property* and many courts remark without much explanation that because harm from the violation of a restrictive covenant is hard to quantify, injunctive relief is appropriate.[215]

Still, under standard remedial principles, a court may go on to evaluate whether injunctive relief—even if a better compensator than damages—is appropriate based on a "balance of equities"; that is, whether an injunction makes sense given the harm such relief might cause to both the defendant and the broader public.[216] Often it does not make sense in light of those considerations. The benefit to the plaintiff homeowner would be avoiding some indeterminate amount of psychic harm. But the harm to the defendant and the public from an injunction (that is, strictly enforcing the covenant) might be more pronounced. The owner of the land limited by the covenant would suffer the financial consequences of only being able to operate a single-family home when multi-family use might be dramatically more profitable. And the public would suffer the consequences of one more instance of constrained housing supply.

The legal landscape thus points two ways here. On the one hand, courts are generally free to opt for damages instead of an injunction when presented with a violation of a covenant. On the other hand, courts in practice rarely do so, especially for single-family covenants. I next move on to the interrelated economic and psychological perspectives on the issue to explore why courts' overprotectiveness of such covenants with injunctive relief is likely misguided.

ii. Economic Considerations

From an economic perspective, damages are often the best remedy if available. That is because they allow for "efficient breach."[217] This concept is most prominent in contract theory, but it applies more broadly. To put it simply, damages place a number value on a legal right or duty. If a party wants to violate such a right or duty, damages set how much they must pay

214. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 111, 206–07.

215. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 cmt. b (AM. L. INST. 2000); *see* Golston v. Garigan, 265 S.E.2d 590, 591 (Ga. 1980); Cordogan v. Union Nat'l Bank, 380 N.E.2d 1194, 1198 (Ill. Ct. App. 1978).

216. *See* Blakeley v. Gorin, 313 N.E.2d 903, 912 (Mass. 1974); Crossmann Cmtys., 767 N.E.2d at 1041–42; Reynolds, 778 So.2d at 765–66; Saint John's Church in the Wilderness, 194 P.3d at 480–81 (Colo. App. 2008).

217. Winokur, *supra* note 26, at 37.

to do so.[218] And most commonly, damages aim to compensate the injured party for what it lost. So, if a violating party chooses to violate a right, and then pays damages to do so, theoretically that party has determined that its action is worth more to it than the money it had to pay. The end result is that the injured party is no worse off than before, and the violating party is better off—approaching a Pareto-efficient result.[219]

If instead a violating party does not have the opportunity to violate a right and pay damages—indeed, if it cannot permanently violate a right at all because it is prohibited by an injunction—then the law entrenches inefficiency.[220] The violating party cannot pay to get something they value more than the money, even when allowing them to do so theoretically would not ultimately make anyone else worse off.

To make it plain for the context of this Article: in theory a single-family covenant has a specific quantifiable value to a beneficiary of it (such that the owner assumes it enhances their property value).[221] And a prospective builder expects a certain financial gain from being able to construct a duplex, quadplex, or other multi-family housing development.[222] If the value the builder expects to gain from the project is greater than the value of the single-family restriction to the neighbors, then an efficient framework would allow the developer to violate the covenant and pay the neighbors what the restriction on that particular property was worth to them. The developer still profits, and the neighbors are no worse off (and that is not to mention the added benefit to the public at large from the increased housing supply).[223]

As explained in Part I above, although such a result could theoretically be achieved through private bargaining, the logistical difficulties of doing so means that a "liability rule" might be necessary to reach an optimal result.[224] Under Calabresi and Melamed's famous and foundational remedial framework, the standard perspective is that a right should be protected by a property rule when transactions costs are low, and a liability rule when

218. *See* Huynh v. Vu, 111 4 Cal. Rptr. 3d 595, 607–08 (Cal. Ct. App. 2003); Bhole, Inc. v. Shore Invs., Inc., 67 A.3d 444, 453 n.39 (Del. 2013).

219. *In re* Grace, No. 7-04-14547, 2008 WL 1766752, at *7 (Bankr. D.N.M. Apr. 14, 2008).

220. *See* Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 47 (1999); Winokur, *supra* note 26, at 37.

221. *See, e.g.*, Crossmann Cmtys., Inc. v. Dean, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002) (explaining that because restrictive covenants are compensable interests in land, damages may serve as an adequate remedy for their violation).

222. *See* Baca et al., *supra* note 96 (supporting that an owner can generate greater revenue from more units).

223. *See generally* Andrea Ventura, Carlo Cafiero & Marcello Montibeller, *Pareto Efficiency, the Coase Theorem, and Externalities: A Critical View*, 50 J. ECON. ISSUES 872 (2016) (discussing Pareto optimalization and Coasian bargaining).

224. *See supra* Section I.B.2.

transactions costs are high.[225] The reason for this is that when transactions costs are low, such as when only two parties in close proximity are involved, then it is logistically simple for them to negotiate a buyout.[226] But when transactions costs are high, such as when a builder must obtain permission from many parties, then a liability rule bypasses drawn-out negotiations and holdouts and jumps straight to compensation.[227]

For single-family covenants, a liability rule is often more appropriate. This is so especially when the population of property owners with the right to say "no" to multi-family development is large and thus the risk is great of holdouts who will accept no reasonable price for a change.[228] Combined with the psychological phenomena leading neighbors to assume that such restrictions are worth more than they in fact are,[229] this means that a lawsuit with damages as the end result is often a necessary tool to reach an efficient arrangement that private bargaining cannot achieve.[230]

What about an obvious and important economic objection—that any such limitation on the strength of single-family covenants might in the short run constrain housing supply? The idea is that there must be some profits-focused reason why subdivision developers include the single-family covenant in new CC&Rs.[231] And so if such a provision is weaker, the developers might have a harder time selling off homes initially. By extension, they perhaps would have less incentive to develop land in the first place.

Two responses: first, although it is true that homes within HOAs tend to be more valuable than those not in HOAs,[232] the evidence does not indicate that reciprocal single-family covenants are necessarily the primary reason for that. It is more likely that the better services within an HOA compared to those of the surrounding locality is a major selling point, with the complete, broad network of restrictions playing a role alongside.[233] Indeed, a single-

225. Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 718 (1996) (identifying, though questioning, the standard perspective that property rules should be used when transactions costs are high and liability rules when costs are low).

226. *See generally id.* (discussing the standard rationale behind the choice of property versus liability rules).

227. *See generally id.* (discussing the standard rationale behind the choice of property versus liability rules).

228. *See* Winokur, *supra* note 26, at 26–27, 33 ("In addition to the association and possibly the developer, there may be hundreds of individual neighbors entitled to enforce the servitudes. Their sheer numbers may make negotiation for modified enforcement unworkable.").

229. *See supra* notes 124, 127–28 and accompanying text.

230. *See* Winokur, *supra* note 26, at 26–27, 37.

231. *See supra* Section I.B.2.

232. Clarke & Freedman, *supra* note 60, at 2.

233. *Id.* at 1.

family restriction on a given piece of property likely suppresses that property's value.[234] So even if it were a selling point that other surrounding houses are covenant-bound to remain single family, any value bump from that fact could be offset by the fact that the same restriction applies to the purchased property too. Put another way, any "demoralization costs" of limiting the enforcement of restrictive covenants may in part be offset by the "morale benefits" of loosening constraints on individuals' free use of their properties.[235]

Second, the objection fails to distinguish between local market conditions at the time of initial sale of the home and the time of subsequent transfers of the property to new owners. Most likely, by the time an owner of a house restricted to single-family use determines that they want to develop additional housing, years have gone by since the covenant was initially placed.[236] When the initial developer of the subdivision first sold off the homes, it was able to capitalize on any value added immediately from the single-family restrictions (if there was any value added). So, the fact that legal remedies might make some room for market pressure towards multi-family housing down the road is unlikely to significantly affect the initial profitability for the developer from building out and selling off the subdivision of homes restricted to single-family use. The availability of damages down the road unlocks new housing and probably will not stifle initial subdivision development.

iii. Psychological Phenomena at Play

One might argue, though, that the precise problem is that you *cannot* put a numerical value on a single-family restriction from the point of view of the neighbors.[237] This very Article even suggests that psychological attachment, more than quantifiable financial interest, explains the perseverance of such covenants.[238] But even if it is difficult to put a number on what it means to lose the benefit of a restrictive covenant, psychological phenomena suggest that enforcing a covenant, but ordering damages, is perhaps the best way to pursue the public interest in a way that does minimal harm to landowner expectations.

234. *See* Glaeser & Gyourko, *supra* note 113, at 35.

235. Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 442 (2011).

236. The average homeownership tenure is around thirteen years, *see* Dana Anderson, *The Typical U.S. Home Changes Hands Every 13.2 Years*, REDFIN (Mar. 2, 2022), https://www.redfin.com/news/2021-homeowner-tenure [https://perma.cc/4N4T-9FDR], and that does not account for any owners who owned the home after the covenant was placed and before the present owners took possession.

237. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 cmt. b (AM. LAW INST. 2000).

238. *See supra* Section I.B.3.

First, I will address some psychological research that might seem to point away from a monetary remedial scheme. Research shows that people prefer in-kind redress over monetary relief.[239] When they lose something, they are likely to be more satisfied if it is replaced with something similar—even if the thing lost is fungible.[240] Relatedly, Stern and Lewinsohn-Zamir argue in favor of property rules and injunctive relief because in their view this principle means that courts systematically undercompensate injured parties.[241] If that is so, then perhaps one might assume that a property rule enforced by an injunction makes the most sense; if money in exchange for the loss of a right does not seem to make the injured party feel whole, then monetary relief is inadequate and an alternative remedy like an injunction is necessary.

Relatedly, the Mere Ownership Effect may partially explain the existence of property rules in general. If a liability rule assumes that basic infringements on property rights can be rectified through pay, property rules assume that sometimes they cannot.[242] A property rule promises that the legal system will protect a property interest even if infringement of that interest does not manifest as quantifiable financial harm (hence the classic standard for injunctive relief, which requires the plaintiff to show that they will suffer irreparable harm without an injunction and that legal remedies like damages do not adequately safeguard their interests).[243] Property rules assume real harm even absent affirmative proof of it.[244]

To put it in terms of the Mere Ownership Effect: if something becomes "mine," then for that reason alone it is more valuable to me.[245] Therefore, an act that I see as an affront to the thing being "mine" hurts me, even if it causes no measurable damage to the object and even if it does not prevent me from using my property. If my right to exclusive possession is not respected, then I have lost something.[246] At the end of the day, then, monetary compensation would fall short because the core of the harm is difficult or impossible to

239. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 111, 206–07.

240. *Id.*

241. *Id.* at 193, 201.

242. Calabresi & Melamed, *supra* note 186, at 1092.

243. *See, e.g.*, RMH Tech, LLC v. PMC Indus., Inc., 352 F. Supp. 3d 164, 198 (D. Conn. 2018).

244. *See* Henry Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1760 (2004) (explaining that property rules place with the owner of an entitlement the power to determine the value of the entitlement).

245. *Supra* notes 117–22 and accompanying text.

246. 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* § 102 (2024) ("Since the value of a restrictive covenant is often difficult to quantify and may be impossible to replace, injunctive relief is normally available to redress violations of restrictive covenants affecting real property, without proof of irreparable injury or a showing that a judgment for damages would be inadequate. It is the theory of the law that every piece of land has a peculiar value, infringement of which is not readily remedied by an assessment of damages of law.").

quantify.[247] And so, if we care about that non-quantifiable harm, the best way to guard against it would be a property rule expressed through injunctive relief.[248]

That argument is compelling, but it suffers from a few shortcomings when applied to the issue at hand. First, it would mean mostly surrendering to gridlock. If we assume that because owners of restrictive covenants would rather have the covenants than money, we therefore must accommodate that preference; then life will go on as it has. In the numerous and increasing swaths of land across our country where single-family homes under covenant dominate, but housing demand is high, we will simply persist indefinitely in the housing shortage. Psychological realities may be quite important, but do not alone carry all the normative weight. Property owners might report that they prefer something over something else, but whether the law should cater to the preference is another matter entirely. Stern and Lewinsohn-Zamir, despite their favoring of in-kind remedies and property rules, note that just because people might prefer one kind of remedy does not mean the law necessarily should accommodate their desire.[249]

Indeed, while we can generate crucial insights by understanding psychological phenomena undergirding people's relationship to their possessions, we likely cannot satisfy short-term preferences of all property owners and correct the legal and market mechanisms that have brought about housing gridlock at the same time. Again, recall the Mere Ownership Effect.[250] Because people value their possessions above market rate by the simple fact that they possess them, a feature of human psychology makes efficient transfer of goods less likely.[251] The Mere Ownership Effect thus entrenches a status-quo bias into people's relationship to property. And property rules simply bolster that status quo, regardless of whether it is economically efficient or socially beneficial to do so.[252]

Next, even from a psychological standpoint, we must take the preference for in-kind redress itself with several grains of salt. This Article explained above how the fear of neighborhood change has such deep psychological roots.[253] But there is another element at play here. It is the fact

247. *Id.*
248. *See* Smith, *supra* note 244, at 1758–60.
249. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 201–02.
250. *Supra* notes 117–22 and accompanying text.
251. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 11, 196–97; Winokur, *supra* note 26, at 34–37.
252. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 11, 196–97; Winokur, *supra* note 26, at 34–37.
253. *See supra* Section I.B.3.

that people are bad estimators of their future flourishing.[254] Take for example, one of the most serious forms of compulsory lifestyle change: relocation. If people develop a fear and aversion to changes in their familiar surroundings like their neighborhood, then even more so they assume they will suffer deep psychic harm from being forced to move somewhere else entirely. But the psychological reality is that that is generally not the case. In fact, there is almost no evidence at all that people who must relocate to another home suffer any lasting psychological harm from that event.[255] There are some narrow exceptions, such as people living in poverty for whom relocation often means eviction and homelessness.[256] But for most people, even though the prospect of change may hurt, they readjust quickly.

That is not to say the initial discomfort does not matter. But when the choice is between an injunction that freezes a housing shortage under force of law and damages that both attempt redress and free up new housing, we have some important questions to ask: If any discomfort from the addition of new housing may wane into the immeasurable given enough time, then why operate under legal rules that, in effect, indefinitely prevent such change? And if psychological research shows that a person would not pay over market value to get a restriction in the first place, then why should we effectively "pay" them far above market value (expressed through unending specific performance)[257] when they stand to lose that restriction?

Furthermore, not only do people adjust to new circumstances despite their initial discomfort, they also can be nudged to see their own possessions and entitlements through a different lens. Specifically, the degree of psychic harm a person experiences by losing a legal entitlement can be influenced by how that entitlement was previously framed and presented to them. One study measured this effect among a group of first-year law students.[258] Students were divided into two groups and all were given a laptop. The students in one group were told they owned the laptop, which, they were informed, included the right to use, exclude others, and transfer.[259] The other group was told that they owned all those same sticks in their bundle of property rights but not specifically that they owned the laptop itself.[260] Both

254. *See* STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 61.

255. *Id.* at 59.

256. *Id.* at 59, 67.

257. *Cf.* Autozone Stores, Inc. v. Ne. Plaza Venture, LLC., 934 So. 2d 670, 675 (Fla. Dist. Ct. App. 2006) ("We acknowledge the view that any harm—including the harm caused by the violation of a restrictive covenant relating to the use of real property—can be assigned a monetary value. But the law of Florida has not embraced that view.").

258. Jonathan R. Nash, *Packaging Property: The Effect of Paradigmatic Framing of Property Rights*, 83 TUL. L. REV. 691, 693–94 (2009).

259. *Id.* at 712–15.

260. *Id.*

groups were then informed that the school was placing certain restrictions on the laptops' use. Between the two groups, the students who were told they owned the laptop were more likely to report that they "lost" something because of the restrictions compared to the students who were merely told they had a collection of specific rights regarding the laptop.[261] Researchers later concluded that forewarning property owners of potential restrictions on their free use of property leads those owners to feel less like their rights had been violated when restrictions were later presented.[262]

So, if owners of a possession or entitlement are informed about the qualified nature of their right, they are less likely to feel a sense of loss when restrictions manifest later. For single-family covenants, this means that people's expectations about what entitlements a restrictive covenant gives them potentially can be adjusted. If, in practice, they begin to see that violation of such a covenant entitles them to some form of financial compensation, then over time they may adjust to see their interest in the covenant as a financial one—and not an amorphous, yet deeply cherished, interest that entitles them to block neighborhood change.

On the other side of the coin, that same principle demonstrates why the damages approach has some psychological advantages to other methods of breaking housing gridlock, especially those involving sweeping mandates or broad invalidation of such single-family covenants. A damages regime enables people to relearn the nature of their interests. A wide-reaching statute that terminates or voids all single-family covenants in one shot gives people no time to adjust their expectations about their own entitlements before those entitlements are taken away. But if the covenants stay in place and are simply enforced differently when violations arise, then people perhaps have room to adjust their expectations without feeling like they have been entirely deprived of their rights. Admittedly, property owners might still experience some degree of surprise, such as when the legislative body first enacts an approach like the one this Article urges. Furthermore, the first property owners in a given geographic area to find themselves neighbors to a covenant violation under the new remedies approach would not have had sufficient time or previous examples based on which to adjust their expectations. But for subsequent neighbors, the blindsiding effect could be reduced.

But if damages are the answer, how will they be calculated? It is an important question because, as Stern and Lewinsohn-Zamir point out, the "coercion premium" means that property owners are unlikely to receive

261. *Id.* at 721–22.

262. Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449, 470 (2010).

compensation that makes them whole, at least in the takings context.[263] First, property owners, so the thinking goes, refuse to sell in a voluntary market transaction because they value their property above market value.[264] Second, and relatedly, when the government resorts to a taking, the property owner suffers an additional psychic harm through the coercive practice.[265] So, if just compensation is determined by a court's estimation of fair market value, that compensation will systematically undercut what the property owner feels they lost.[266] If all of that is true in the takings context, presumably it could hold true in the damages context too. In both cases, the property owner is given money in the face of their refusal to relinquish a property right.[267]

Still, the fact that someone subjectively would feel immense loss from having a property right transformed to a liability right does not by itself mean that their preference should determine proper compensation. If it did, then we could hardly hope to escape the holdout problem. A property owner who deeply cherishes the restrictive covenant could be entitled to such a substantial damages award for the loss of the covenant that developers would seldom find it profitable to build and risk the lawsuit. If all that mattered were property owner expectations, that might be fine. But if the public interest factors into the balance of the equities, we need another approach.

iv. Four Features of the Damages Action

To address this problem, I propose a compensation method with four key features.[268] The first is that the property owner ought to be allowed to have a jury decide compensation if they so choose. Some jurisdictions already allow for this, even if they are not required to as a matter of

263. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 111, 201.

264. *See* Clare Trapasso, *Why Aren't Would-Be Sellers Listing Their Homes? There's One Big Reason They're Stalling*, REALTOR.COM (May 4, 2023), https://www.realtor.com/news/trends/why-potential-sellers-arent-listing-their-homes [https://perma.cc/TKC5-PAUB] ("About a fifth of homeowners in February [2023] reported they were concerned about slowing buyer demand in their area and that sellers aren't receiving good offers.").

265. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 111.

266. *Id.*

267. Indeed, it is possible that certain changes in property law and entitlements at the hands of a court could constitute a taking. *See* James E. Krier, *Judicial Takings: Musings on* Stop the Beach, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 217, 221 (2014) ("Judicial takings are *solely* concerned with court decisions that reallocate existing property rights by changing established property doctrine.").

268. In the United Kingdom, a common method is to estimate the amount the parties would have reasonably negotiated for. Amec Devs. Ltd. v. Jury's Hotel Mgmt. (UK) Ltd. [2000] EWHC (Ch) 454 [12] (Eng.). In my view, this method risks overinflating damages awards, in light of the premium owners tend to demand for goods because of the Mere Ownership Effect. In the U.S., the common method is to estimate the degree the value of the plaintiff property owner's property decreased from the violation. *See, e.g.*, Garrett v. City of Topeka, 916 P.2d 21, 36 (Kan. 1996) (applying the principle in the context of an inverse condemnation action). This method, in my view, may fail to consider the psychic harms to the plaintiff rooted in the principle of loss avoidance and the Mere Ownership Effect.

constitutional law.[269] A jury trial could in theory soften the effect of the coercion premium. Each member of the jury is someone who could own property or reside in a home that is part of a neighborhood with covenants.[270] Because each of them could find themselves in the same situation, they could sympathize with the property owner's subjective plight. Conversely, the jury could be a useful tool to moderate the intensity of the property owner's preferences. Although the jury could have sympathy for the property owner, the fact that the jury is drawn from a "cross-section" of the community[271] means that it is less likely to be swayed by a property owner with an *unusual* attachment to the single-family covenant.[272]

The second and related feature of my compensation regime is that the property owner ought to be allowed to present evidence explaining why and to what degree they value their right to prevent the building of the structure at issue above market. In takings cases, most often the measure of just compensation is the market value of what was taken (that is, for the purposes of the issue at hand, the right to enforce the covenant in that particular instance), or the difference in fair market value between the plaintiff's entire property before and after the taking.[273] But of course in tort actions and elsewhere across the common law, other factors (such as pain and suffering and other psychic harms) can enter the equation to determine what would make an injured party whole.[274]

The third feature of my compensation regime is that the damages should be based on the harm from the construction of the precise structure or development the covenant-violating landowner builds, not from an extinguishing of the right to enforce the covenant against any other property

269. The Seventh Amendment does not generally guarantee the right to a jury trial in civil cases in *state* courts. Great Lakes Gas Transmission Ltd. P'ship v. Markel, 573 N.W.2d 61, 63–64 (Mich. Ct. App. 1997). However, states often allow the right to trial by jury for cases alleging a violation of a restrictive covenant when the plaintiff seeks damages. Ingledue v. Dyer, 937 P.2d 925, 930–31 (Haw. Ct. App. 1997) (noting that Hawai'i gives this right when damages are involved); Glover v. Santangelo, 690 P.2d 1083, 1085 n.3 (Or. Ct. App. 1984).

270. McCandless v. Pease, 465 P.3d 1104, 1120 (Idaho 2020) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946)).

271. *Id.*

272. Of course, attorneys could seek to form a more favorable jury for their client through voir dire, but such efforts take place in an adversarial setting and are thus open to both sides. And it would not be unique to this issue alone.

273. *See, e.g.*, U.S. v. 50 Acres of Land, 469 U.S. 24, 25–26 (1984); Twp. of Chester v. Commonwealth, 433 A.2d 1353, 1354–55 (Pa. 1981).

274. Kahrar v. Borough of Wallington, 791 A.2d 197, 204–05 (N.J. 2002); Miranda v. Said, 836 N.W.2d 8, 22–23 (Iowa 2013) (emotional distress damages from legal malpractice); Gates v. Richardson, 719 P.2d 193, 200 (Wyo. 1986); Howard v. Lecher, 366 N.E.2d 64, 65 (N.Y. 1977) (citing Johnson v. State, 334 N.E.2d 590, 593 (N.Y. 1975)) (physical harm not a necessary prerequisite).

bound by it.[275] In other words, someone who wants to construct a medium or large apartment building may have to pay more in damages than a homeowner who wants to add an accessory dwelling unit behind their house, or convert their house into a duplex. If the central harm from the non-enforcement of a single-family covenant is more rooted in the change that could result from the specific covenant violation, as opposed to the weakening the covenant in the abstract, then it makes sense for the damages due to reflect that.[276]

The fourth and final feature of the compensation regime is statutory ranges or caps on damages, if not inconsistent with state law where the regime would be implemented. Specifically, the legislative body should prescribe either a range or a maximum damages award per property owner that considers the nature of the new structure, the nature of the surrounding structures, and the distance from the new structure to the property of the aggrieved owner. In other words, the legislative body could, for example, provide a range of permissible damages awards for duplexes built in single-family neighborhoods, which would be slightly lower in value than the range of permissible awards for quadplexes in the same neighborhood, which would be lower than that for ten- to twenty-unit apartment buildings in the same neighborhood, and so on.[277] Prescribing a range instead of specific values enables courts or juries to consider various other factors that might make the new structure more or less harmful to the aggrieved property owner in a given case. And prescribing a range instead of allowing any damage award whatsoever accomplishes at least two things: (1) it gives builders some amount of predictability and thus confidence about whether it will likely be financially feasible for them to move forward and build the non-conforming structure;[278] and (2) it guards against the risk that some juries might offer astronomical awards even for minor departures from single-

275. Courts dealing with property harms generally attempt to award damages that would make the plaintiff whole. *See* Ruiz v. Varan, 797 P.2d 267, 270 (N.M. 1990). There are multiple routes to reach that goal, such as measuring damages by the diminution in property value or by the cost to restore the property to its former state. *Id.*; Thompson v. King Feed & Nutrition Serv., Inc., 105 P.3d 378, 381 (Wash. 2005); Romine v. Gagle, 782 N.E.2d 369, 383 (Ind. Ct. App. 2003).

276. This feature of the compensation system could help limit dramatic covenant violations. It is unlikely to result in the construction of massive apartment buildings in otherwise sparsely populated regions because, in such circumstances, the neighboring property owners would likely suffer greater psychic harm. (Moreover, from a financial standpoint, a builder would likely only find it profitable to build a larger structure in regions where demand for such housing would be substantial. Ten-story buildings in rural areas are unlikely.).

277. The general guiding principle would be that the greater a deviation from the neighborhood state the covenant would have preserved, the greater the damages could be.

278. *Cf.* Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. STATE U. L. REV. 1, 6–7 (discussing the relative unpredictability created by damages measures that allow for more discretion by the court).

family use restrictions—disproportionately burdening builders of smaller structures who likely have less capital on hand. Many states have addressed whether statutory caps on noneconomic compensatory damages are constitutional as a matter of their state's law.[279] In most states such limitations would likely be constitutional,[280] but in the minority of states where they would not be, this compensation regime would have to operate without express limits on the compensatory damages that a plaintiff property owner could obtain.[281]

It would be difficult here to declare the specific dollar value ranges appropriate for all possible cases. A legislative body could benefit from thorough input on that matter from builders and property owners. But, importantly, whatever ranges the legislative body chooses must not allow for such significant damages awards that builders would rarely bother moving forward with relatively noninvasive multi-family projects for which there is market demand. To make it just a bit more concrete: in regions where demand for more housing is high but not astronomical, damages awards in the range of several hundred dollars for the nearest neighboring properties may be appropriate for converting one home to a small handful. The value could scale up for larger construction projects and scale down for neighbors located farther from the project. Perhaps three-digit damages would strike many people as surprisingly low (not to mention the two-digit damages potentially in play for more distant neighbors). But the key here is that the damages award would, again, be provided in response to *one* covenant violation, not for termination of the covenant all together. The same or a similar amount in damages could be in play the next time around if another neighbor plans to develop housing in violation of the covenant too. And from the builder's perspective, it is possible that they will have to pay *every* other property owner within the HOA in some form, either through damages or as part of the initial lump-sum payment. Thus, if individual neighbors are entitled to too high of a value in compensation, rarely would builders go through any of this process at all (except in cases of extremely high potential profit from the project).

These four features of the process of calculating damages should go far towards ensuring that property owners' psychic harm is taken seriously, but not given so much weight that gridlock can persist as it has. And, as the next

279. MacDonald v. City Hosp., Inc., 715 S.E.2d 405, 421–22 (W. Va. 2011).

280. *See id.*; *see also* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 688 (Tenn. 2020); Evans v. State, 56 P.3d 1046, 1050–57 (Alaska 2002); Judd v. Drezga, 103 P.3d 135, 139–45 (Utah 2002); Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 529 (Va. 1989).

281. In such circumstances, I would still consider the damages regime beneficial, though it would lack some of the predictability advantages described immediately above.

Section explains in more detail, from a psychological standpoint, it gives property owners a voice in the process—a crucial component to minimizing psychic harm throughout the procedural stages themselves.[282]

One thorny issue still remains: the proper timing for such a damages action. Many HOA CC&Rs specify time limits on how long construction projects may take; these are often one-year limitations.[283] And HOAs may levy reasonable fines for failure to comply with such a deadline.[284] That being so, an action for damages could ripen whenever covenant terms have been violated.[285] For an express single-family covenant, that means the plaintiff can sue once a multi-family structure is built out to a habitable standard (that is, when the defendant no longer uses the property as a single-family residence as the covenant requires).[286] For other restrictions that have the effect of only allowing for one single-family unit, such as minimum-square-footage requirements, an action could ripen as soon as the new construction has caused a violation. The HOA's time limits on construction can serve as separate restrictions for which fines could accrue to the HOA daily after the deadline passes. This acts as an incentive for builders not to unduly delay and thus force aggrieved neighbors to delay their compensation. Yet, it is possible that HOAs could limit construction times so stringently that few multi-family projects could go forward.[287] To dodge this counterpunch, localities or states may need additional legislative provisions directly targeted at allowing reasonable construction times.

3. Why an Opt-In Mechanism?

There is, however, one more psychological observation that bears on the question of the proper mechanism for escaping a single-family covenant, for which a damages approach alone might not meaningfully account. It is

282. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 92, 96.

283. *See, e.g.*, Conditions, Restrictions, Easements and Set Back Lines, Westhaven, Polk Cnty., Or. ¶ 10 (Sept. 15, 1986) (on file with author).

284. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 (AM. L. INST. 2000) (Statutory Note); Morningside Crescent Ct. Condo. Ass'n v. Nayak, No. 2-15-1126, 2016 Ill App. Unpub. LEXIS 1908 at **12 (explaining that a fine must be reasonable).

285. Generally, for a plaintiff to have standing to sue, they must have suffered an injury recognized by law or show that such an injury is imminent. Leiendecker v. Asian Women United of Minn., 731 N.W.2d 836, 841 (Minn. Ct. App. 2007) (citing State v. Colsch, 284 N.W.2d 839, 841 (Minn. 1979)); Knittle v. Progressive Cas. Ins. Co., 908 P.2d 724, 725–26 (Nev. 1996). The timing of the action discussed in this Article is meant to comply with that general requirement for both legal and practical reasons (i.e., so that damages will be easier to determine).

286. Note that this approach to timing may differ from when a plaintiff could (and, indeed, must) sue to *enjoin* a covenant violation. *See, e.g.*, Hidalgo v. 4-34-68, Inc., 988 N.Y.S.2d 64, 66–67 (N.Y. App. Div. 2014).

287. Some have six-month limitations, Declaration of Restrictions on Mountain Fir Estates, Independence, Polk Cnty., Or. 4 (Aug. 5, 1999) (on file with author), and some could be even quicker.

the fact that even property owners who lose an entitlement tend to feel that they have not lost as much if they (1) were given voice in the process,[288] and (2) were not singled out for negative treatment.[289] To account for the coercion harm and singling-out harm, I suggest a new legal mechanism that would chronologically precede the damages schema described above.

Psychologists have conducted specific research on the psychological effects of takings, and of procedural legal processes more generally. They have found that people often care as much about being treated with dignity and respect during legal processes as they care about the end result.[290] Likewise, people are averse to legal processes that single them out for unfavorable treatment, even if it is in the name of the public interest.[291] That means that people are likely to suffer psychic harm if they are coerced into a situation in which they are disadvantaged for the sake of some public good but others against whom they compare themselves are not.[292]

Property owners who expect to be able to limit fellow HOA members to single-family use, but then can only collect market price for the right instead, might feel that their particular interests were steamrolled on behalf of some public good. That does not mean the damages approach is inappropriate, but it does beg the question of whether that particular form of psychic harm could be minimized along the way.

My proposal is one that gives landowners voice, but not veto. The legal mechanism is created by statute and triggered when an owner of a property within an HOA seeks to build in violation of a single-family covenant, and that area is not subject to single-family zoning. The builder can initiate a decision by each member of the HOA. It offers a single lump-sum value in exchange for the right to violate the covenant. Each member decides whether to opt in to receive a portion of the sum. The sum is divided among all HOA members who opt in, and in exchange, those members and the HOA itself relinquish the right to challenge the building. For those that do not opt in, the damages approach will apply.[293] If they object to the construction, they can roll the dice and collect damages in court.

This legal mechanism draws inspiration from land assembly districts ("LADs"), though it has some key differences. LADs seek to break another form of property gridlock.[294] Sometimes a large development that would

288. STERN & LEWINSOHN-ZAMIR, *supra* note 31, at 96.
289. *Id.* at 98.
290. *Id.* at 96.
291. *Id.* at 98.
292. *Id.*
293. *See supra* Section II.B.1.
294. HELLER, *supra* note 39, at 118–21.

span several individual land parcels would generate more economic value or public benefit than the sum of all the individual parcels under their current use.[295] But because each individual parcel owner can refuse to sell, a single holdout can sink a socially beneficial development. LADs tackle this problem.[296] When a state or locality authorizes an LAD, it gives the neighborhood the power negotiate a sale of *all* the land within it—either by majority or supermajority vote, or by the appointment of a board to negotiate the sale.[297] The dissenting property owners can opt out, but then they would still lose their land to the project by eminent domain (and in exchange, receive just compensation from the government).[298] All other properties effectively receive a pro rata share of the overall sale price.[299]

My proposal is similar to the LAD mechanism in two important ways. One, it allows for a lower-transactions-costs method of negotiating a selling price than bargaining with each individual entitlement holder. Two, it provides an incentive against holdouts,[300] and ultimately can move forward whether there are individual holdouts or not. My proposal differs from the LAD mechanism because whereas with a LAD the owners have the ultimate say by majority vote over whether the land collection is sold at all,[301] in my proposal for restrictive covenants the development may move forward either way.[302] But the property owners can choose whether they prefer compensation through the slice of the developer's up-front offer or whether they would rather leave their compensation to litigation and jury determination within the predefined damages range.

A psychological benefit of this approach is that it gives the property owners a sense of ownership over whatever result they reach. Those who opt in to the developer's offer choose to do so and thus escape any acute harm

295. *Id.*

296. *Id.*

297. *See* Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1488–92 (2008).

298. *See id.*

299. HELLER, *supra* note 39, at 120.

300. Because the lump sum would be divided between only those who opt in to receive it, in a sense the sum itself could act as a form of "commons," encouraging individual owners to take a slice in fear of missing out on their share. *See supra* notes 32–34 and accompanying text. But, of course, the more owners who do so, the less each one will receive.

301. *See* Heller & Hills, *supra* note 297, at 1488–92.

302. I do not see this diversion from the standard LAD procedure to be an absolutely essential component of the compensation regime. I favor it because I suspect that the psychological phenomena leading people to resist change and cherish their restrictive covenant rights are sufficiently strong to (often) prevent a majority of HOA members from acquiescing to the new development. But it is possible that, especially in larger HOAs, many members, particularly the ones located farther away from the development, would be content to collect their portion of a lump sum and leave the resistance to a minority of homeowners who are closer to the development.

from direct coercion. But even those who do not opt in could to an extent feel that their interests mattered. True, they were not able to stop the development simply by speaking up. But when they ultimately are only entitled to damages in court, that result is one they had some choice in bringing about; they are in the same boat as all other HOA members in that respect.

Of course, this procedural mechanism will interplay with the damages backdrop. If the builder has reason to believe that juries would give more favorable awards to neighboring property owners and strongly compensate for any unquantifiable psychic harm (that is, select higher values within the predefined damages ranges), then the builder might want to avoid such damages actions. They therefore would have an incentive to offer more in the initial lump sum to try to persuade owners to opt in and thus relinquish their rights to a later suit. Conversely, if the builder offers too much in the lump sum, but the neighborhood contains many holdouts, then the builder might end up substantially paying in the lump sum and still face the prospect of numerous damages suits, after which it would pay out again and again. And from the neighboring property owners' perspectives, the lower the value a jury is likely to award within the damages range, the more likely the neighbors will be encouraged to accept a lump sum monetary offer by the builder up front. But the crucial point is that the two-stage solution, while guaranteeing that a builder can develop multi-family housing if it is determined to do so, also provides neighboring landowners both a degree of ownership over how their interests are credited and a mechanism for targeted compensation. This approach avoids holdouts and loosens housing gridlock in a way that takes property interests and people's psychological attachments to them seriously.[303]

303. If enough property owners within an HOA followed the procedures I have laid out to create more housing, might the community reach a critical mass, so to speak, by which the covenants could be considered unenforceable under the common law because of changed conditions, or even abandonment? *See supra* Section II.A.3. A court probably would not conclude so. Through the process I have laid out, each property owner with a right to enforce the covenant either can do so through the damages action, or they will assert their legal right of enforcement by expressly opting into the lump sum instead. Neighbors thus would not have sat back passively while covenants were violated. In my view, that fact would count against a finding of abandonment, acquiescence, or anything similar. As for changed conditions: the framework I have presented is meant to *facilitate* a change in conditions. If at a certain point, the framework is "shut off" because the covenants simply are deemed unenforceable for changed conditions, then that would in part undermine the balance I have tried to strike. At the very least, it would mean that neighbors would probably be entitled to more damages for every violation, because each violation would be chipping away at the enforceability of the covenant against anyone in the community. Rather than elevate damages accordingly, I think it makes more sense to simply ignore the changed circumstances doctrine wherever my schema is in place.

Of course, when a jury or relevant decision maker pinpoints the appropriate damages award within

CONCLUSION

The housing crisis is complex. It is partly a legal and financial problem and, as this Article especially emphasizes, partly a psychological one. Even if homeowners have the economic incentive to build or allow for multi-family housing, and even if localities and states lift the "zoning straitjacket,"[304] housing supply still could lag. Private restrictive covenants enshrining single-family housing curb housing production in many localities, potentially distressing millions of Americans and disproportionately harming those living in poverty. Psychological phenomena concerning how people develop attachments and perceive change conspire with powerful legal tools to hold these restrictions in place. The solution to this gridlock thus must account for those conspiring factors. This Article charts a possible course: an initial lump-sum offer from a builder with an opt-in mechanism for each HOA member, followed by a carefully prescribed damages action available to all remaining members. If we care deeply about both property owner expectations and providing an adequate supply of housing, this approach shows a way forward.

the statutory range in a given instance, it could take into account the changed circumstances of the neighborhood to determine *how much* the suing neighbor is harmed by the one additional covenant violation at hand (the first property in a single family neighborhood converted to a six-unit building is more striking of a change than the hundredth such domino to fall).

304. *See* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 397 (2021).