

Supremacy Lost?: Zoning, Covenants, and the Evolution of Single-family Ownership

Professor Mary Jo Wiggins*

ABSTRACT

For as long as detached, single-family homes have been part of the modern real estate market, they have been a relatively staid and sleepy part. Traditionally, corporate developers built and sold single-family homes, and banks financed the developers' land acquisitions and home construction projects. Individual buyers then bought and occupied the homes, took the title, and assumed all of the rights and responsibilities of ownership. Individual sellers then sold their homes to individual buyers who usually took the title in the same manner as their predecessors. Due to a variety of forces, the situation is different today. Single-family homes are now increasingly viewed as short-term, investor-owned capital assets rather than long-term, occupant-owned dwellings. Added to this, investors are now packaging thousands of single-family homes, enabling the creation of asset-backed securities, which the investors then either retain, sell, or use as collateral for financing other transactions. This Article describes these developments as the "institutional capitalization" of single-family homes and considers what impact it will likely have on property concepts and policies reflecting ownership and investment models of previous eras.

After this Article briefly introduces the broad shift in the nature of the single-family home market and explaining its importance, Part II briefly reviews the perceived benefits and burdens of single-family residential living as reflected in American land use law and policy. Part III shows how the norms of single-family residential living are embodied in two areas of land use law: municipal zoning and private residential restrictive covenants. With respect to zoning, Part III connects the growth

* Professor of Law, The University of San Diego School of Law. I would like to thank the University of San Diego School of Law Summer Research Grant Program for research support. I would also like to thank Donald Wiggins, Dianne Mead, and Joni Gang for conversations and comments. Joseph Heisley, Kelsey Tidgewell, Anthony Walker, and Emily Serleth provided excellent research assistance. Special thanks to the librarians of the Legal Research Center, particularly Sasha Nunez for expert research support.

of single-family residential living to judicial decisions and legislative choices that extolled the perceived virtues of the single-family home. Turning to private restrictive covenants, this Article explains how a doctrinal shift in their enforceability played a significant role in the ascendancy of single-family residential living, particularly after World War II. Part IV moves to how ownership and investment patterns associated with single-family homes have changed significantly over the last decade. The most important consequence is that single-family homes are increasingly viewed as short-term, income-producing capital rather than as long-term, occupant-owned property interests. Part V contends this shift will likely put significant pressure on the logic and operation of zoning and private residential restrictive covenants. Part VI reflects on the broader implications of the preceding analysis.

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I. INTRODUCTION

For as long as detached, single-family homes been a part of the modern real estate market, they have been a staid and sleepy part. Traditionally, corporate developers built and sold single-family homes, and banks financed the corporate developers' land acquisitions and home construction projects.¹ Additionally, banks financed individual buyers by providing mortgages.² Individual buyers then bought and occupied the homes, took the title, and assumed all the rights and responsibilities of fee ownership.³ Individual sellers then sold their homes to individual buyers who usually took the title in the same manner as their predecessors.⁴ If the mortgage was not paid off by the time of the sale, a lien was placed on the next buyer's interest.⁵ The cycle would then repeat.

Due to a variety of forces, the situation is different today. Single-family homes are now increasingly viewed as short-term, investor-owned capital assets rather than strictly long-term, occupant-owned dwellings.⁶ Moreover, the single-family home market once dominated by a predictable mix of developers, traditional banks, and individual buyers and sellers, has expanded. Now, real estate investment trusts (REITs), platform

1. See Gopal Ahluwali et al., *Concentration In Homebuilding Driven By A Few Large Builders*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY (Apr. 19, 2022), <https://bit.ly/3EzThq4> (noting that national and regional corporate builders have dominated the homebuilding industry).

2. See JESSE DUKEMINIER ET AL., PROPERTY 619–622 (Vicki Been et al. eds., 9th ed. 2017).

3. See *id.* at 621.

4. See *id.* at 621–22.

5. See *id.* at 621.

6. See, e.g., Greg Moran & Lauryn Schroeder, *Cash-rich investors surged into San Diego's hot housing market. Here's where they bought*, SAN DIEGO UNION-TRIB., Oct. 2, 2022, at A1, <https://bit.ly/3J0Jxry>; Will Parker, *Home Builders Bypassing Individual Home Buyers for Deep-Pocketed Investors*, WALL ST. J. (Apr. 11, 2022), <http://bitly.ws/Fh8F>; Will Parker, *Atlanta's No. 1 Broker Bought Homes for Big Investors From 600 Miles Away*, WALL ST. J. (May 17, 2022), <https://bit.ly/3PH4sDS>; Diana Olick, *How to get in on the booming single-family rental market without buying a house*, CNBC (Aug. 9, 2021), <http://bitly.ws/FhdI>; Bill Conroy, *As rates skyrocket, 'Wall Street' single family rental investors see opportunity*, HW MEDIA (June 15, 2022), <http://bitly.ws/FheE>; Carol Ryan, *Investors' Housing Bets Are on Shaky Foundations*, WALL ST. J. (June 22, 2022), <https://bit.ly/3Ls8yx5>; see also Lorenz Schwarz & Laura Ferris, *Single-Family Rental Securitization: The Evolution of a New and Growing Asset Class*, 21 J. STRUCTURED FIN. 15, 16 (2015); Morgan W. Pierson, *REO to Rental: The Creation of a New Asset Class and the Transformation of the American Single Family Landscape*, MASS. INST. TECH. 2 (Jan. 17, 2014); DESIREE FIELDS, THE RISE OF THE CORPORATE LANDLORD: THE INSTITUTIONALIZATION OF THE SINGLE-FAMILY RENTAL MARKET AND POTENTIAL IMPACTS ON RENTERS, REPORT BY THE HOMES FOR ALL CAMPAIGN OF RIGHT TO THE CITY ALLIANCE (2014).

companies, and private equity firms⁷ have intruded on the market by becoming developers, builders, buyers, sellers, landlords, property managers, and lenders, adding complexity and financial sophistication. The single-family home, a type of real estate that was once offered exclusively for sale, is now offered almost exclusively for rent.⁸ In addition, investors are now packaging thousands of single-family homes together to create asset-backed securities that the investors either retain, sell, or use as collateral for financing other transactions, sometimes all three.⁹ This Article describes the above phenomenon as the “institutional capitalization” of single-family homes and considers what impact institutional capitalization will likely have on property concepts and policies reflecting ownership and investment models of previous eras.¹⁰

However, institutional capitalization reaches beyond conceptualization in property law because single-family use also

7. “Private equity” refers to entity ownership that is not publicly listed or traded on stock or other exchanges. A “platform company” is the initial acquisition that is launched by a private equity in an industry. A “real estate investment trust” owns and operates real estate that produces income.

8. See Hannah Madans Welk, *Haven Realty Grows Build-to-Rent Portfolio to \$1B*, L.A. BUS. J. (Mar. 07, 2022), <http://bitly.ws/Fhot>; Patrick Sisson, *House-Flipping Tech Powers a Boom in Single-Family Rentals*, BLOOMBERG (Mar. 15, 2022, 4:32 PM), <http://bitly.ws/FhoJ>; Debra Kamin, *The Market for Single-Family Rentals Grows as Homeownership Wanes*, N.Y. TIMES (Oct. 22, 2021), <http://bitly.ws/FhpE>; Tim Glaze, *Investors are buying up single-family homes across the US*, HW MEDIA (May 19, 2021, 6:33 PM), <http://bitly.ws/FhpN>; Michelle Conlin, *Selling out: America’s local landlords. Moving in: Big investors*, REUTERS (July 29, 2021, 1:12 PM), <http://bitly.ws/FhqX>; *See the Wall Street Investors Buying Single Family American Homes*, SOVEREIGN WEALTH FUND INST. (June 12, 2021), <http://bitly.ws/Fhr9>; Larry Getlen, *How corporations are buying up houses—robbing families of the American dream*, N.Y. POST (July 18, 2020, 8:51 AM), <http://bitly.ws/FhrX>; Peter Grant, *Point, Click, Own: Firms Transform How To Buy Investment Homes*, WALL ST. J. (Jan. 8, 2020, 7:00 AM), <http://bitly.ws/Fhsn>. See also Ryan Dezember, *If You Sell a House These Days, the Buyer Might Be a Pension Fund*, WALL ST. J. (Apr. 4, 2021, 10:00 AM), <http://bitly.ws/Fhtk>; Francesca Mari, *A \$60 Billion Housing Grab by Wall Street*, N. Y. TIMES MAG. (Mar. 4, 2020), <http://bitly.ws/FhtH>. Single-family living exists in a variety of settings (i.e., suburban, urban, rural) and in a variety of forms (attached dwellings such as condos and townhomes, for example). This Article focuses primarily on detached, single-family homes in residential neighborhoods.

9. These transactions are usually grouped under the umbrella of what is called “securitization.” In the context of home building and buying by institutional investors, securitization involves the issuance of securities backed by a pool of homes. The securities are then sold to and traded by investors in capital markets. For more on this, see *infra* Section IV.B.

10. Previous analysts have given these developments the monikers of “institutionalization,” “securitization,” or “capitalization,” but no other analyst to date has joined the terms together in broadly describing this phenomenon. This Article calls it “institutional capitalization” because institutional players, rather than individual ones, are dominating the space as the owners of the property involved and because these players increasingly view single-family homes as assets in capital markets rather than as physical assets.

constitutes a major land designation across the United States.¹¹ A host of issues within land use law revolve around the need to reconcile conflicts between single-family use, multi-family use, and other residential and non-residential uses.¹² Moreover, as society grapples with housing affordability, wealth inequality, and the effects of climate change, the market for single-family homes will continue to play an outsized role in the way society navigates these challenges. For these reasons and others, it is vital to understand how property law regulates single-family living and how fundamental transformations are likely to affect future efforts.

Part II of this Article includes a brief review of the perceived benefits and burdens of single-family residential living as reflected in American land use law and policy.¹³ The benefits include long-term owner-occupancy, simplified transactional structure, owner autonomy, and an alternative to geographic and architectural density. The burdens include use rigidity, race and income segregation, environmental impact, and economic and political inequality.

Part III of this Article demonstrates how the norms of single-family residential living are embodied in two specific areas of land use law: municipal zoning and private residential restrictive covenants.¹⁴ Concerning zoning, a connection will be shown to exist between the growth of single-family residential living and judicial and legislative decisions that extolled the perceived virtues of the single-family home. For private restrictive covenants, this Article will show how one key doctrinal shift in the enforceability of these covenants played a significant role in the ascendancy of single-family residential living, particularly after World War II.

11. See Michael Manville et al., *It's Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 106, 107 (2020) (noting that depending on one choice of denominator, a high amount of urban land is devoted to single-family use). For example, “[i]n Los Angeles (CA) the proportion [of single-family zoned land] is more than 70%. Seattle’s (WA) estimated share is more than 80%, and San Jose’s (CA) approaches 90%. In the prosperous suburbs of urban areas, moreover, R1 approaches ubiquity.” See *id.*

12. See *infra* Section III.A. See also DAVID L. CALLIES ET AL., *LAND USE CASES AND MATERIALS* 628–634 (8th ed. 2021), (discussing the interaction between single family homes and the regulations of nontraditional living arrangements); Dan Kois, *The Nimby's in My Backyard*, SLATE (May 15, 2023, 5:54 AM), <https://bit.ly/44v6zj5>; David Garrick, *Higher density, more SROs and a controversial new state law: What's in San Diego's sweeping new housing proposal*, SAN DIEGO UNION-TRIB (May 17, 2023), <https://bit.ly/3Oz0Y4q>; and Phillip Molnar & Emily Alverenga, *Will Senate Bill 10 destroy San Diego's single-family neighborhoods? Experts aren't so sure*, SAN DIEGO UNION-TRIB (May 18, 2023), <https://bit.ly/3Oz0FGO> (providing examples of the issues raised by conflicts between single-family use and other uses, particularly when it comes to multi-family use).

13. See *infra* Part II.

14. See *infra* Part III.

In Part IV, this Article describes the significant changes over the past decade regarding ownership and investment patterns associated with single-family homes.¹⁵ In the past decade, the market has diversified along five key dimensions: nature of initial title acquisition and ownership, initial players and acquirers, secondary acquirers, main inventory, and occupancy modes. The most important consequence that this Article addresses is the ever-increasing view that single-family homes are short-term, income-producing capital rather than long-term, occupant-owned property interests.¹⁶ Lastly, Part IV explains and compares the key features of this new model to traditional single-family ownership.¹⁷

In Part V, this Article argues three reasons why institutional capitalization will likely put significant pressure on the logic and operation of zoning and private residential restrictive covenants.¹⁸ First, institutional capitalization has the potential to significantly mitigate patterns of single-family favoritism that have long dominated zoning law in several possible ways. There are several ways in which this could happen.¹⁹ Whether the loss of favored status results in net overall welfare gains depends on the preservation of benefits for single-family residential living and innovative ideas regarding the challenges of affordable housing. However, there are limits on the extent to which changes in zoning law brought about by the mitigation of single-family favoritism can reverse long-standing patterns.

Second, as single-family homes take on more diverse ownership attributes, parties will question the utility of private residential restrictive covenants previously considered uncontroversial.²⁰ This Article argues that parties²¹ might be more willing to resist or limit certain types of restrictive covenants out of fear that the covenants will harm expected gains.²² As a result, using private residential restrictive covenants as private land use control mechanisms will be undermined, especially in newer, nontraditional single-family neighborhoods.

Finally, Part VI of this Article reflects on the broader implications of the preceding analysis.²³ One reflection is that the United States could be witnessing an unprecedented decoupling of single-family homes from their traditional roots because of institutional capitalization. Instead, single-family residential neighborhoods may become increasingly linked

15. *See infra* Part IV.

16. *See infra* Section IV.A.

17. *See infra* Section IV.B.

18. *See infra* Part V.

19. *See infra* Section V.A.

20. *See infra* Part V.

21. "Parties" could include a range of persons and entities, including traditional owners, non-traditional owners, investors, landlords, and tenants.

22. *See* Section V.B.

23. *See infra* Part VI.

to ownership rooted in possession. The shift to possession-based ownership could have profound effects that analysts and policymakers must anticipate.

Another reflection is that the trend toward institutional capitalization will continue to raise challenges in landlord-tenant law and policy.²⁴ More specifically, challenges will arise because institutional owners have not embraced the legal realities associated with their ownership status.²⁵ In legal form and substance, these owners are landlords, but they often fail to grasp the duties and obligations that come with that status.²⁶ Single-family home renters may then be left without adequate protections for property defects and other rental issues. As a result, reforms are necessary to ensure more comprehensive protection for this new generation of landlords and tenants.

Part VI of this Article also reflects on the notion that institutional capitalization of the single-family home reveals a trend towards further disaggregation of ownership rights and interests.²⁷ Intensified disaggregation has animated many specific property interests over the last 20 years but has only recently begun to penetrate single-family homes on a large scale.²⁸ This Article is the first to systematically link the costs and benefits of disaggregation to the legal dynamics of zoning and covenants. While this Article builds on previous scholarship by reconnecting conventional narratives about single-family ownership to zoning and covenant law, it is unique in three ways. First, this Article describes and analyzes the changes in how single-family neighborhoods are developed and how single-family homes are owned and transferred. Second, it explains how these changes are likely to alter crucial aspects of law and policy surrounding zoning and covenants. Finally, it situates the transformation to institutional capitalization in the broader context of contemporary property theory.

II. CONVENTIONAL ACCOUNTS OF THE BENEFITS AND BURDENS OF SINGLE-FAMILY RESIDENTIAL LIVING

Did single-family residential living become popular in the United States because the law favored it, or did the law favor it because it became popular? The answer to this question is difficult to determine with certainty because law and markets interact in complex and dynamic ways. Even though there may not be a clear answer, two points can be discerned: (1) single-family residential neighborhoods are associated with several

24. *See infra* Part VI.

25. *See infra* Part VI.

26. *See infra* Part VI.

27. *See infra* Part VI.

28. *See infra* Part VI.

perceived benefits and burdens, and (2) municipal zoning laws and private residential restrictive covenants rest on the assumption that the benefits outweigh the burdens.²⁹

A. Perceived Benefits of Single-Family Residential Living

1. Long-Term Owner-Occupancy

The theory and logic of single-family living are tied to the perceived benefits of long-term owner-occupancy. The perceived benefits include greater potential for residential stability and engagement with the community by the true owner.³⁰ Continual owner-occupancy can facilitate the formation and execution of long-term planning for residential

29. Legal scholars have discussed the advantages and disadvantages of zoning writ large. See MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* 135–155 (2008); Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 762–770 (2020). Although this work has some parallels to this Article, it also differs to the extent that this Article focuses on the perceived advantages and disadvantages of single-family living (not just single-family zoning). Also, most legal scholars give brief attention to the benefits of single-family zoning and instead focus more heavily on the costs. For an example of a work that mentions benefits, see Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1616 (2021) (citing keeping home values high, limiting traffic, and limiting nuisances as benefits of exclusionary zoning). For examples of works that focus on costs, see Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395 (2021) (use rigidity over time); Sarah J. Adams-Schoen, *Dismantling Segregationist Land Use Controls*, 43 ZONING & PLAN. L. REPS. 1, 3–8 (2020) (racial and economic segregation). Scholars of architectural history and urban planning have provided an account of how land use planners approached their work with a bias toward single-family neighborhoods. See generally SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND USE REGULATION* 156–177 (2014). Urban planning scholars continue to debate the pros and cons of single-family zoning. For recent examples, see generally Lane Kendig, *Eliminating Existing Single-Family Zoning Is a Mistake*, 86 J. AM. PLAN. ASS'N 124 (2020); Manville et al., *supra* note 11; Jake Wegmann, *Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. AM. PLAN. ASS'N 113 (2020). However, these works (understandably) are not grounded in the logic and operation of specific legal doctrines. Moreover, this literature does not incorporate institutional capitalization and its possible implications for zoning and covenant law.

30. This presumption finds its most obvious expression in ongoing debates over the presence and operation of short-term rental companies, such as Airbnb, in single-family neighborhoods. Long-term residents express great frustration over the presence of short-term rentals in single-family neighborhoods and argue that their presence impairs single-family neighborhoods because long-term occupancy boosts residential stability in a way that short-term occupancy does not. See Haylie Logan, *San Diego Residents Continue to Debate Short-Term Rental Regulations*, MEDIA PROFESSIONAL, <http://bitly.ws/FwRB> (last visited Sept. 16, 2023) (quoting a resident, “[Short-term rentals] don’t belong in a single-family neighborhood . . .”); Joe Flynn, Opinion, *Short Term Rentals Aren’t Worth the Long-Term Harm*, VOICE OF SAN DIEGO (Oct. 5, 2017), <http://bitly.ws/FwSG> (expressing the view that short-term rentals in single-family neighborhoods undermine the objectives of single-family areas, including the tranquility and quality of life).

properties.³¹ Occupancy durability is an actual, physical presence on the property, namely, using the home for a wide range of residential activities. As a result, these activities encourage decisions that positively affect the value of single-family property, such as home repairs.³² Residents are then highly incentivized to continue positive behaviors with respect to the property.³³

The most common estate in single-family living—the fee simple absolute—is of unlimited duration,³⁴ but the advancement of long-term owner-occupancy is not directly apparent from a review of the case law and associated legal texts. Instead, a preference for long-term owner-occupancy is expressed mainly in lofty appeals to preserve the stability, residential character, and property value of single-family neighborhoods.³⁵ Further, courts have made no systematic attempt to link perceived benefits for individual property owners to advantages for society at large. Instead, there seems to be an assumption that the benefits of long-term owner occupancy for single-family owners can be extrapolated to overall societal gains.

2. Simplified Transactional Structure

Another example of a perceived benefit of single-family living is the relatively simplified way in which single-family homes can be bought and

31. For an example from popular media, see Chris Bibey, *Single-Family Homes vs. Attached-Unit Homes -Pros and Cons*, MONEY CRASHERS (Jan. 30, 2022), <http://bitly.ws/FwTD> (“If you’re looking to start or grow your family—or if you foresee a day when aging parents or grandparents may come to live with you—a single-family home may be your best option.”).

32. For related arguments in a different context, see Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, 33 (2017) (explaining the “standard economic argument” that perpetual land rights “incentivize property owners to invest in land to maximize its value over time”).

33. See George C. Galster, *Empirical Evidence on Cross-Tenure Differences in Home Maintenance and Conditions*, 59 LAND ECON. 107, 107–113 (1983), <https://bit.ly/3KCr4T1> (citing numerous studies showing that “owners occupied higher quality dwellings than renters, and that a major reason for this difference was the superior investments in home maintenance undertaken by owner-occupants” and concluding that “owner-occupied dwellings will evidence superior physical conditions compared to the renter-occupied one” and a greater probability of maintenance at a certain price level); National Association of Realtors, *Social Benefits of Homeownership and Stable Housing* (Apr. 2012), <https://bit.ly/3PxX6Tm> (citing a study showing that homeowners have a financial interest in ensuring that their unit is well maintained and repaired while mobile households may ignore damage).

34. See *DUKEMINIER ET AL.*, *supra* note 2, at 596 (noting that the usual deed for most real estate transactions conveys an estate “to the use of the grantee and her heirs and assigns forever”).

35. See Edward H. Ziegler, Jr., *The Twilight of Single-Family Zoning*, 3 UCLA J. ENV'T L. & POL'Y 161, 171 (1983) (noting that courts that favor modern single-family zoning rely on the rationale that single-family “zoning protects the character of the area and thereby serves to maintain property values”).

sold. Traditionally, the buying and selling of most single-family homes reflected a simplified transactional structure. The transaction usually involves only a few main parties: the buyer, the seller, the bank, and the title company. In a typical transaction, the parties first negotiate a land sale contract. During this stage, the contract is executory, and the parties address and resolve various contingencies. Once the contingencies are resolved, the home is sold, and a deed is delivered to the buyer.³⁶ A mortgage or other financing tool will be used if needed.³⁷ As legal economists would predict, the law has reduced the transaction costs associated with buying and selling as the demand for housing has grown.³⁸ With respect to the sale from the developer to the buyer, large single-family subdivisions and planned communities promote efficient alienability.³⁹ Other efficiency gains associated with large single-family subdivisions include economies of scale and risk/benefit spreading.⁴⁰ Although no scholar has yet made an empirical case for a direct link between low transactions costs and the ascendancy of single-family living, it is possible that the small number of players, standard contracts, and similarity of transactions have helped make acquiring single-family property attractive for buyers and sellers.

3. Owner Autonomy

Relative to most multi-family dwellings, single-family living provides the reality of owner autonomy.⁴¹ Single-family homes tend to facilitate personal privacy and offer the owner relatively more control over their property compared to many multi-family dwellings.⁴² Political and legal rhetoric surrounding single-family homeownership has strong appeals to individual control over the owner's life and the advancement of

36. See DUKEMINIER ET AL., *supra* note 2, at 619–622.

37. See *id.* at 553–54. Certainly, external real estate market dynamics and the strategies families use to buy and sell homes have grown increasingly more complex as the supply of homes has declined. Nonetheless, the basic documents and technical steps for most single-family home transactions have remained relatively unchanged.

38. See Richard A. Epstein, *Covenants and Constitutions*, 73 Cornell L. Rev. 906, 907 (1988) (positing that the law will be expected to reduce transaction costs as the demand for housing increases).

39. See *id.* at 916 (explaining the reductions in transaction costs associated with standard form contracts used in large subdivisions).

40. See *id.* 914–916 (explaining how parties to a common building plan can use community covenants to reduce transaction costs and spread benefits).

41. See Alanna Schubach, *Amid the Covid Crisis, Single-Family Homes May Be the Smart Investment* (May 29, 2020), <https://bit.ly/3PqCUM5> (explaining the greater autonomy provided by the single-family home).

42. See Bibey, *supra* note 31 (citing no shared walls or floors, the presence of front yards, attic space, back yards, garage space, basement space, storage space, room for pets, etc.).

their personal freedom.⁴³ Traditionally, ownership of a single-family home was thought to bring with it a “bundle of rights,” including, perhaps most importantly, the right to control and the right to exclude.⁴⁴ Even the label “single-family” connotes individualistic and exclusionary advantages.

In the modern era, single-family residential neighborhoods often embody the idea of “neighborliness.”⁴⁵ Although single-family residential neighborhoods do not always facilitate formal and informal interactions better than other types of neighborhoods, early advocates of single-family homes touted the neighborhoods as teaching civic duty and responsibility.⁴⁶ Additionally, single-family residential neighborhoods often have mechanisms that facilitate cooperation and problem-solving, including community groups, Homeowners’ Associations, planning groups, neighborhood “watch groups,” and other associations.⁴⁷ These neighborhoods illustrate the interplay between autonomy and community in another way: through litigation between and among homeowners in the community. For example, residents enforcing the community’s land use rules that other neighbors believe unduly restrict the free use of their property has resulted in a significant amount of litigation.⁴⁸

43. See *infra* Section III.A; see also HIRT, *supra* note 29, at 175 (noting Herbert Hoover’s exhortation about the superiority of the single-family home in terms of the home being one’s castle); Sonia A. Hirt, *Privileging the Private Home: A Case of Persuasive Storytelling in Early Twentieth-Century Professional Discourses*, 11 J. URBANISM 277, 277 (2018) (“To this very day, the private home is considered a constitutive element of the ‘American Dream.’”); Jensen Young & Sophie Collongette, *Gainesville commissioners approve elimination of single-family zoning*, WUFT NEWS (Oct. 18, 2022), <https://bit.ly/3Wx74WS> (noting that citizens opposed to the elimination of single-family zoning viewed it as a threat to their ability to “build their home and livelihood based on the American Dream”).

44. See SIMON WINCHESTER, *LAND: HOW THE HUNGER FOR OWNERSHIP SHAPED THE MODERN WORLD* 215 (2021) (noting that “[o]ne who acquires land gets to enjoy the legally famed Bundle of Rights: the right of possession, the right of control, the right of enjoyment, the right of disposition—and, most relevant here, the right of exclusion”); see also EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* 1 (7th ed. 2017) (noting that most property theorists think of ownership of property as a bundle of rights). For a specific argument connecting ideas about the single-family concept to strong versions of property rights, see Randall O’Toole, *The Case for Single-Family Neighborhoods* THE ANTIPLANNER (Oct. 15, 2019), at 5, <https://bit.ly/3q9R1C6> (“[M]ost consider the single-family nature of their neighborhood to be a property right itself”). For the opposite view, see Anthony Sanders, *No Taking: Why the Abolition of Single-Family Zoning Doesn’t Disturb Your Bundle of Sticks*, INST. FOR JUST. (June 22, 2020), <https://bit.ly/43731D8>.

45. See Manville et al., *supra* note 11, at 109 (noting the argument that “[d]etached single-family neighborhoods generate a special sort of social life”).

46. See Hirt, *supra* note 43, at 290.

47. See *supra* Section III.B.

48. See, e.g., *O’Buck v. Cottonwood Vill. Condo. Ass’n*, 750 P.2d 813 (Alaska 1988); *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275 (Cal. 1994); *Liebler v. Point Loma Tennis Club*, 47 Cal. Rptr. 2d 783 (Cal. Ct. App. 1995); *Villa De Las Palmas Homeowners Ass’n v. Terifaj*, 121 Cal. Rptr. 2d 780 (Cal. Ct. App. 2002); *Garden Lakes Cmty. Ass’n v. Madigan*, 62 P.3d 983 (Ariz. Ct. App. 2003).

4. An Alternative to Geographic and Architectural Density

Single-family neighborhoods are perceived as beneficial because they provide a residential alternative to geographic and architectural density.⁴⁹ Geographic density involves locating residential neighborhoods close together, and architectural density situates each residential unit or structure in tight proximity. Geographic features of single-family residential living contributing to low density include standardized lot sizes and configurations, uniform spacing between lots, and setback lines.⁵⁰ Natural and man-made barriers such as planned streets, sidewalks, fences, hills, and canyons also provide space and separation. Low-density architectural details for single-family homes include height limits, standard home sizes and designs, and reasonable limitations on home additions that might impair privacy and/or views.⁵¹ Proponents of single-family living credit low-density structures with reduced congestion, lower crime rates, enhanced privacy, and even affordable housing.⁵² Although early proponents of single-family living touted its superior health effects, recent evidence casts doubt.⁵³ Overall, the perceived benefit of low-

49. Early touting for the low-density living associated with many single-family homes relied on the idea that such homes provided both superior health effects and also more favorable conditions for raising children and promoting family values. *See* HIRT, *supra* note 29, at 175.

50. Setback lines require homes to be “set back” a certain distance from public sidewalks, streets, and neighboring homes. *See* GALT, CAL., MUN. CODE § 18.16.020(C) (2022), <https://bit.ly/3qf55ub>. For example, one code provides as follows:

The R1A zoning district provides a [low-density], residential environment. This zoning district is characterized by large residential lots (minimum ten thousand (10,000) square feet) designed to promote the development of single-family dwellings at a low suburban density with ample open space and separation between residences. The maximum allowable residential density ranges from zero (0) to six (6) dwelling units per acre. The R1A zoning district is consistent with the [low-density] land use designation of the General Plan.

Id.; *see also* *Lohmeyer v. Bower*, 227 P.2d 102, 104 (Kan. 1951) (litigation involving a single-family neighborhood with a zoning ordinance requiring three-foot side and rear lot line limits); *see generally* William A. Fischel, *Zoning and Land Use Regul.*, 2 ENCYCLOPEDIA OF L. & ECON. 403 (Boudewijn Bouckaert & Gerrit De Geest eds., 1999) (noting that zoning controls minimum area per lot, uses, building height, unit amounts, street setback length, and parking, and that single family homes are protected).

51. *See Lohmeyer*, 227 P.2d at 104 (referring to an architectural requirement that only two-story homes could exist in a single-family, residential subdivision).

52. *See* O’Toole, *supra* note 44 (citing all four benefits).

53. *See, e.g.*, Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFFAIRS 3–4 (2018), <https://bit.ly/3OlHn9k> (“Living in close proximity to high-volume roads, in contrast, is a danger to health and can result in increased rates of respiratory diseases such as asthma and bronchitis and increased use of health care.”); According to Lorenzo Capasso and Daniela D’Alessandro:

[A]n urban morphology with high density seems to facilitate healthier choices, at least in terms of attitude towards physical activity, than urban forms characterized by scattered settlements and low residential density. The presence of land-use mix, frequent road intersections between residential and commercial

density geographic living and architecture enhanced the popularity of single-family residential living.

B. *Perceived Burdens*

Single-family living has not been perceived as a total positive. To the contrary, many observers have viewed it as doing more harm than good.

1. Use Rigidity

Single-family residential neighborhoods tend to produce rigidity in land use over time.⁵⁴ The very features that make these neighborhoods attractive also make them difficult to transform into other uses of land that might be more socially optimal. First, the sheer size and scale of these neighborhoods often leaves them with a large geographic footprint.⁵⁵ Second, long-term owner-occupants are more likely to object when new uses are proposed in or near these communities.⁵⁶ The community collaboration within single-family neighborhoods often promotes community mobilization against changes that would benefit society.⁵⁷ Moreover, the geographic and architectural desirability of single-family

areas, etc., increase walkability, thereby facilitating direct pedestrian paths between various destinations. At the same time, density can increase pollution, if neighborhoods are not well designed or managed.

Lorenzo Capasso & Daniela D'Alessandro, *Housing and Health: Here We Go Again*, 18(22) INT'L J. ENV'T RSCH. & PUB. HEALTH 12060, at 3 (2021); Zainab Ibrahim Abass et al., *Socializing in the Suburbs: Relationships Between Neighbourhood Design and Social Interaction in Low-Density Housing Contexts*, 25 J. URB. DESIGN 108, 128 (2020) (“[T]he study generally supports the precepts of New Urbanism, showing that neighborhood contentment, perceptions of socializing, accessibility, numbers of people known, and frequencies of interaction are higher in higher-density, walkable, permeable, gridded-street neighbourhoods that are well connected to public transport and have good provision of greenery and open space.”); BILLIE GILES-CORTI ET AL., NAT'L HEART FOUND. OF AUSTL., *LOW DEN: IMPACTS ON PHYSICAL ACTIVITY AND ASSOCIATED HEALTH OUTCOMES* 24 (2014), <https://bit.ly/3owr2Er> (asserting that residents of higher density neighborhoods do more walking than those living in low-density neighborhoods).

54. See Ellickson, *The Zoning Straitjacket*, *supra* note 29.

55. See Alexander Von Hoffman, *Single-Family Zoning: Can History Be Reversed?*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY (Oct. 5, 2021), <https://bit.ly/3r6sxdW> (explaining that single-family suburbs “commonly imposed large minimum house-lot sizes”).

56. For example:

Homeowners are interested in maximizing their own wealth and accordingly are likely to oppose rezoning requests that would increase their tax burdens, decrease the amenities (including community character) they have grown used to, or bring new housing to the community (because that housing will compete with their own homes in the sale and rental markets).

ROBERT C. ELLICKSON & VICKI L. BEEN., *LAND USE CONTROLS* 344 (2d ed. 2000).

57. See DUKEMINIER ET AL., *supra* note 2, at 933 (explaining that in a typical zoning dispute, on one side are homeowners who want to keep anything but single-family homes out of their neighborhoods with the goal of protecting property values even though the larger public interest might call for a daycare center, apartments, or “whatever”).

neighborhoods enhances reliance interests, making it difficult to implement significant adjustments and reforms to land use.⁵⁸

2. Race and Income Segregation

Single-family residential neighborhoods have been, and continue to be, highly correlated to race and class segregation.⁵⁹ The growth of single-family residential neighborhoods in suburban areas is directly traceable to widespread patterns of racial segregation in the post-World War II era.⁶⁰ Although data linking single-family home ownership itself to race is difficult to find, clear disparities exist between white and black households for homeownership generally.⁶¹ Economically, single-family residential neighborhoods tend to be more expensive than other types of housing, and the associated costs of ownership—for things like repairs, maintenance, property taxes, and HOA dues—make these neighborhoods cost-prohibitive for individuals and families at the lower end of the income scale.⁶²

3. Environmental Impact

Single-family residential neighborhoods are coming under increasing criticism for their negative effects on the environment.⁶³ Neighborhoods with large numbers of detached, private homes require substantial amounts of land, contributing to geographic sprawl, which is linked to pollution and associated negative health effects, climate change, and other ills.⁶⁴

58. *See id.* (describing homeowner mobilization against new projects if the projects would decrease the amenities that residents have grown used to).

59. *See* Adams-Schoen, *supra* note 29, at 3–8; *see also* Manville et al., *supra* note 11, at 106 (noting that single-family zoning’s origins are “[s]tain[ed] by explicitly racist motivations”); *but see* WILLIAM A. FISCHER, *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION* 280–282 (2015) (challenging the idea that suburban communities are always hostile to social and economic diversity in their borders).

60. *See supra* Section IV.A.

61. *See* Brandi Snowden & Nadia Evangelou, *Racial Disparities in Homeownership Rates*, NAT’L ASS’N REALTORS (Mar. 3, 2022), <https://bit.ly/45zeaxX> (conveying that overall data reflects 43.3% Black home ownership compared to 72.1% for whites, 51.1% for Hispanics, and 61.7% for Asians). When Black Americans own homes, it appears that ownership rates for single-family homes are comparable to ownership rates of other races. *See* U.S. CENSUS BUREAU, CB22-170, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP (Third Quarter, 2023), <https://bit.ly/44xePz2>.

62. *See* Michael Hyman, *Single-Family Home Prices Show Double-Digit Increase in 70% of 185 Metro Areas in 2022 Q1*, NAT’L ASS’N OF REALTORS (May 9, 2022), <https://bit.ly/3Ca63dK> (showing qualifying income based on sale price of existing single-family homes for metro areas by region).

63. *See* Wegmann, *supra* note 29, at 115 (noting that single-family zoning has negative effects for the environment, including auto use and raising auto emissions).

64. *See New Research on Population, Suburban Sprawl and Smart Growth*, SIERRA CLUB, <https://bit.ly/3s9St8E> (last visited Nov. 28, 2022) (claiming suburban sprawl “destroys green space, increases traffic and air pollution, crowds schools and drives up

Concerningly, the perceived benefits associated with single-family residential neighborhoods may prevent land use reforms that could reduce these deleterious effects.

4. Economic and Political Inequality

Single-family residential neighborhoods tend to exacerbate existing patterns of economic and political inequality.⁶⁵ Residents of single-family neighborhoods enjoy higher property values and benefit from the redistribution of resources, thereby taking away resources from other neighborhoods.⁶⁶ Also, single-family neighborhood residency strongly correlates with better educational access, creating a deeper disparity with lower income neighborhoods with less access to quality education.⁶⁷

taxes”); *see also* Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 303 (2000) (citing sources for claim that sprawl has many negative societal effects).

65. *See* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 115 (2017); *see also* William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 330 (2004) (suggesting that the “facially neutral expedient of insisting on large lots and single-family homes in residential districts” reduced contact between people of different incomes); *see also* Wegmann, *supra* note 29, at 115 (noting that single-family zoning “persists as perhaps the most potent link in a ‘chain of exclusion’ of people of color and low incomes”). For related data, *see* Katherine Schaeffer, *Key facts about housing affordability in the U.S.*, PEW RSCH. CTR. (Mar. 23, 2022), <https://bit.ly/3EEIV8L> (data showing that renters skew toward the lower end of the economic scale); *see also* Drew DeSilver, *As national eviction ban expires, a look at who rents and who owns in the U.S.*, PEW RSCH.. CTR. (Aug. 2, 2021), <https://bit.ly/43h7uTz>.

66. For example,

R1 delivers large and undeniable benefits to some people who own property
 R1 inflates home values and protects the physical character of neighborhoods
 Because homeowners as a group are richer and Whiter than renters, policies that increase housing prices redistribute resources upward, increasing homeowner wealth, reducing renter real incomes, and exacerbating racial wealth gaps.

Manville et al., *supra* note 11, at 107–08.

67. As one court states,

The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole. The establishment of single family residence districts offers inducements not only to the wealthy but to those of moderate means to own their own homes. With ownership comes stability, the welding together of family ties and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country.

Miller v. Board of Public Works, 195 Cal. 477, 493; *see also* Vicki Been, *Comment on Professor Jerry Frug’s “The Geography of Community,”* 48 STAN. L. REV. 1109, 1110 (1996) (noting that colleagues moved out of central cities in order to take advantage of suburban public schools and avoid paying private school tuition); Jeremy Gabe et al., *The Relationship Between School Quality and U.S. Multi-family Housing Rents*, 64 J. REAL

On the political front, residents in single-family neighborhoods tend to mobilize quickly and effectively against policies and initiatives they perceive as injurious to their quality of life.⁶⁸ This tendency originates from the movement, Not In My Backyard (“NIMBY”), a catch-all label describing many single-family homeowners who oppose developments that change the look and feel of their neighborhoods.⁶⁹ A recent vote to eliminate single-family zoning in Gainesville, Florida brought out passionate public protest from local homeowners.⁷⁰ In connection to the economic inequality, residents of single-family residential neighborhoods often have relatively high levels of education in addition to the time, ability, and resources to maximize their economic and political leverage.⁷¹ The economic and political leverage concentrated in single-family residential neighborhoods tends to exacerbate the burdens previously described.

III. CONVENTIONAL ACCOUNTS OF THE BENEFITS OF SINGLE-FAMILY RESIDENTIAL LAND USE IN MUNICIPAL ZONING AND PRIVATE RESIDENTIAL RESTRICTIVE COVENANTS

The norms of single-family residential living are embodied in two specific areas of land use law: municipal zoning and private residential

EST. FIN. & ECON. 615, 639–42 (2021) (“In this context, the evidence suggests a hypothesis that renters are likely to shift to home ownership if they wish to pursue higher quality secondary schools . . . renters appear to capitalize school quality at a magnitude less than single family homeowners.”); Geoffrey K. Turnbull & Minrong Zheng, *A Meta-Analysis of School Quality Capitalization in U.S. House Prices*, 49 REAL ESTATE ECON. 1120, 1147 (2021) (explaining research indicating that neighborhood effects are largely correlated with school quality effects); REPUBLICAN JOINT ECON. COMM., ZONED OUT: HOW SCHOOL AND RESIDENTIAL ZONING LIMIT EDUCATIONAL OPPORTUNITY, SOC. CAP. PROJECT REP. NO. 6-19, at 2–3 (2019), <https://bit.ly/43knyE8> (citing Thomas J. Kane et al., *School Quality, Neighborhoods and Housing Prices: The Impacts of School Desegregation*, NAT’L BUREAU OF ECON. RSCH., 1 (2005), <https://bit.ly/3OL79V0>; and David N. Figlio & Maurice E. Lucas, *What’s in a Grade?: School Report Cards and Housing Prices*, NAT’L BUREAU OF ECON. RSCH., 1 (2000), <https://bit.ly/45L0zUD>) (“Research finds housing characteristics vary systematically across school zones, with larger houses and single family homes more common within high performing school boundaries, and larger housing cost gaps exist across high and low quality schools in areas with more restrictive residential zoning.”).

68. See Conor Dougherty, *Twilight of the NIMBY*, N.Y. TIMES (June 5, 2022), <https://bit.ly/3rwWHXL>.

69. See *id.*

70. See Young & Collonette, *supra* note 43. Many Black homeowners who have owned their own homes for generations expressed fear that the elimination of single-family zoning would harm their ability to amass and transfer wealth to future generations. Other residents embraced the change as necessary to promote housing affordability and better protect the environment.

71. See Dougherty, *supra* note 68 (“Many of the most active members [of a NIMBY group] are from wealthy enclaves . . .”); see generally WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001).

restrictive covenants. These norms provide much of the energy fueling the legitimacy and durability of these land use doctrines.⁷² However, changes in ownership and investment patterns associated with single-family homes are beginning to undermine them.⁷³

A. Municipal Zoning

Government policies and judicial decisions have continuously promoted the virtues of segregation in land use, the supremacy of single-family residential living, the preference for low-density building, and the implementation of comprehensive planning. In his meticulous work, *The Color of Law*, historian, Richard Rothstein, documents the birth and fruition of the federal government's "Own Your Own Home" campaign in 1917.⁷⁴ The combined effort between the government and the private sector encouraged white families—and *only* white families—to reject multi-family housing and, instead, buy detached, single-family homes.⁷⁵ The campaign was a direct and sustained appeal to capitalism and white supremacy, indicating that the federal government's full support was behind single-family neighborhoods, single-family zoning, and residential segregation.⁷⁶ As Rothstein notes, the campaign stalled in the wake of the Great Depression and, thereafter, needed a boost.⁷⁷ This boost took the form of government-backed loans and other subsidies reserved almost exclusively for white families.⁷⁸

In 1926, the United States Supreme Court, in *Village of Euclid v. Ambler Realty Company*, legally cemented preferred treatment for single-family land use.⁷⁹ In *Euclid*, the Court determined that municipal zoning restrictions were constitutionally valid.⁸⁰ The Court reasoned that broad zoning restrictions were necessary to protect the single-family mode of living.⁸¹ The Court went so far as to categorize "apartment house[s] [as] mere parasite[s], constructed in order to take advantage of open spaces and attractive surroundings created by the residential character of the district."⁸²

72. See *infra* Section III.A.

73. See *infra* Parts IV. and V.

74. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 59–63 (2017).

75. See *id.* at 63–64.

76. See *id.* at 63–67.

77. See *id.* at 63.

78. See *id.* at 63–67.

79. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). For more on *Euclid* and especially its aftermath with respect to insulating single-family residences from perceived threats, see MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA* 138–143 (2008).

80. See *Euclid*, 272 U.S. at 395.

81. See *id.* at 394–95.

82. *Id.* at 394.

Once *Euclid* gave zoning constitutional legitimacy, comprehensive municipal zoning spread widely throughout the United States.⁸³ These zoning practices ran concurrently with the rapid growth of all-white suburbs after World War II. Racial prejudice, the relatively cheap cost of land, and other factors caused white families to migrate from cities and rural areas to the suburbs.⁸⁴ The migration of white families was intimately connected to the norms of single-family living, including long-term owner-occupancy, simplified transactions, autonomy, and low density.⁸⁵ Additionally, government-backed loans provided to white families and widespread acceptance of both *de facto* and *de jure* discrimination contributed to the growth of single-family living and its resulting zoning bias.⁸⁶ Single-family residential zoning eventually dwarfed other types of residential land use allocation.⁸⁷ The justifications for setting aside disproportionately large areas of land for detached, single-family homes

83. See Allison Shertzer et al., *Zoning and the Economic Geography of Cities*, 105 J. URB. ECON. 20, 21 (2018) (noting that zoning spread rapidly between 1916 and 1936 and was a response to rapid, unplanned growth following large-scale immigration and industrialization); see also Andrew Cappel, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 YALE L.J. 617, 634 (1991) (noting that New Haven, Connecticut passed its first zoning ordinance in 1926 and that interest in zoning appeared to be the result of worries about rapid urban growth and density issues like traffic, parking, and congestion).

84. See Mary Jo Wiggins, *Race, Class and Suburbia: The Modern Black Suburb as a Race-Making Situation*, 35 U. MICH. J. L. REFORM 635, 759 (2002) (tracing the sociological and market forces that led to the rapid growth of all-White suburbs after World War II).

85. See *supra* Part II.

86. See ROTHSTEIN, *supra* note 74, at 63–75 (documenting the FHA and VA loan policies and programs that excluded Black people and predominantly Black areas from participating, encouraged white people and white areas to do so, and noting racially exclusive zoning ordinances promoted by the federal government).

87. See Manville et al., *supra* note 11, at 107; 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://bit.ly/3qrhcUR> (noting that single-family zoning is “practically gospel in America, embraced by homeowners and local governments to protect neighborhoods of tidy houses from denser development nearby”). See, e.g., PINETOP-LAKESIDE, ARIZ., TOWN CODE SINGLE-FAMILY RESIDENTIAL ZONING DISTRICT ch. 17.32 (2022), <https://bit.ly/43E839X>; NEWPORT BEACH, CAL., MUN. CODE MUNICIPALITIES ch. 20.18 (2022), <https://bit.ly/3oLmx9h>; MIAMI-DADE CNTY., FLA., CODE OF ORDINANCES OFFENSES AND MISCELLANEOUS PROVISIONS ch. 21, art. XIV (2022), <https://bit.ly/3MPaMXq>; LANSING, MICH., CODE OF ORDINANCES R-1 SUBURBAN RESIDENTIAL ch. 1244.05 (2022), <https://bit.ly/43Kymf4>; FIRTH, NEB., MUN. CODE ZONING REGULATIONS ch. 9 (2020), <https://bit.ly/3Jq539A>; FAYETTEVILLE, N.C., MUN. CODE pt. II, UNIFIED DEVELOPMENT ORDINANCE ch. 30, art. 30-3.D (2021), <https://bit.ly/42lyYGC>; NORMAN, OKLA., CODE R-1, SINGLE FAMILY DWELLING DISTRICT art. XI, § 421.1 (2020), <https://bit.ly/3WNdZex>; TWP. OF LANCASTER, PA., CODE OF ORDINANCES INTENDED PURPOSE ch. 280, art. IV, §§ 280-401—280-406 (2012), <https://bit.ly/43vBBGY>; AUSTIN, TEX., CODE SINGLE-FAMILY RESIDENCE LARGE LOT DISTRICT REGULATIONS § 25-2-553 (2022), <https://bit.ly/3OQ5xsY>; NORFOLK, VA., ZONING ORDINANCE SINGLE FAMILY § 3.2.3 (2022), <https://bit.ly/3ML4zvx>.

mirrored claims regarding the benefits of single-family residential living.⁸⁸ Moreover, proponents used single-family residential zoning to establish and entrench race and class segregation and other types of discriminatory policies.⁸⁹ When establishing new neighborhoods, the burdens of single-family land use were either minimized or entirely ignored.⁹⁰ As a result, single-family zoning came to dominate residential land use patterns in every area of the country that had zoning laws.⁹¹

Single-family zoning gathered even more dominance when the standard of judicial review for zoning ordinances changed from heightened scrutiny to rational basis.⁹² To the dismay of some Americans, and the cheers of others, near-uniform favoritism for single-family neighborhoods and single-family zoning practices persists.⁹³ However, several jurisdictions have taken action to weaken its dominance. For example, Oregon enacted a law requiring certain cities to allow multi-family dwellings to be built on land set aside for single-family use.⁹⁴ In addition, California recently enacted legislation requiring cities to approve multi-family units under certain conditions.⁹⁵ Other jurisdictions,

88. See *supra* Section II.A; see also Fischel, *supra* note 65, at 323 (citing Raphael Fischler, *Health, Safety, and the General Welfare—Markets, Politics, and Social Science in Early Land-Use Regulation and Community Design*, 24:6 J. OF URB. HIST., 675–719 (1998) and quoting many contemporary sources to show that protection of single-family homes was a main goal of jurists and commentators who endorsed zoning from 1910–1930); see also Ziegler, *supra* note 35, at 171 (noting the justifications many courts used after *Euclid* to enshrine single-family zoning, including density and protection of neighborhood character). It is important to note that some judicial opinions in the early part of the twentieth century went in the opposite direction. See Francine Romero, *How State Judiciaries Battled Exclusionary Zoning*, PLANNING MAG. (July 25, 2002), <https://bit.ly/3N8RAFm> (noting that Supreme Court decisions prior to 1926 criticized the view that single-family neighborhoods should receive special protection and considered such protections unconstitutional).

89. See Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and The Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1429–1447 (2015) (analyzing the constitutionality of local ordinances that restrict occupancy in residential areas to households whose members are all related to one another by blood, marriage, or adoption).

90. Some land use experts questioned the need to aggressively separate residential uses from commercial uses, but those experts were in the minority. See HIRT, *supra* note 29, at 161.

91. See sources cited, *supra* note 71; see also CALLIES ET AL., *supra* note 12 (“Much of the residential land in major cities remains zoned for single-family residences.”).

92. See *Chong Yim v. City of Seattle*, 451 P.3d 675, 691 (Wash. 2019) (rejecting heightened scrutiny to laws regulating land use).

93. See Dougherty, *supra* note 68.

94. See 2019 Or. Laws 639; see also Laurel Wamsely, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), <https://bit.ly/3MINFxG>. For an analysis of the law and its implications, see Sarah Adams-Schoen & Edward J. Sullivan, *Reforming Restrictive Residential Zoning: Lessons from an Early Adopter*, 30 J. AFFORDABLE HOUSING 161, 171–202 (2021).

95. See SB-9 (Cal. 2021). See also Andrew Dallas Kent, *The Fight for Local Land Use Control: With the State of California Clawing Back Previously Delegated Land Use Powers, How Might Cities and Residents Respond?*, 12–13 (2023) (unpublished paper on

including Minneapolis, Minnesota and Gainesville, Florida, have passed similar laws.⁹⁶ These reforms reveal an understanding among policymakers that substantial legal and economic subsidies for single-family zoning have detrimental effects. These effects include unduly impeding flexibility in land use, stifling affordability, and undermining equitable access to land ownership. Despite these developments, single-family favoritism continues to be the norm in zoning and broader public policy choices.⁹⁷

B. *Private Residential Restrictive Covenants*

Private residential restrictive covenants were developed for private landowners to achieve goals similar to those thought to be achievable through municipal zoning-nuisance control.⁹⁸ Also, these covenants were intended to reduce the perceived externalities associated with conflicting land uses.⁹⁹ Interestingly, the first serious efforts to create and enforce private residential restrictive covenants occurred in urban environments in nineteenth-century England to preserve open space for the recreational pursuits of affluent city-dwellers.¹⁰⁰ However, once English courts recognized the enforceability of private restrictive covenants against successive landowners, American landowners followed suit by deploying these covenants in many residential settings.¹⁰¹ The legal enforceability of private residential restrictive covenants played a significant role in the dominance of single-family residential living in the United States from the 1920s onward.¹⁰²

file with author) (describing purpose and operation of SB-9); Jon Healey & Matthew Ballinger, *What just happened with single-family zoning in California?*, L.A. TIMES (Sept. 17, 2021, 4:09 PM), <https://bit.ly/3WDMIRb>.

96. See, e.g., Young & Collongette, *supra* note 43. See also Theresa Clift, *Sacramento Moves On Eliminating Single-Family Housing Zones*, SACRAMENTO BEE, Jan. 19, 2021; Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), <https://bit.ly/43ehL2S>. It is interesting to observe that debates over the future of single-family zoning are taking place in states that trend conservative (Florida) and moderately liberal (Minnesota).

97. See David Garrick, *Messaging May Be Key on Trash Pickup Measure*, S.D. UNION-TRIBUNE, July 31, 2022, at A1, <https://bit.ly/44ScBdr> (noting debate on a law that exempts single-family homes from local trash pickup fees); see also Brian Potter, *How Building Codes Work in the US*, CONSTR. PHYSICS (July 29, 2022), <https://bit.ly/43fxXks>.

98. See JOHN R. NOLAN ET AL., *LAND USE AND SUSTAINABLE DEVELOPMENT LAW* 349 (9th ed. 2017) (observing that the aim of private land use controls was the creation of high quality residential neighborhoods and prescribing specific land use practices and uses).

99. See Fischel, *supra* note 65, at 323 (noting that covenants had been used to protect wealthy neighborhoods from commerce and apartments).

100. See *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848).

101. See JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 716–766 (3d. ed. 2015).

102. See Marc A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, 3 BERKELEY PLAN. J. 7, 8 (1986) (noting that through the use of

The link between private residential restrictive covenants and the ascendancy of single-family use is shown in the line of legal cases analyzing whether a single-family use restriction could apply even if the restriction was not explicitly contained in a purchaser's deed.¹⁰³ A typical case involved the owner of a large tract of residential land who divided the tract into many smaller lots. If single-family use was preferred, the owner would place a written restriction on many of the lots, limiting them to single-family use. The owner would also undertake other efforts, indicating an intent to develop the lots pursuant to a common scheme.¹⁰⁴ Usually, due to a mistake, there would be one lot in the subdivision that did not contain a restrictive covenant, thereby limiting the lot to single-family use. Inevitably, the purchaser of this lot would want to build a structure other than a single-family home, resulting in neighbors arguing the contested lot was subject to the same restriction as the others. The purchaser would then contend that the statute of frauds¹⁰⁵ prevented enforcement of the restriction because it was not written in the deed.

Traditionally, courts did not allow for the enforcement of a single-family use restriction unless it was explicitly in the deed.¹⁰⁶ Over time, however, many courts shifted their view, believing that as long as there was a common plan for uniform residential development, the restriction was enforceable.¹⁰⁷ Courts based their reasoning on third-party beneficiary doctrines and other legal theories.¹⁰⁸ Today, a majority of courts hold that

private deed restrictions, landowners and others proved the value of such restrictions for stability and predictability of "good residence neighborhoods").

103. The most famous case is *Sanborn v. McLean*, 206 N.W. 496, 498 (Mich. 1925) (holding that negative restrictions on land can be implied from a general plan for uniform, residential development).

104. See *NOLAN ET AL.*, *supra* note 98 (describing the process by which common interest communities were created through the subdivision of land and the insertion of covenants in each deed).

105. The English version of the Statute of Frauds was enacted in 1677, and it has been enshrined in American law in statutes and judicial decisions. See *DUKEMINIER ET AL.*, *supra* note 2, at 640. The statute requires transfers for the sale of land to be in writing.

106. See *Werner v. Graham*, 183 P. 945, 949 (Cal. 1919) (holding that no mutual equitable servitudes are created when in any single deed taken by itself there is nothing to indicate any intent to create reciprocal land rights).

107. See *JOHN G. SPRANKLING & RAYMOND R. COLLETTA*, *PROPERTY* 697 (5th ed. 2021) (citing cases holding that when a developer has shown a common plan to impose standard restrictions on a subdivision, all lots are subject to the restriction even if it does not appear in any deeds).

108. See, e.g., *Womack v. Dean*, 266 S.W.2d 540, 542 (Tex. Civ. App. 1954) (holding that there was a sufficient basis for the trial court's finding of fact that a general scheme existed for the building of residential houses on no less than one-acre and houses at a minimum price level of \$3500); *R & R Realty Co. v. Weinstein*, 422 P.2d 148, 161 (Ariz. Ct. App. 1966) (Grantor had in mind a comprehensive plan for a residential subdivision and thus, restrictions for a "first-class private family residence" were enforceable); *Snow v. Van Dam*, 197 N.E. 224, 226 (Mass. 1935) (A general plan can be used to show that neighbors in a residential subdivision were intended as beneficiaries and

single-family use restrictions can be implied from a general plan existing at the time of the initial development of the subdivision only if other deeds within the plan have the restriction recorded.¹⁰⁹ The judicial willingness to allow for the enforcement of implied single-family use restrictions, combined with white landowners' desire to enforce segregation through racially restrictive covenants, has been central to the popularity of single-family residential living, particularly after World War II.¹¹⁰

Many private residential restrictive covenants continue to derive their power and legitimacy from the norms of single-family living. The durability of single-family living depends on the availability and usefulness of covenants. These covenants often include obligations such as continuous on-site occupancy, which may prohibit rentals.¹¹¹ Covenants tend to provide strong dominion and control for the owner and specify community obligations for the land. Private restrictive residential covenants usually promote low-density building and uniform aesthetics.¹¹² Spurred by landowners and commentators, modern courts have steadily reduced technical barriers to enforcement, thereby making these covenants the primary way in which private landowners attempt to control uses of single-family homes and the general atmosphere of single-family neighborhoods.¹¹³

can enforce the covenant); *Steinmann v. Silverman*, 200 N.E.2d 192, 246 (N.Y. 1964) (holding a covenant not enforceable because no general plan for residential development); *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 314, 910–11 (Cal. 1996) (holding single-family use restrictions enforceable but only if contained in a recorded subdivision map). *See also* *McQuade v. Wilcox*, 183 N.W. 771, 774 (Mich. 1921) (holding that developers had constructive notice of a negative easement restricting homes to single-family residential with a minimum lot price because the deeds containing the restrictions were in the land record).

109. *See* *DUKEMINIER ET AL.*, *supra* note 2, at 863.

110. *See* *ROTHSTEIN*, *supra* note 74, at 78–85.

111. Such prohibitions are becoming increasingly vulnerable to legislative action that restrains the enforcement of such restrictions under certain circumstances. For example, California law no longer allows after-purchase rental restrictions unless the restriction prohibits short-term rentals. *See* CAL. CIV. CODE §§ 4740-41.

112. Examples of covenants that promote low-density building are height limits and setbacks. Uniformity is promoted through consistent exterior wall types and color schemes, limits on front and side additions, and guidelines for front-yard maintenance and landscaping. *See* *NOLAN ET AL.*, *supra* note 98.

113. *See* *Neponsit Prop. Owners' Ass'n. v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 798 (N.Y. 1938) (holding that a property owner's association could enforce a real covenant even without strict privity and without satisfying the traditional touch and concern test). As of 2023, the Neponsit Property Owners' Association still very much exists and touts the single-family feel of its community as one that promotes many of the perceived benefits of single-family living discussed earlier in this paper: low-density living, family-oriented residents, and the neighborly character of the community. *See* Neponsit Property Owners Association, <https://bit.ly/3pNXRwS> (last visited Sept. 9, 2023).

To be sure, modern courts have recognized the burdens associated with private restrictive covenants in the single-family residential context. Use rigidity, racial discrimination, and other concerns have led courts to develop doctrines preventing private restrictive covenants from negatively affecting residents.¹¹⁴ Legislatures have moved in a similar direction by outlawing unreasonable restrictions on solar power panels, brown lawns, rentals, and pets.¹¹⁵ These judicial and legislative decisions reflect a conclusion that particular residential restrictive covenants undermine other policy goals and unduly disrupt the equitable balance between the rights of current and future landowners.

IV. THE RISE OF INSTITUTIONAL CAPITALIZATION IN THE SINGLE-FAMILY HOME

Ownership and investment patterns associated with single-family homes have undergone a substantial transformation over the past decade. This transformation has shifted models of title acquisition, sale, and occupancy by institutions and is likely to be foundational and long-lasting.

A. Conditions Creating Institutional Capitalization

The social, legal, and economic developments previously described led to a market for single-family homes lacking the complexity and constant innovation of other property markets. That stagnation has changed; multiple forces are now at work to modernize the single-family home marketplace. First, many consumers, preferring to enjoy the benefits of occupying a single-family home without the costs associated with traditional ownership, are affirmatively choosing to rent rather than buy a single-family home.¹¹⁶ These renters can gain more space, privacy, and options for use and enjoyment than would come with a multi-family dwelling and simultaneously forgo financial responsibility for

114. See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that the enforcement of a racially restrictive covenant violates the Equal Protection Clause of the 14th Amendment). Covenants can be terminated by a court, by operation of law, or by abandonment, waiver, acquiescence, or a change in circumstances.

115. See, e.g., CAL. CIV. CODE § 4715(a) (2022) (“No governing documents shall prohibit the owner . . . from keeping at least one pet . . . subject to reasonable rule and regulations”); CAL. CIV. CODE § 4735(c) (2022) (an HOA cannot issue a fine or assessment on a homeowner for reducing or eliminating the watering of vegetation or lawns during a state or locally-declared drought emergency); CAL. CIV. CODE § 4741 (2022) (a condominium or stock cooperative association may not unreasonably restrict the rental or leasing of the owner’s unit); MASS. GEN. LAWS ch. 184, § 23C (2022) (“Any provision in an instrument relative to the ownership or use of real property which purports to forbid or unreasonably restrict the installation or use of a solar energy system . . . or the building of structures that facilitate the collection of solar energy shall be void.”).

116. See *Kamin*, *supra* note 8.

maintenance, improvements, repairs, and property taxes.¹¹⁷ In the wake of the economic disruptions and changing work habits resulting from the COVID-19 pandemic, more people are commonly forsaking long-term ownership of a single-family home.¹¹⁸

Another factor contributing to renting single-family homes is the severe lack of affordable housing in many parts of the country. Population growth, rising costs of construction, and outdated land use policies have reduced the supply of housing, even for the relatively small number of consumers who can afford traditional ownership.¹¹⁹ Affordability issues have kept traditional single-family homes out of reach for many Americans, stimulating demand for a more diverse set of rental options.¹²⁰ Unlike traditional ownership, renting a single-family home usually does not require a pristine credit rating, an outsized amount of upfront cash, or a mortgage.¹²¹

Investor behavior has also forced a shift toward renting single-family homes because investors, through various means, realized increased incentives to purchase single-family home properties. These incentives and resulting purchases by investors left inventory for would-be buyers but increased the supply of single-family rental units. After the Great Recession and the accompanying mortgage foreclosure crisis, large institutional investors were looking for newer asset classes in which to park their money.¹²² For example, one asset class—foreclosed single-family homes—was perceived to be relatively safe and profitable.¹²³ The safety and profitability led platform companies, real estate investment companies, and private equity firms to invest in the single-family home market on an unprecedented scale.¹²⁴ Because of the favorable tax

117. *See id.* (quoting one developer of built-to-rent homes as saying that “[y]ears prior to the pandemic, we found that consumers were drawn to a housing option that offers the best of both worlds: single-family living and no-hassle, maintenance-free leased living”).

118. *See id.*

119. *See* Holly Ober, *Housing scarcity: the Inland Empire’s natural barrier to economic growth*, U.C. RIVERSIDE NEWS (Nov. 6, 2019), <https://bit.ly/3OqYt5P>.

120. *See* Jeff Rohde, *9 key single-family rental statistics to know for 2022* (Jan. 11, 2022), <https://bit.ly/44yDfZ0> (“Young, modest-income families with children are more likely to live in single-family rentals because of the . . . relative affordability compared to new single-family homes for sale.”).

121. *See* Kamin, *supra* note 8 (citing favorable transaction cost comparisons between renting and buying for consumers who prefer not to commit to one place for a long time).

122. A majority of the institutional investments in single-family rentals came in areas hit hardest by the 2008 foreclosure crisis: California, Arizona, Nevada, Illinois, Georgia, Florida, and North Carolina. *See* Schwarz & Ferris, *supra* note 6, at 15.

123. *Id.* *See also* Madans Welk, *supra* note 8 (explaining that the market for build-to-rent homes started with foreclosure buy-ups).

124. *See* Madans Welk, *supra* note 8 (describing players in the build-to-rent market as accredited investors, private equity firms, and institutional limited partnerships). *See also* FSC Staff Report, *U.S. House of Rep., Comm on Fin. Services*, June 23, 2022 (“To

treatment they receive, REITs¹²⁵ stood out as the primary vehicle for institutional investment.¹²⁶ Institutional investors began investing through bulk purchases of a wide range of single-family homes and later shifted to middle-class suburban homes near large metropolitan areas.¹²⁷ Although it is not entirely clear, it is possible that the involvement of REITs and the investment shift might have implications for municipal zoning and private restrictive covenants.¹²⁸

Additionally, government policies changed the market's incentive structure. In 2012, the federal government encouraged Wall Street to invest in the single-family home market by launching a pilot program that made it easier for investors to purchase foreclosed homes in bulk.¹²⁹ The federal government's immediate goal was to stabilize the housing market.¹³⁰ The program also allowed groups of investors to spread both the costs of acquiring the property and the downside risks if the investments declined in value. Investors pooling large amounts of money into the market, rather than making large investments, made cost-spreading and risk-spreading possible. The federal government packaged thousands of homes together and sold them to investors in bulk at a discounted price.¹³¹ The initial investors typically did not use mortgages; instead, they bought the homes outright. These unfinanced purchases enabled market participants to create asset-backed securities, which the investors then retained or sold as "rent-backed" investment vehicles.¹³²

fund their acquisitions, companies raise billions of dollars in capital from hedge funds, pensions funds, ultra-net worth individuals, and other institutional investors.”)

125. See *supra* note 7 (defining real estate investment trust).

126. See Aimee Cummo et al., *Pros and Cons of New REO Investment*, LAW360 (Feb. 24, 2012), <https://bit.ly/3pLIncL>.

127. See James Mills et al., *Large-Scale Buy-to-Rent Investors in the Single-Family Housing Market: The Emergence of a New Asset Class*, 47 REAL ESTATE ECON. 399, 399–400 (2019).

128. See *supra* Part V.

129. See Federal Housing Finance Agency, News Release, *FHFA Announces Interested Investors May Pre-Qualify for REO Initiative* (Feb. 1, 2012), <https://bit.ly/3DTWssI>.

130. See *id.* (announcing a program to help stabilize local markets hardest hit by mass foreclosure and to gauge investor interest in the market).

131. See Federal Housing Finance Agency, News Release, *FHFA Announces First Winning Bidder in REO Pilot Initiative* (Sept. 10, 2012), <https://bit.ly/3MoYNzk> (announcing first REO sale from Fannie Mae consisted of over 600 homes).

132. See Schwarz & Ferris, *supra* note 6, at 16; See also Kishore Yalamanchili, *Single Family Securitizations: Residential Wine in a Commercial Bottle*, 21 J. OF STRUCTURED FIN. 15, 15–17, (2016) (explaining the securitization of rental cash flows); Bill Conroy, *As rates skyrocket, 'Wall Street' single family home rental investors see opportunity*, HOUSINGWIRE.COM (June 15, 2022), <https://bit.ly/43tj1P> (explaining that single-family rental securities offerings are collateralized by a single loan, that is, in turn, backed by a pool of income-producing family homes).

Investors either received rental income from the property or used the securities to obtain financing for other ventures.¹³³

Finally, the COVID-19 pandemic accelerated the trend toward institutional capitalization in three ways. First, individual landlords unloaded their properties to corporate investors because the economic costs of being a landlord rose and the benefits declined.¹³⁴ Smaller landlords saw a reduction in profit because state and local governments enacted moratoria on evictions due to unpaid rent during the pandemic,¹³⁵ and individual landlords were not as well-positioned as corporate landlords to absorb the resulting loss of rental income. Second, economic dislocation caused by the pandemic exacerbated existing affordability issues, particularly for consumers at the lower end of the income scale.¹³⁶ Third, according to one industry source, “the pandemic created a heightened demand for more square footage, less urban density, and privacy for the new ‘work-from-home’ environment.”¹³⁷

As noted above, this transition from single-family homes being primarily owned to being primarily rented is not the result of one or two forces.¹³⁸ Instead, this shift is due to a confluence of events, preferences, incentives, and structural changes.¹³⁹ This complexity makes it more likely that renting single-family homes will remain the norm in the long term and will be geographically widespread, rather than limited to one state or region.

B. Evolving Models of Title Acquisition, Sale, and Occupancy by Institutions

Because of the forces just described,¹⁴⁰ large corporations and other investment entities are deeply intertwined in the single-family home market on a size and scale previously not seen.¹⁴¹ In some cases, entire

133. See Schwarz & Ferris, *supra* note 6, at 16.

134. See Conlin, *supra* note 8 (noting that local landlords are offloading their properties because of COVID-19 and its fallout).

135. See *id.*

136. See Richard Florida, *How the ‘Rise of the Rest’ Became the ‘Rise of the Rents,’* BLOOMBERG NEWS (Sept. 8, 2022, 8:00 AM), <https://bloom.bg/3WrA3ve>.

137. Tim Reilly, *SFR Emerges From Pandemic*, REIINK, <https://bit.ly/3sNr0dg> (last visited Sept. 16, 2023).

138. See *infra* Sections IV.A and B.

139. See *infra* Sections IV.A and B.

140. See *supra* Section IV.A (citing consumer preferences, lack of affordable housing, investor behavior, government policies, and the COVID-19 pandemic).

141. See Mills et al., *supra* note 127, at 399–400; see also Kamin, *supra* note 8 (noting that investors spent \$77 billion on homes from April 2021 to October 2021 and that Invitation Homes announced a joint venture with the investment firm Rockpoint that involved a \$1 billion acquisition of single-family homes across the country).

neighborhoods have become capital investments.¹⁴² The landscape is complex and dynamic, but the transactional activity can be organized along five dimensions: nature of initial title acquisition and ownership, initial players and acquirers, secondary acquirers, main inventory, and occupancy mode.

First, in the nontraditional single-family home market, the initial title acquirers are building single-family residential homes to rent in bulk rather than selling each home to an individual buyer in fee simple.¹⁴³ Alternatively, platform companies are acquiring already existing single-family homes and acting as rental management companies.¹⁴⁴ Private equity firms are also partnering with developers for bulk or partial rents of single-family homes.¹⁴⁵

Second, the initial players include developers, property investment platforms, home rental firms, and real estate investment firms.¹⁴⁶ These players contrast with initial players in the past, when the single-family home market consisted of corporate developers or real estate partnerships.¹⁴⁷ Initial acquirers today may still be corporate developers; however, they are also platform companies, private equity firms, real estate investment firms, or a combination of all.¹⁴⁸ The main secondary acquirers include platform companies, home rental firms, real estate investment firms, and real estate management firms.¹⁴⁹

Third, the main inventory consists of individual units in new or existing subdivisions or, in some cases, entire single-family home communities.¹⁵⁰ Investors tend to target middle-class suburban homes near large metropolitan areas and attractive school districts.¹⁵¹ Further, the majority of the inventory tends to be located in the south, southeast, and southwest areas of the United States, due largely to the particular impact of the foreclosure crisis in those areas.¹⁵² There is also evidence that

142. See Felipe Ossa, *Build to Rent: Single-Family Homes are Scarce and Capital is Cheap, so Investors are Extending Their Reach with 'Infill' Projects*, ASSET SECURITIZATION REP., Mar. 1, 2018, at 10, 12.

143. See Robyn A. Friedman, *Build-to-Rent: Feeding the Hungry Single Family Rental Market*, MULTI-HOUSING NEWS, Mar. 2021, at 14.

144. See *id.*

145. See Ossa, *supra* note 142, at 12.

146. See Pierson, *supra* note 6, at 84 (explaining the presence in the market of “so many serious players in the marketplace” and identifying Deutsche Bank, JP Morgan, Sidley Austin, Moody’s Blackstone, and Riverstone Residential Group).

147. See sources cited, *supra* notes 6 and 8.

148. See sources cited, *supra* notes 124–129.

149. See *id.*

150. See sources cited, *supra* notes 6 and 8.

151. See Patrick Clark, *Wall Street is Buying Starter Homes to Quietly Become America’s Landlord*, BLOOMBERG (Feb. 18, 2022), <https://bit.ly/45kOx33>; see also Dezember, *supra* note 8.

152. See Schwarz & Ferris, *supra* note 6, at 15.

predominantly Black neighborhoods and low-income neighborhoods might be disproportionately affected by institutional capitalization.¹⁵³ Although the exact reasons are unclear, leading theories trace this disproportionate effect to mass foreclosures targeting (perhaps indirectly and through effect only) homeowners of color, investor-friendly local housing laws and policies, and tax incentives that directed investor funds to low income areas.¹⁵⁴

Lastly, the typical occupant is a middle-income individual or family.¹⁵⁵ Some renters have chosen to participate in this market because they desire the advantages of a single-family home without the expense and hassle accompanying traditional ownership.¹⁵⁶ Some renters have succeeded in having these experiences,¹⁵⁷ but others have not been as lucky.¹⁵⁸ Unsurprisingly, renters' experiences are not uniform or predictable amongst differing neighborhoods. However, even in highly capitalized single-family neighborhoods, there may still be some owners who traditionally purchase, own, and occupy their homes. Additionally, institutional investors purchase and rent individual homes in neighborhoods that remain largely unaffected by wide-scale institutional capitalization.

The table below provides a comparison between nontraditional single-family ownership associated with institutional capitalization and traditional single-family ownership:

153. See Peter Whoriskey & Kevin Schaul, *Corporate landlords are gobbling up U.S. suburbs. These homeowners are fighting back*, WASH. POST (Mar. 31, 2022), <https://wapo.st/43eCrHH> (noting that investors have purchased a disproportionate number of homes in neighborhoods where a majority of residents are Black, according to one analysis).

154. See *FSC Staff Report*, *supra* note 124.

155. See Alexander Hermann, *Young Families and the Growing Number of New Single-Family Rentals*, HARV. JOINT CTR. FOR HOUSING STUD. HOUSING PERSPECTIVES BLOG (Apr. 27, 2021), <https://bit.ly/43g0ne0>.

156. See Kamin, *supra* note 8.

157. See *id.*

158. See Pierson, *supra* note 6, at 88; see Mari, *supra* note 8.

Factor/Consideration	Traditional Ownership	Nontraditional Ownership
Ownership Configuration	FSA-Ultimate Title-Individual or Concurrent	Rental-Relative Title-Institutional
Length of Occupation	Long-term/Indefinite	Short-term/Definite
Financing	Mortgage	Private Equity Funding, Other Investor Groups
Owner Costs	Occupancy, Taxes, Repairs, Maintenance, Improvements, HOA Dues (if applicable), Other Fees	Rent and Very Closely Related Costs
Density	Low	Can be Low or Medium
Owner Cost Control	Low to High	Low to None
Fee Simple Owner	Occupant	Developer, Investor, or Institutional Owner
Subordinate Owner	Usually None	Tenant

V. INSTITUTIONAL CAPITALIZATION'S IMPACT ON THE LOGIC AND OPERATION OF MUNICIPAL ZONING LAW AND PRIVATE RESIDENTIAL RESTRICTIVE COVENANTS

Institutional capitalization is likely to interact with the law of zoning and covenants in dynamic ways. Two probable impacts seem on the horizon: institutional capitalization will likely reduce single-family favoritism in zoning law and undermine the usefulness of private restrictive covenants, especially in newer, non-traditional single-family neighborhoods.

A. *Municipal Zoning Law: Accelerating the Deterioration of Single-family Favoritism*

In the context of zoning, institutional capitalization will mitigate single-family supremacy. If single-family neighborhoods no longer have traditional ownership forms and expectations, the neighborhoods may lose contests for zoning control in several ways.

First, institutional capitalization may lead to a reduction in the quality and quantity of land set aside for single-family use in comprehensive zoning plans. This reduction may occur because single-family favoritism has been predicated on the perceived superiority of traditional fee ownership as opposed to leasehold interests.¹⁵⁹ If single-family neighborhoods no longer favor traditional fee ownership and its perceived benefits,¹⁶⁰ zoning officials may begin to question their disproportionately favorable treatment. As a result, land use policy could become more balanced between multi-family and single-family use in zoning and land use plans. Additionally, more flexible and innovative use designations allowing for a blend of single-family and multi-family use may become prevalent.¹⁶¹ Mixed-use projects combining residential and commercial uses may also incorporate single-family use more than in the past.

Second, institutional capitalization may create a more level playing field among competing landowners for specific land use conflicts, such as when zoning officials approve or reject projects, because single-family neighborhoods will no longer be considered the exclusive province of a unique type of owner in search of long-term ownership, autonomy, and low-density living that have been strongly associated with single-family ownership.¹⁶² For example, zoning officials may evaluate more favorably a proposed multi-family project that would be located within or contiguous to a single-family neighborhood because the officials might consider multi-family and single-family neighborhoods to be more or less the same. Additionally, as remote work moves vocational activities to single-family neighborhoods, homes are increasingly being used for work. If this trend becomes more pronounced in nontraditional single-family neighborhoods, the lines between traditional single-family use and other uses might become more blurred. Zoning officials will likely need to proceed cautiously when assessing conflicts between single-family use and “light commercial” use.

159. *See supra* Section III.A.

160. *See supra* Section III.B.

161. *But see* Conor Dougherty, *The Great American Single-Family Home Problem*, N.Y. TIMES (Dec. 1, 2017), <https://nyti.ms/3PxqARs> (describing community conflict over higher-density building even in a space already designated as “‘R2-A,’ or a mixed-density area with apartments as well as houses”).

162. *See supra* Section II.A.

Third, institutional capitalization might also reduce single-family favoritism by restraining the use of so-called “ballot-box planning.” Ballot-box planning occurs when residents of a community use an election initiative to revoke or modify a legislative land-use decision.¹⁶³ While there are benefits, ballot-box planning has often been used by residents of affluent single-family neighborhoods to circumvent rational planning, gain an outsized voice in land use decisions, and halt projects that could bring benefits to present and future residents.¹⁶⁴ Factors associated with institutional capitalization, such as increased heterogeneity in resident profiles and diffusion of ownership, may empower residents with nontraditional ownership interests to push back against residents opposing modest efforts to alter existing land uses that could bring community-wide benefits.¹⁶⁵

Finally, institutional capitalization may expand single-family housing affordability and access. Economies of scale, enhanced cost spreading, risk spreading, and standardized inventory have the potential to significantly reduce the cost of building single-family home projects.¹⁶⁶ A more efficient exchange of single-family homes could disperse the benefits of single-family living throughout a community, thereby balancing the supply and demand of the housing market.¹⁶⁷

163. See David Callies et al., *Ballot Box Zoning, Initiative Referendum and the Law*, 39 J. OF URB. & CONTEMP. LAW 53, 78–94 (examining the use of initiative and referendum for rezoning land and exploring legislative, quasi-judicial, and constitutional considerations); see also Institute for Local Self Government, *Community Land Use Project - Development Agreement Manual: Collaboration in Pursuit of Community Interests 1* (observing that local communities have increasingly been using land use initiatives decided in voting booths to make land use decisions).

164. See Erin Baldassari, *From Menlo Park to Laguna Beach, Residents Turn to Ballot Box to Fight New California Mandates*, KQED NEWSLETTER (Oct. 20, 2022), <https://bit.ly/3Q6buCY> (explaining how residents in single-family neighborhoods are using a ballot measure to oppose development in single-family neighborhoods); Samuel R. Staley, *Ballot Box Zoning, Transactions Costs, and Urban Growth*, 67 APA J. 25, 34 (2007) (showing that ballot measures appear to signal to developers that their projects will encounter higher levels of delay).

165. See *supra* Section IV.B.

166. Although it is too soon to tell whether cost reduction can be proven as an empirical matter, industry providers certainly tout the efficiencies associated with single-family build-to-rent housing. See National Rental Home Council, *Single-Family Rental Home Providers Shift to Build-for-Rent to Address Housing Shortage*, AP NEWS (Mar. 28, 2022), <https://bit.ly/3rt8Igy>. For example:

America needs a viable and sustainable supply of quality, affordably-priced rental housing One of the areas where this is most evident is in the market for build-for-rent housing, an innovative effort to bring new supply to the market for rental housing, providing communities with an invaluable source of critically needed middle-income and workforce housing.

Id.

167. See Parker, *supra* note 6 (citing one benefit of investor-owned single-family homes being that of allowing renters to live in good neighborhoods they could not otherwise afford).

However, there are potential limits. Single-family districts, even if somewhat internally diversified, are likely to dominate compared to other types of residential and non-residential land uses because homebuyers in the United States tend to prefer single-family over multi-family living.¹⁶⁸ The preference for single-family living, along with the history of land use law and policy,¹⁶⁹ makes it unlikely that institutional capitalization will uproot single-family supremacy entirely. Moreover, as institutional capitalization becomes more durable and profitable, institutional investors and other corporate players may advocate more fervently for special interest treatment of single-family use. Due to comparatively more resources, network connections, and specialized knowledge,¹⁷⁰ institutional players may have greater lobbying power than individual owners or neighborhood groups.

In the context of zoning, traditional single-family neighborhoods, particularly affluent ones, may undertake legal and physical efforts to differentiate themselves from nontraditional, single-family neighborhoods. Such efforts could include advocating for a designation as a “traditional single-family use district” on a zoning map. Neighborhoods could also install physical signals, such as gates or signage, marking a more traditional single-family neighborhood. Additionally, residents could engage in aggressive lobbying for exemptions from density mandates, affordable housing requirements, or other regulations. More drastic efforts could include litigation brought by residents to prevent zoning changes from blurring the line between traditional and nontraditional neighborhoods. Racial and class stratification between the two types of neighborhoods could also perpetuate the societal burdens of single-family supremacy.¹⁷¹

168. See Tamara E. Holmes, *Homebuyers Favoring Single-Family, Smaller Homes*, YAHOO NEWS (Nov. 21, 2019), <https://bit.ly/3pk1eMb>.

169. See *supra* Sections II and III.

170. See ELLICKSON & BEEN, *supra* note 56, at 344–46 (discussing the relative strength of real estate interests compared to existing homeowners under models of interest group power and noting that real estate interests are major campaign contributors and more likely to develop on-going personal relationships with key decisionmakers, which will likely lead them to be more sympathetic to real estate interests than they are to neighbors); see also *Leading lobbying industries in the United States in 2022, by total lobbying spending*, STATISTA, <https://bit.ly/45mI2wP> (last visited Sept. 16, 2023) (showing that real estate is one of the leading lobbying industries in the U.S. as of 2023, spending \$135.57 million); *Summary*, OPEN SECRETS, <https://bit.ly/3OTxPmb> (last visited Sept. 16, 2023) (showing the top campaign contributors from the real estate industry in 2021–2022). The National Rental Home Council, a lobbying group that is active in the single-family rental housing industry and consolidates the political efforts of several different build-to-rent companies, devotes considerable effort to organizing and advocating for what it calls “the professionalized single-family rental market.” See *Policy Platform*, NAT’L RENTAL HOME COUNCIL, <https://bit.ly/45mDsP4> (last visited Sept. 16, 2023).

171. See *supra* Section II.B.

Recognizing these limits, the ultimate demise of single-family supremacy may not be imminent.¹⁷² Regardless, single-family living remains deeply and pervasively entrenched in land use law and policy.¹⁷³ As a result, and also due to the likely effects of institutional capitalization land use reforms, single-family zoning is likely to change in substantial ways affecting its form, character, and dominance.

B. Private Restrictive Covenants: Rethinking Utility

As single-family homes take on more diverse ownership and investment attributes, parties to these transactions should second-guess the usefulness of private residential restrictive covenants previously considered routine. Parties should be more willing to resist or limit covenants that are broad in scope or long in duration because of the potential negative impacts on expected gains from capitalization.¹⁷⁴ These negative impacts could destabilize the strength of private residential restrictive covenants as devices for private land use control.

For example, institutional owners attempt to prevent or substantially restrict residents from enacting covenants that prohibit rentals.¹⁷⁵ These covenants include retroactive rental bans, rental caps, and pre-approval provisions.¹⁷⁶ Residents advocating for these covenants argue that such covenants are necessary to control nuisances and retain the essential character of the neighborhood.¹⁷⁷ In response, institutional owners across several states are lobbying for laws that prevent residents from banning rentals.¹⁷⁸ Although institutional owners justify these laws as necessary to

172. Predictions of its death have been made before. *See* Ziegler, *supra* note 35, at 217 (“While it is probably too early to signal the imminent demise of restrictive residential zoning, we may have already witnessed its last gleaming.”).

173. *See supra* Sections II and III.

174. *See* Epstein, *supra* note 38, at 916–919 (discussing types of restrictions that generate possible externalities that might produce possible harms to third persons but might not be internalized by the original owner of the land, including covenants that produce monopoly effects and covenants that discriminate on the basis of race or religion).

175. *See* Will Parker & Nicole Friedman, *Homeowner Groups Seek to Stop Investors From Buying Houses to Rent*, WALL ST. J. (Apr. 18, 2022, 3:38 PM), <https://bit.ly/42ZhJez>.

176. *See id.* (homeowners’ tactics include capping the number of rental homes or requiring board approval of rental tenants); Peter Whoriskey & Kevin Schaul, *supra* note 153 (homeowners adopted a rule that no more than 18% of houses can be approved for rental).

177. *See* Whoriskey & Schaul, *supra* note 153 (neighbors complaining of shootings, property damage, broken gates, and litter associated with tenants renting single-family homes). One resident-owner said, “[P]eople realized we couldn’t just become a community of renters These are our homes. We had too much to lose.” *Id.*

178. *See* H.B. 844, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (“[T]o amend Title 36 of the Official Code of Georgia Annotated, . . . to prohibit certain restrictions on long-term rental of single-family detached dwellings”); S.B. 1381, 112th Gen. Assemb., Reg. Session (Tenn. 2021) (enacted as 2021 Tenn. Pub. Acts ch. 151) (creates a vested

promote consumer access and affordability,¹⁷⁹ a self-interested motivation may be to reduce restrictions on transferability and ensure the ability to reap profits from rentals and securitization.¹⁸⁰

To understand why legal actors challenge private residential restrictive covenants, it is first necessary to understand how and why traditional residential developers initially create residential covenants. When planning a residential subdivision, developers will impose restrictions that attract buyers who are willing to pay a premium to live in a community with predictable land use patterns.¹⁸¹ Developers include these restrictions in the original deeds, sell the property to individual buyers, and delegate enforcement to a successor entity, such as a homeowner's association.¹⁸² Typically, once all the properties in a development are sold and the delegation occurs, the developer no longer has a continuing interest in the creation and enforcement of post-sale restrictions.

right in an owner to use residential property as long-term rental property if certain conditions exist).

179. See Whoriskey & Schal, *supra* note 153 (quoting industry spokesperson as saying, “[p]reventing single-family home rental companies – of any size – from purchasing homes in a community does nothing but reduce the availability of affordably priced rental housing”); National Home Rental Council, *Single-Family Rental Home Providers Shift to Build-for-Rent to Address Housing Shortage*, CISION PR NEWSWIRE (Mar. 28, 2022, 12:00 PM), <https://bit.ly/3KBU3Xl>.

180. Judges have traditionally limited the scope or reach of private restrictions when it was determined that enforcement would be unfair or unduly restrict alienability. See Susan F. French, *Tradition and Innovation in the New Restatement of Servitudes: a Report from Midpoint*, 27 Conn. L. Rev 119, 119–126 (1994). The investors who argue for laws that prevent residents from restricting rentals (and thus allow for the investors to rent to whomever they please) are (whether they realize it or not) aligning their motivation within this traditional view. As established earlier, the ability to rent homes whenever the investor wants is a key component of the business model of single-family rental companies and investors. Restrictions on rentals, as well as limitations on other forms of alienability, would frustrate that model and the profits that go along with it. Robyn A. Friedman writes:

‘They can develop to hold and rent-and get high returns that way,’ said [a housing industry consultant]. ‘Or they can build houses and sell them to an operator. If they’re a developer, they can develop and sell lots. Or they can form a joint venture, staying in on the deal on the rental side. There are a lot of different strategies.’

Robyn A. Friedman, *Build-to-Rent: Feeding the Hungry Single-Family Rental Market*, NICHE MARKETS, March 2021, at 15, <https://bit.ly/3DTBkTm>; Brian Eason, *American Dream For Rent: Investors slam tenants with fees, evictions: Private equity makes big push into metro Atlanta’s single-family homes*, ATLANTA J. CONST. (Feb. 16, 2023), <https://bit.ly/446inr1> (“Armed with technological and financial advantages, Progress and other large single-family rental firms are more sophisticated than traditional landlords at scooping up homes, filling them with renters and maximizing profits.”).

181. See NOLAN, ET.AL., *supra* note 98, at 349–350; See also *Nahrstedt v. Lakeside Village Condominium Assoc., Inc.*, 878 P.2d 1275, 1284 (1994) (observing that use restrictions contained in deeds encourage the development of shared ownership by, among other things, protecting the reliance interests of buyers).

182. See NOLAN, ET.AL., *supra* note 98, at 349–350.

By contrast, under institutional capitalization, the original developer or its corporate successor retains a fee-simple interest in the property when transferring a leasehold interest to a tenant.¹⁸³ The institutional owner, therefore, has a direct and enduring interest in both the profitability and transferability of the single-family home. As a result, if an institutional owner believes that a restrictive covenant will have an unduly negative impact on profitability or alienability, the institutional owner will have a strong incentive to object to the covenant. In most instances, a renter will not have the same incentive because a renter usually has no long-term interest in profit or alienation beyond the length of the leasehold. If these incentives transpire accordingly, the frequency and scope of private restrictive covenants in nontraditional single-family neighborhoods will likely decline.

There are potential upsides associated with a decline in the utility of private residential restrictive covenants. First, the decline may reduce transaction costs by discouraging over-reliance on deed covenants as a mechanism for private land use control.¹⁸⁴ Additionally, a decrease in covenants that substantially restrain individual use and enjoyment may mitigate property conformity and use rigidity.¹⁸⁵ Less utility in private residential restrict covenants may ease discrimination and structural subordination, making single-family use available to a more diverse array of buyers, especially those for whom traditional ownership is not an option. Finally, the decline might assuage undue levels of favoritism toward owners who acquired ownership through more traditional means.

Although there might be a trend toward less reliance on private residential restrictive covenants in nontraditional single-family neighborhoods, it is not clear that this trend will transfer into traditional single-family neighborhoods. In fact, the use of private residential restrictive covenants in traditional single-family neighborhoods may actually increase because residents may want to ensure that their neighborhoods remain legally and physically distinct. The reluctance of institutional investors to enter into or enforce certain use covenants in nontraditional neighborhoods may also show traditional single-family owners that they need to enact and enforce private restrictive covenants more vigorously than before. A desire to protect their property from undesirable uses or to signal wealth and income exclusivity will likely motivate residents to enforce these covenants more vigorously.¹⁸⁶ For

183. See sources cited, *supra* notes 6 and 8.

184. See *supra* Section III.B (explaining how private restrictive covenants became the primary way to control private land use).

185. See *supra* Section III.B (identifying restrictions on solar power panels, brown lawns, rentals, and pets).

186. See *supra* notes 175–77 (citing traditional single-family owner concerns about the loss of community character and a possible decline in property value that might occur

zoning purposes, the result may be significant social and economic stratification among different types of single-family neighborhoods, but the engine of change will come from private contracts rather than zoning.¹⁸⁷

VI. CONCLUSIONS

This Article concludes by reflecting on some of the broader implications from the preceding analysis, particularly the conceptions of ownership, legal duties and obligations, and the nature of property itself.

One implication of the trend toward institutional capitalization is that the United States could be witnessing a major decoupling of the single-family home from its traditional roots in fee simple ownership. Of course, possession-based ownership of single-family homes is not entirely new—single-family homes have always been available for rent. The change has come from the long-term retention of title by institutional investors and the securitization of the underlying property.¹⁸⁸ In the long term, it will be important to consider whether this ownership shift should force a reassessment of the perceived benefits and burdens of single-family living. A reassessment should occur because one of the justifications for single-family favoritism has been its close alignment with robust ownership norms. However, property law and regulatory movements do not turn on logic alone; there are other challenges competing for the attention of housing policy makers.¹⁸⁹

In the short term, diversified ownership options for single-family homes are likely to bring benefits to a wider number of individuals and families than in the past—fee simple owners do not have to monopolize the positive norms of single-family living. Variegated ownership allows younger buyers, buyers of color, and buyers with lower income levels to participate fully in the single-family home market. In turn, these buyers will be better off because single-family neighborhoods often bring collateral entitlements, such as access to better-resourced schools, proximity to employment prospects, and enhanced social networks.¹⁹⁰

On the other hand, traditional fee simple ownership of a single-family home has been a key means of building individual and familial wealth in the United States, and a reduction in that type of ownership could reduce

when investors buy and then rent single-family homes); *see also* Amber Gaudet, *Section 8 landlords to be fined \$300 weekly until tenants ousted, HOA says*, DENTON RECORD-CHRONICLE (June 13, 2022), <https://bit.ly/45pYa0t>.

187. *See* Gaudet, *supra* note 186.

188. *See supra* Part IV.

189. Challenges include housing affordability, climate change, and water availability and quality.

190. *See supra* Section II.B.4.

future generational wealth. Specifically, fee simple ownership allows for the accumulation of equity and usually garners favorable tax treatment.¹⁹¹ For example, home equity can be used as collateral for personal and family financing needs, and home appreciation helps owners purchase a more desirable home.¹⁹² Additionally, on-time mortgage payments build a good credit rating for future borrowing.¹⁹³ For these reasons, substituting possession-based ownership for fee-simple ownership could leave possession-based owners at a comparative economic disadvantage, even if the type of house they both occupy is the same.

Expansion of single-family residential living beyond fee simple ownership may trouble those who contend that single-family living brings substantially more costs to society than benefits. If one wants to see single-family living patterns substantially diminished, aside from the ownership form, one will not welcome these developments. Yet, given the popularity and durability of single-family living, it will be important for scholars and policymakers to address two questions: (1) whether single-family living can innovate in ways that maximize social gains and minimize losses, and (2) how property law and policy can play a constructive role.

The second implication of the trend toward institutional capitalization is that such capitalization will likely raise new challenges concerning legal duties and obligations for residents and institutional owners. For example, institutional owners often do not understand the legal realities associated with their new ownership status: landlord. Importantly, in legal form and substance, institutional owners are landlords, but they often fail to appreciate and discharge the obligations of this title.¹⁹⁴ For example, institutional owners routinely breach habitability warranties, fail to perform repairs on a timely basis, and fail to properly administer rent payments.¹⁹⁵ Single-family home renters, many of whom enter these transactions without a sufficient understanding of their legal rights, are severely disadvantaged. Reforms are necessary to ensure that single-family home renters receive protection commensurate with their ownership interests.

Further, the institutional capitalization of the single-family home is part of a trend in property transactions in which market participants

191. See Denny Ceizyx, *10 Benefits of Owning a Home*, LENDING TREE (May 2, 2023), <https://bit.ly/3OltVly> (citing building equity and possible tax deduction).

192. See *id.*

193. See *id.*

194. See Sophie Kasakove, *Why the Road Is Getting Even Rockier for First-Time Home Buyers*, N.Y. TIMES (Apr. 25, 2022), <https://bit.ly/3NVOCmV> (citing studies finding that corporate landlords are more likely to raise rents, evict their tenants, and poorly maintain their properties).

195. See Clark, *supra* note 151 (noting residents' problems with rent hikes, unexpected fees, and landlords ignoring request for repairs).

maximize the utility of property ownership by disaggregating the rights and interests relating to the property. Thus, the “bundle of rights” traditionally associated with leasehold interests and personal property is quickly falling apart, creating a patchwork of entitlements more appropriately described as “stand-alone sticks” than a bundle. For example, co-living, or a residential living arrangement where companies offer communal living space in multi-unit dwellings in exchange for payment at below market rates, has carved up parts of the leasehold interest;¹⁹⁶ fractional ownership allows for unlimited division of the right to possess personal property;¹⁹⁷ and non-fungible tokens (NFTs) segregate tangible and intangible rights to the same item of property.¹⁹⁸ While the underlying details vary, one common theme is the bifurcation of interests once implicitly or explicitly unified, accompanied or spurred on by innovative monetization and securitization.¹⁹⁹

Institutional capitalization is transforming the traditional bundle of rights associated with single-family home ownership in similar ways to what is happening in leasehold, personal, and tangible and intangible property. As a result, the market for single-family homes and the law governing their ownership and occupation will not retreat to its once quiet corner, but will instead remain a vibrant laboratory for legal, social, and economic transformations yet to come.

196. See Mary Jo Wiggins, *Access Anxiety*, 54 REAL PROP. TRUST & ESTATE L.J. 133, 145–154 (2019) (examining how co-living tests distinctions in property law between ownership interests defined by possession and ownership interests defined by use).

197. See Paul Sullivan, *Can't Afford a Birkin Bag or a Racehorse? You Can Invest in One*, N.Y. TIMES (July 31, 2020), <https://bit.ly/3JzLKKX>.

198. See Sebastian Marcu, *NFT Ownership: What Does That Actually Mean*, STUDIO LEGAL (Feb. 2, 2023), <https://bit.ly/3ItPgpJ>.

199. See *id.*