ZONING FOR DIRECT SOCIAL CONTROL

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I. INTRODUCTION

Traditionally, people have thought of zoning as a means of controlling physical aspects of the urban environment. Indeed, over the years zoning has frequently been viewed as a method of "nuisance control"—the device that protects a homeowner from having a glue factory, or some other noxious use, locate next door. There is a good deal of justification for this widely held view.

Although a number of local regulatory efforts around the turn of the century resembled zoning, the building zone resolution of New York City, passed in 1916, "constituted the first comprehensive zoning of height, area, and use in this country."¹ The individuals who brought comprehensive zoning to New York City were deeply concerned with controlling the negative externalities accompanying various urban land uses. In particular, the skyscraper, with its propensity to make "dark canyons of narrow streets,"² was identified as an architectural villain that could create fire hazards, foster crowding and panic should a catastrophe occur, and threaten public health by shutting out light, thus contributing to eyestrain and the spread of tuberculosis.³

The zoning pioneers also sought the stabilization of neighborhoods with a view to protection of property values. In making the case for zoning, they wrote of apartments and retail uses invading residential districts while, in turn, "bright business streets would be invaded by

1. E. BASSETT, ZONING 23 (1940 ed.).

2. *Id.* at 24.

3. See S. TOLL, ZONED AMERICAN 153-54 (1969).

factories.”⁴ With its apparent ability to separate incompatible land uses, zoning appeared a good means of protecting property values.

Courts also thought of zoning in terms of its contribution to the improvement of the physical environment during these early years, as *Village of Euclid v. Ambler Realty Co.*⁵ illustrates. In *Euclid* the Supreme Court considered the constitutional validity of comprehensive zoning for the first time. In arriving at its decision the Court looked to the common law of nuisance, not to delimit the boundaries of the zoning power, “but for the helpful aid of its analogies.”⁶ The Justices identified the most contentious aspect of the Euclid scheme—the creation of a residential classification which excluded not only business and industrial uses, but apartment buildings as well. In upholding this restriction, the Court described in terms of physical impact how the presence of a multiple-family structure could lead to a deterioration in developmental quality:

[T]he coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun[,] . . . bringing . . . increased traffic and business, . . . depriving children of the privilege of quiet and open spaces for play, . . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would not only be entirely unobjectionable but highly desirable, come very near to being nuisances.⁷

Not only did the judiciary usually think of zoning as a means of ordering the urban environment to reduce negative externalities; some courts took the position that zoning ordinances should not regulate anything but the physical aspects of land use.⁸ Nevertheless, over the years both courts and commentators have noted that, like it or not, land use restrictions apparently aimed at physical concerns alone can have profound socioeconomic implications.

4. E. BASSETT, ZONING 315-16 (Nat'l Municipal League Tech. Pamphlet Series No. 5, rev. 1922).

5. 272 U.S. 365 (1926).

6. *Id.* at 387.

7. *Id.* at 394-95.

8. For instance, Justice Frederick Hall of the Supreme Court of New Jersey, in a dissent which has since become famous for other reasons, stated that zoning is “land use control by *physical* planning to bring about physical results” and “is not a device to be used to accomplish any and all purportedly desirable *social* results.” *Vickers v. Township Comm.*, 37 N.J. 232, 261, 181 A.2d 129, 145 (1962) (emphasis in original), *appeal dismissed and cert. denied*, 371 U.S. 233 (1963). Similar opinions have appeared in other cases. See, e.g., *Central Management Co. v. Town Bd.*, 47 Misc.2d 385, 262 N.Y.S.2d 728, *aff'd mem.*, 24 A.D.2d 881, 264 N.Y.S.2d 1011 (1965); *Board of Supervisors v. DeGroff Enters.*, 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973).

The capacity for local ordinances dealing exclusively with physical standards to dictate, albeit indirectly, who may live where has appeared most clearly in "exclusionary zoning." Such land use controls are "those which interfere seriously with the availability of housing for low- and moderate-income people in areas where such housing is much needed."⁹ By manipulating restrictions on matters such as lot size, lot width, building size, or the number of bedrooms in multiple-family units, or by excluding mobile homes or multiple-family structures, a municipality can make housing within its borders too expensive for low- and moderate-income groups. Exclusionary zoning has served goals that courts¹⁰ and commentators¹¹ have identified as improper. For instance, zoning ordinances have separated housing for working-class families from industrial job opportunities,¹² and barred racial minorities from communities to the extent that a greater proportion of these groups are forced into the lower income levels.¹³

Even in the earliest years of the institution some people expressed concern that zoning could effect profound socioeconomic, including exclusionary, results. The district court's opinion in *Euclid* provides an apt example: Judge Westenhaver found it a "plain truth" that the vil-

9. 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 64.01, at 666 (1974).

10. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Pascack Ass'n v. Mayor of Washington*, 74 N.J. 470, 379 A.2d 6 (1977); *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808 (1975); *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977); *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970); *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

11. See, e.g., R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S 3-44 (1973); 2 N. WILLIAMS, *supra* note 9, chs. 62-65; 3 *id.* ch. 66; Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1618-1708 (1978).

12. See Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 704 (1973); see also M. DANIELSON, THE POLITICS OF EXCLUSION 23-24 (1976).

13. See D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 243 n.6 (1975); 2 N. WILLIAMS, *supra* note 9, § 59.07, at 585; Aloï, Goldberg, & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. TOL. L. REV. 65, 74-79 (1969); Brantman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483, 503-06 (1973); Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 330 (1955) ("Economic segregation is not only the easiest but also the most effective form of racial and ethnic segregation. . . .").

lage's ordinance sought to place the affected land in a "strait-jacket" and concluded that "[i]n the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life."¹⁴ In an article published in 1920 entitled *Unwalled Towns*, Bruno Lasker argued that zoning "inevitably increases the separation of the classes."¹⁵

Today most would admit that residential zoning does, indeed, determine to some extent the type of person who lives in a particular area, even if, unlike Westenhaver and Lasker, they may not consider this state of affairs necessarily bad.¹⁶ New Jersey's highest court provided an illustration of the modern view in *Taxpayers Association v. Weymouth Township*,¹⁷ observing that "as a conceptual matter regulation of *land use* cannot be precisely dissociated from regulation of *land users*."¹⁸ Thus, generally speaking, a zoning ordinance that in its operation displays a socioeconomic purpose or effect will not disturb the judiciary merely because it does not deal exclusively with physical characteristics.

Conventional residential zoning ordinances regulate tangible elements of the urban environment, identifying the users or potential users of a given parcel of land in only an indirect manner. But municipalities can also explicitly identify land users or potential land users in zoning ordinances, and in this manner exercise social control directly. In doing so, localities have "zoned for direct social control." This article addresses this sort of land use regulation.¹⁹ As a useful starting point, this article constructs a definition of zoning for direct social control:

A zoning ordinance is used for direct social control when land users are authorized to live in a residential district, or potential land users are excluded from the same, on the basis of relatively immutable personal characteristics that are explicitly identified in the ordinance.

14. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

15. 43 THE SURVEY 675, 676 (Mar. 6, 1920).

16. See, e.g., ADVISORY COMMITTEE TO THE DEP'T OF HOUSING AND URBAN DEVELOPMENT, NATIONAL ACADEMY OF SCIENCES-NATIONAL ACADEMY OF ENGINEERING, FREEDOM OF CHOICE IN HOUSING 31 (1972), *quoted in* E. BERGMAN, ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AREAS 15 (1974) ("The nature of zoning is such that it is difficult to disentangle its control over physical development per se, its influence over the economic status of prospective residents, and its use to discriminate against specific ethnic or racial groups."); C. PERIN, EVERYTHING IN ITS PLACE 3 (1977); Gans, *Social and Physical Planning for the Elimination of Urban Poverty*, 1963 WASH. U.L.Q. 2, 16.

17. 71 N.J. 249, 364 A.2d 1016 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977).

18. *Id.* at 277, 364 A.2d at 1031.

19. Many courts and commentators have considered exclusionary zoning which exercises social control in an *indirect* way. See, e.g., authorities cited *supra* notes 10-11.

There are several reasons for examining the use of zoning as a direct social control. First, such zoning raises the clash between the police power, the basis of all zoning restrictions, and certain constitutional protections in a most interesting way, and helps to test the boundaries of each. An inquiry into zoning of this sort also helps to determine the regulatory capacity of enabling legislation and other devices that delegate the zoning power from the state legislatures to municipalities. Zoning for direct social control also illustrates the use of zoning to further sophisticated modern regulatory goals. Finally, in the past, with one major exception,²⁰ few such regulations were promulgated; currently they appear to be much more prevalent and are employed to serve increasingly diversified ends.

One potential end of this type of zoning is racial segregation.²¹ Yet the segregation ordinance is the easy case: zoning with respect to race for purposes of segregation²² founders on clearly overriding constitutional protections. But what of other, less obviously unfair, measures effecting direct social control? For instance, a great number of municipalities have enacted ordinances that, with certain exceptions, authorize only individuals related by blood, marriage, or adoption—in other words, a traditional family—to live in a dwelling unit in a partic-

20. The exception is racial zoning for segregation. See *infra* note 21.

21. Possibly the first zoning ordinance aimed at racial segregation was the "Bingham Ordinance," adopted in San Francisco at the end of the nineteenth century, which required the city's Chinese population to abandon their residences and businesses and quit the city and county of San Francisco or, in the alternative, move to a designated area within the municipality. See generally *In re Lee Sing*, 43 F. Supp. 359 (N.D. Cal. 1890) (ordinance invalidated). Most local segregation laws tried to separate whites from blacks. Early attempts preceded the development of comprehensive zoning and were often called "segregation ordinances." See generally Benson, *Segregation Ordinances*, 1 VA. L. REG. (n.s.) 330 (1915); Note, *Constitutionality of Residential Segregation Ordinances*, 41 KY. L.J. 250 (1952). Later efforts were incorporated into comprehensive zoning restrictions. See, e.g., *Monk v. City of Birmingham*, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951).

Apparently the first segregation ordinance was adopted in Baltimore in 1911, Baltimore, Md., Ordinance 692 (May 15, 1911), but it was a Louisville, Kentucky, ordinance that came before the Supreme Court in *Buchanan v. Warley*, 245 U.S. 60 (1917). The *Buchanan* ordinance was typical of many: it made it unlawful for any black to move into and occupy a house in a block where a majority of dwellings were occupied by whites. After reviewing the history of the fourteenth amendment, its treatment in the case law, and the legislative provisions enacted to implement it, the Court concluded that the state could not lawfully disqualify a man from acquiring property solely because of color, or prevent a man from selling his property solely because of the buyer's color. *Buchanan* clearly established the invalidity of segregation ordinances, and subsequent attempts by recalcitrant municipalities to adopt this type of regulation were struck down. See, e.g., *Bowen v. City of Atlanta*, 159 Ga. 145, 125 S.E. 199 (1924); *Tyler v. Harmon*, 160 La. 943, 107 So. 704 (1926), *rev'd per curiam*, 273 U.S. 668 (1927); *Jackson v. State*, 132 Md. 311, 103 A. 910 (1918); *Clinard v. City of Winston-Salem*, 217 N.C. 119, 6 S.E.2d 867 (1940); *Irvine v. City of Clifton Forge*, 124 Va. 781, 97 S.E. 310 (1918).

22. Racial zoning for the purpose of promoting integration is discussed *infra* in Part IV.

ular residential district. In other cases, local governments have adopted age-restrictive ordinances that permit only the elderly to live in a defined zone. These ordinances plainly aim at goals other than the traditional objectives, such as providing more light and air, that characterized early zoning efforts. At the same time, these new ordinances do not seek to further residential preferences as obviously base as segregation. Whether the law can accommodate these experiments is a question worth exploring.

Part II of this article examines ordinances that permit only traditional families to live in a dwelling area. Part III discusses age-restrictive zoning. Some other forms of zoning for direct social control are identified in Part IV. Each of these parts traces the historical development of the type of zoning discussed, indicates the purported goals of those restrictions, and outlines some of the constitutional implications of such ordinances. Each part also suggests some safeguards against potential abuses of land use restrictions of this kind. Finally, addressed in each section, and most fully explored in Part III, are several tests that courts should apply in reviewing these newest developments in zoning, to insure that the competing values they embody receive proper attention.

II. ZONING FOR DIRECT SOCIAL CONTROL: THE FAMILY

A. *Historical Development of Single-Family Ordinances.*

"Promotion of the single-family home . . . is deemed good public policy in America,"²³ wrote Alfred Bettman in 1924. Fostered by this sentiment, zoning spread swiftly,²⁴ particularly in suburban communities.²⁵

The original New York City building zone resolution did not establish an exclusive single-family home area; it merely created a district where new dwellings could cover no more than thirty percent of the lot.²⁶ The resolution's backers thought that treating private detached

23. Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 839-40 (1924).

24. See R. BABCOCK, *THE ZONING GAME* 115 (1966); B. SIEGAN, *LAND USE WITHOUT ZONING* 49 (1972); Ellickson, *supra* note 12, at 629 ("Although a few major cities had earlier made modest attempts to control land uses, the precedent of the New York City ordinance triggered the rapid spread of zoning, apparently because of its political appeal as a device to protect the value of single-family homes."); see also E. BASSETT, *supra* note 1, at 64; J. DELAFONS, *LAND-USE CONTROLS IN THE UNITED STATES* 26 (1962); NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 204 (1969).

25. See S. TOLL, *supra* note 3, at 193 ("The suburbs were among the first municipalities in the nation to enact zoning. During the twenties they were prime contributors to the extraordinary spread of the institution.").

26. E. BASSETT, *supra* note 4, at 323.

residences as a separate use would be a "hazardous course" because courts might question whether traditional police power considerations of health and safety could justify a differentiation between one-family and two-family dwellings.²⁷ Court decisions soon proved, however, that no such hazard existed. The United States Supreme Court allowed the exclusion of apartment buildings from residential districts,²⁸ and a Massachusetts court decided that two-family dwellings could be validly separated from single-family homes.²⁹ Thus, by the mid-1920s the legitimacy of exclusive single-family districts was settled; the next important question became how, if at all, a given ordinance defined the term "family" for purposes of determining who could live in these districts.³⁰

In the early years of zoning, a significant number of ordinances simply left the word family undefined,³¹ and some modern ordinances continue to include no definitional provision.³² A good deal of litigation naturally resulted: homeowners or occupants and zoning enforcement authorities often disagree on exactly what "single-family" means.³³ Ultimately the courts can decide, but the obvious problem with this type of ordinance is the uncertainty it creates.³⁴

Even in the earliest days of zoning many municipalities were not willing to leave so much to chance and therefore included some defini-

27. See *id.* at 323-24.

28. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

29. *Brett v. Building Comm'r*, 250 Mass. 73, 145 N.E. 269 (1924).

30. Of course, the definition of "family" could also affect the occupants of two-family and other multiple-family dwellings. It appears, however, that the definition of "family" has been contested almost exclusively in relation to single-family dwelling districts. Furthermore, restrictions on dwelling type were invariably accompanied by regulations concerning physical characteristics such as lot size, area of permissible coverage, building height, and so on. Thus, the type of area restriction employed in the original New York City building zone resolution was not abandoned; it was merely supplemented by regulations segregating building types.

31. See, e.g., BALTIMORE, MD., CODE art. 49, § 1 (1928); BIRMINGHAM, ALA., GENERAL CODE ORDINANCE 1101-C, art. I, § 1 (1930).

32. See, e.g., *Brady v. Superior Court*, 200 Cal. App. 2d 69, 77-82, 19 Cal. Rptr. 242, 247-49 (1962) (discussing Atherton Ord. 146 § 22-5); *Region 10 Client Management, Inc. v. Town of Hampstead*, 120 N.H. 885, 887, 424 A.2d 207, 208-09 (1980) (discussing Hampstead Zoning Ordinance); *Carroll v. Washington Township*, 63 Ohio St. 2d 249, 251, 408 N.E.2d 191, 193 (1980).

33. See, e.g., *Brady v. Superior Court*, 200 Cal. App. 2d 69, 71-72, 19 Cal. Rptr. 242, 243-44 (1962); *Planning & Zoning Comm'n v. Synanon Found.*, 153 Conn. 305, 311, 216 A.2d 442, 444 (1966); *Village of Riverside v. Reagan*, 270 Ill. App. 355, 365-66 (1933); *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 529, 213 N.W. 835, 837 (1927); *Sullivan v. Anglo-American Inv. Trust, Inc.*, 89 N.H. 112, 115, 193 A. 225, 227 (1937); *Village of Quogue v. Ladd*, 40 A.D.2d 859, 859, 337 N.Y.S.2d 868, 869 (1972); *City of Schenectady v. Alumni Ass'n of Union Chapter, Delta Chi Fraternity, Inc.*, 5 A.D.2d 14, 15, 168 N.Y.S.2d 754, 755 (1957); *Town of Henrietta v. Fairchild*, 53 Misc. 2d 862, 279 N.Y.S.2d 992 (Sup. Ct. 1967).

34. One commentator has concluded that in general "the courts have approached these cases on a pragmatic, ad hoc basis." Note, *Excluding the Commune from Suburbia: The Use of Zoning for Social Control*, 23 HASTINGS L.J. 1459, 1465 (1972).

tion of family in their zoning restrictions. One formulation defined family as a "single housekeeping unit," and many early restrictions incorporated this definition³⁵ or some variation thereof, including the zoning regulation at issue in the *Euclid* case.³⁶ But whether the "single housekeeping unit" formulation injected any certainty into the system is open to question. This type of ordinance has also given rise to a significant amount of litigation,³⁷ and courts have often interpreted the formulation in ways that frustrate its basic objective of limiting the occupation of homes to relatively permanent and stable groups.³⁸

Many municipalities sought even more certain control over the composition of domestic units occupying dwellings in residential areas. They developed provisions describing a family in terms of the biological and legal interrelationships of its members, thus restricting a residential area to what might be variously called "legal," "biological," "traditional," or "conventional" families. A typical example might define "family" as follows:

One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not

35. It seems that even before 1920, a Newark, New Jersey ordinance included such a provision. See CITIZENS' ZONE PLAN CONFERENCE, CHICAGO 20 (1920) (report of proceedings, Dec. 16-17, 1919).

36. See J. METZENBAUM, THE LAW OF ZONING 338 (1930) (reproducing the Village of Euclid ordinance that was upheld by the Supreme Court); see also, e.g., ALEXANDRIA, VA., CODE § 35-1(33) (1953); ATLANTA, GA., CODE § 93-202(k) (1942); CHICAGO, ILL., REVISED CODE § 1860(i) (1931); CLEVELAND, OHIO, CODE § 1281-14 (1924); cf. PHILADELPHIA, PA., CODE § 14-102(11) (1956) ("Family. A person or a group of persons living together."). The widespread use of the single housekeeping unit formulation may have resulted from its use by leading commentators on zoning, see, e.g., E. BASSETT, *supra* note 1, at 189, and by its use in various model ordinances, see, e.g., New York Dep't of Commerce, Zoning in New York State: A Guide to the Preparation of Zoning Ordinances 45-46 (rev. ed. 1958).

37. See, e.g., Neptune Park Ass'n v. Steinberg, 138 Conn. 357, 84 A.2d 687 (1951); Oliver v. Zoning Comm'n, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974); Carroll v. City of Miami Beach, 198 So. 2d 643 (Fla. Dist. Ct. App. 1967); Harmon v. City of Peoria, 373 Ill. 594, 27 N.E.2d 525 (1940); Baddour v. City of Long Beach, 279 N.Y. 167, 18 N.E.2d 18, 7 N.Y.S.2d 167 (1938), *reh'g denied*, 279 N.Y. 794, 19 N.E.2d 90, 7 N.Y.S.2d 794, *appeal dismissed*, 308 U.S. 503 (1939); Carroll v. Arlington County, 186 Va. 575, 44 S.E.2d 6 (1947); Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 267 Wis. 609, 66 N.W.2d 627 (1954); see also cases cited *infra* note 38.

38. For example, in one case a single housekeeping unit restriction was held not to exclude a college sorority. See City of Syracuse v. Snow, 123 Misc. 568, 205 N.Y.S. 785 (Sup. Ct. 1924). In the majority of cases, however, it would be fair to say that the "single housekeeping unit" formulation has proved effective in fraternity-sorority cases. See, e.g., Cassidy v. Triebel, 337 Ill. App. 117, 85 N.E.2d 461 (1949); Theta Kappa, Inc. v. City of Terre Haute, 141 Ind. App. 165, 226 N.E.2d 907, *reh'g denied*, 141 Ind. App. 165, 228 N.E.2d 34 (1967). However, courts have held that twenty nurses can be a single housekeeping unit, see Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. Ct. App. 1954), as can sixty college students, see *In re Laporte*, 2 A.D.2d 710, 152 N.Y.S.2d 916 (1956).

related by blood, adoption or marriage shall be deemed to constitute a family.³⁹

The requirement that the individuals comprise a single housekeeping unit in addition to the requirement of legal or biological relatedness almost invariably appears in these definitions. So the traditional-family definition simply adds restrictions to the single housekeeping unit formulation. An exception permitting some families of unrelated individuals is another element common in these definitions, though the number of unrelated persons that will be deemed to constitute a family in a given ordinance varies widely.⁴⁰ A few ordinances make no such exception.⁴¹ In other ordinances, some "other domestic bond" may satisfy the requirement of relatedness in addition to the usual ties of blood, marriage, or adoption.⁴² Resort communities have introduced requirements of permanent rather than seasonal occupancies;⁴³ other definitions require that the related group live under "one head."⁴⁴

39. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974) (quoting Belle Terre, Long Island Ordinance).

40. The number is often five, *see, e.g.*, *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 127, 610 P.2d 436, 437, 164 Cal. Rptr. 539, 542 (1980) (en banc); *Douglass v. City of Spokane*, 25 Wash. App. 823, 609 P.2d 979 (1980) (discussing Spokane Zoning Ord. 110.060), but it can range as high as ten, *see, e.g.*, *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644, 647 (Mo. Ct. App. 1975) (discussing Meryville, Mo. Zoning Ord. 3142). Another common provision in these types of ordinances exempts domestic servants from the relatedness requirements. *See, e.g.*, *City of Des Plaines v. Trottnier*, 34 Ill. 2d 432, 434, 216 N.E.2d 116, 117 (1966). Limited exceptions are often made for gratuitous guests, *see, e.g., id.*, and boarders, roomers, or lodgers, *see, e.g.*, *Town of N. Hempstead v. Griffen*, 71 Misc. 2d 864, 337 N.Y.S.2d 318 (Sup. Ct. 1972).

Some ordinances make additional exceptions. *See Timberlake v. Kenkel*, 369 F. Supp. 456 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975) (licensed foster home); *City of Des Plaines v. Trottnier*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966) (specified religious uses); *Holy Name Hosp. v. Montroy*, 153 N.J. Super. 181, 379 A.2d 299 (Law Div. 1977) (restrictions relaxed if dwelling is owner-occupied).

41. *See, e.g.*, *City of Newark v. Johnson*, 70 N.J. Super. 381, 175 A.2d 500 (Essex County Ct., Law Div. 1961); ST. PETERSBURG BEACH, FLA., COMPREHENSIVE ZONING ORDINANCE § 1 (1972), *reprinted in* MODERN LEGAL FORMS § 10214.5 (Supp. 1980). Some ordinances permit unrelated groups in designated areas only as a conditional use. *See, e.g.*, *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29 (1979), *vacated*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981); *People v. Renaissance Project, Inc.*, 36 N.Y.2d 65, 324 N.E.2d 355, 364 N.Y.S.2d 885 (1975).

42. *See, e.g.*, *People v. Kalayjian*, 76 Misc. 2d 1097, 352 N.Y.S.2d 115 (Sup. Ct. 1973); NIMLO MODEL ZONING ORDINANCE § 11-204(18) (C. Rhyne ed. 1954).

43. *See, e.g.*, *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Larson v. Mayor of Spring Lake Heights*, 99 N.J. Super. 365, 240 A.2d 31 (Law Div. 1968). Ironically, some resort communities in the province of Ontario, Canada, have employed zoning for direct social control to require that the occupancy of dwelling units be exclusively seasonal. Evidently the municipalities are concerned that servicing problems could arise if the dwellings were used on a year-round basis. *See, e.g.*, *Horseshoe Valley Ltd. v. Township of Medonte*, 79 D.L.R.3d 156 (Ont. H.C. 1977); *Mueller v. Township of Tiny*, 72 D.L.R.3d 28 (Ont. H.C. 1976).

44. *See, e.g.*, *Berger v. State*, 71 N.J. 206, 218, 364 A.2d 993, 999 (1976). Some municipalities have adopted unusual definitions of family that recognize only certain categories of related individuals in an apparent attempt to establish limits on the extended family. One such provision

Though in recent years some municipalities have replaced the single housekeeping unit formulation with a traditional-family definition,⁴⁵ it would be misleading to view the history of single-family zoning ordinances as an even progression from less restrictive to more restrictive definitions of family.⁴⁶ It appears, however, that early instances of defining family in terms of legal and biological relationships did not foster any litigation, perhaps because this type of definition did not become widespread until later years, or perhaps because most domestic groups in this early period lived in the context of a traditional family. Today there is no lack of litigation. From quite insignificant beginnings in the 1950s,⁴⁷ cases considering traditional-family definitions in zoning ordinances occurred more frequently in the next decade⁴⁸ and became commonplace in the 1970s.⁴⁹ The inclusion of this

states "[c]ousins, nephews, nieces, etc., shall not be considered a part of a family so defined." YPSILANTI, MICH., CODE § 209.00 (1957) (amended 1967); *see also* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 304, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 451 (1974). The definition of family in another zoning ordinance recognizes only "direct lineal descendants and adopted children" of "one or two persons" as relatives. TROY, MICH., ZONING ORDINANCE § 5.2(30), *reprinted in* C. CRAWFORD, HANDBOOK OF ZONING AND LAND USE ORDINANCES—WITH FORMS 124 (1974). Some of these definitions can produce peculiar results. For instance, the definition considered in one case allowed two siblings to live with their grandmother but permitted only one child to live with her if the children happened to be cousins. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

45. *See, e.g.*, Prospect Gardens Convalescent Home, Inc. v. City of Norwalk, 32 Conn. Supp. 214, 347 A.2d 637 (C.P. 1975) (change from "single housekeeping unit" formulation to traditional-family definition made in 1974); Town of Durham v. White Enters., 115 N.H. 645, 348 A.2d 706 (1975) (similar change made in 1971).

46. At least one city adopted a definition referring to the legal and biological relationships of household members in the year after the Supreme Court's decision in *Euclid*. *See* PITTSBURGH, PA., GENERAL ORDINANCES § 1887 (1938):

Family: Two or more persons related by blood or marriage living together; or one or more persons maintaining wholly or partly other persons, all of them living together in one household; not embracing clubs, fraternities, boarding or rooming houses or other groups of individuals living together.

(Clause added by Ordinance No. 537, ap. June 30, 1927, O.B. 39, page 89) (emphasis added). Other municipalities adopted zoning restrictions incorporating traditional-family definitions relatively early. *See, e.g.*, Cook County, Ill., Zoning Ordinance § 22 (1940); Detroit, Mich., Official Zoning Ordinance § 2.13 (1945); LOS ANGELES, CAL., CODE § 12.00 (1946). In 1928, the Village of Grosse Pointe Farms, Michigan, adopted the following definition:

FAMILY—A family is one or two persons or parents with their direct descendants and adopted children (and including the domestic employees thereof) together with not more than five persons not so related, living together in a room or rooms comprising a single housekeeping unit. Every additional group of five or less persons living in such housekeeping unit shall be considered a separate family for the purposes of this ordinance.

Grosse Pointe Farms, Mich., Zoning Ordinance § I(15) (1928).

47. *See, e.g.*, Young v. Montgomery County, 216 Md. 341, 140 A.2d 527 (1958); Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n, 265 S.W.2d 374 (Mo. 1954).

48. *See, e.g.*, City of Des Plaines v. Trotter, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); Larson v. Mayor of Spring Lake Heights, 99 N.J. Super. 365, 240 A.2d 31 (Law Div. 1968); Marino v. Mayor of Norwood, 77 N.J. Super. 587, 187 A.2d 217 (Law Div. 1963); City of Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (Essex County Ct., Law Div. 1961).

type of definition of family in model zoning ordinances⁵⁰ and widely used form books⁵¹ undoubtedly contributed to the increasing acceptance of such zoning by municipalities, and one result was more litigation.

The increasing prevalence of traditional-family ordinances represents an increase in zoning for direct social control. An ordinance that defines family with respect to the legal and biological interrelationships of its members exercises such control: land users are authorized to live in a residential district, or potential land users are excluded, on the

49. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Timberlake v. Kenkel*, 369 F. Supp. 456 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975); *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd per curiam*, 487 F.2d 883 (9th Cir. 1973); *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29 (1979), *vacated*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981); *Hessling v. City of Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *Rademan v. City of Denver*, 186 Colo. 250, 526 P.2d 1325 (1974); *Prospect Gardens Convalescent Home, Inc. v. City of Norwalk*, 32 Conn. Supp. 214, 347 A.2d 637 (C.P. 1975); *Village of River Forest v. Midwest Bank & Trust Co.*, 12 Ill. App. 3d 136, 297 N.E.2d 775 (1973); *City of Takoma Park v. County Bd. of Appeals*, 259 Md. 619, 270 A.2d 772 (1970); *Association for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976); *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. Ct. App. 1975); *State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 543 P.2d 173 (1975); *Town of Durham v. White Enters.*, 115 N.H. 645, 348 A.2d 706 (1975); *State v. Baker*, 81 N.J. 99, 405 A.2d 368 (1979); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *Kirseh Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970); *Holy Name Hosp. v. Montroy*, 153 N.J. Super. 181, 379 A.2d 299 (Law Div. 1977); *YWCA of Summit v. Board of Adjustment*, 134 N.J. Super. 384, 341 A.2d 356 (Law Div. 1975), *aff'd*, 141 N.J. Super. 315, 358 A.2d 211 (App. Div. 1976); *Group House of Port Washington, Inc. v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978); *People v. Renaissance Project, Inc.*, 36 N.Y.2d 65, 324 N.E.2d 355, 364 N.Y.S.2d 885 (1975); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); *Town of Ithaca v. Lucente*, 36 A.D.2d 560, 317 N.Y.S.2d 679 (1971); *Abbott House v. Village of Tarrytown*, 34 A.D.2d 821, 312 N.Y.S.2d 841 (1970); *Incorporated Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (Sup. Ct. 1977); *People v. Kalayjian*, 76 Misc. 2d 1097, 352 N.Y.S.2d 115 (App. Term 1973); *Town of N. Hempstead v. Griffen*, 71 Misc. 2d 864, 337 N.Y.S.2d 318 (Sup. Ct. 1972); *People v. Skidmore*, 69 Misc. 2d 320, 329 N.Y.S.2d 881 (Village Justice Ct. of Sea Cliff 1971); *Culp v. City of Seattle*, 22 Wash. App. 618, 590 P.2d 1288 (1979); *Browndale Int'l, Ltd. v. Board of Adjustment*, 60 Wis. 2d 182, 208 N.W.2d 121 (1973), *cert. denied*, 416 U.S. 936 (1974). In a recent survey of Montana localities two-thirds of the responding municipalities had adopted some form of traditional-family ordinance. See Note, *The Definition of "Family" in Single-Family Zoning*, 42 MONT. L. REV. 165, 181-82 (1981).

50. See, e.g., F. BAIR & E. BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE, WITH COMMENTARY* 68 (2d ed. 1960); L. KENDIG, *PERFORMANCE ZONING* 105 (1980) (model ordinance); T. MATTHEWS, *DRAFTING MUNICIPAL ORDINANCES* 323 (1956); NIMLO MODEL ZONING ORDINANCE § 11-204(18) (C. Rhyne ed. 1954).

51. See, e.g., AM. JUR. 2D, *LEGAL FORMS* § 268.34 (1974) ("*Family*: A number of individuals related by blood, marriage or adoption living and cooking together on the premises as a single housekeeping unit and including domestic employees."); MODERN LEGAL FORMS § 10214.5 (Supp. 1980).

basis of marital or family status, relatively immutable personal characteristics explicitly identified in the ordinance. What motivated the development and adoption of these traditional-family ordinances?⁵² One way to find out is to examine cases considering definitions of traditional families to ascertain what governmental objectives are cited as reasons for these restrictions.⁵³

B. *Purported Goals of Zoning for the Traditional Family.*

Many of the ends that traditional-family ordinances are said to promote are conventional zoning goals. The Standard State Zoning Enabling Act⁵⁴ by and large encapsulates these goals:

Such regulations shall be in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from

52. Ordinances defining family with respect to legal and biological relationships almost always make an exception for some number of unrelated individuals. See *supra* note 40 and accompanying text. Therefore, when this article states that a zoning ordinance limits a district to traditional families, or discusses a "traditional-family ordinance", the reader should assume, unless the context indicates otherwise, that unrelated persons are not totally excluded.

53. Another way to answer this question would be to examine, among other things, what members of local governing bodies said when adopting such ordinances. In many instances, however, this sort of record will be unavailable. With respect to one traditional-family ordinance it was said "[t]here exist no City Council minutes nor committee reports which might assist this Court in identifying the purposes of the ordinance in question." Brief for Appellant at 42, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality) (footnote omitted). Also, it may very well be that little discussion would preface the adoption of such provisions because they are accepted largely on the recommendation of a municipal solicitor or planning staff member who previously examined a model ordinance or form book for an acceptable formulation. See R. ELICKSON & A.D. TARLOCK, *LAND-USE CONTROLS* 56 (1981) ("As in other areas of law, those who draft zoning ordinances rely heavily on standard forms and language developed and tested by those who have gone before."). Unfortunately, such form books and model ordinances contain little, if any, explanation of why they suggest a traditional-family definition. See, e.g., F. BAIR & E. BARTLEY, *supra* note 50, at 80. On the preparation and use of model ordinances, see generally E. GREENMAN, *CODIFICATION OF ORDINANCES 9-10* (Municipal Administrative Service Pub. No. 6, 1928); C. RHYNE, B. RHYNE, & E. MEANS, *CODIFICATION OF MUNICIPAL ORDINANCES 27-29* (National Institute of Municipal Law Officers Report No. 147, 1961).

54. The Standard Act was model legislation developed by the United States Department of Commerce in the 1920s for delegating the zoning power from state to local governments. It was instrumental in the rapid spread of zoning throughout the country, see E. BASSETT, *supra* note 1, at 29, and was eventually adopted in some form by all fifty states. In 1974 it remained in effect in forty-seven states. See I N. WILLIAMS, *supra* note 9, § 18.01 (1974). The explanatory notes of the draftsmen encouraged state legislatures to modify the Standard Act as little as possible when adopting enabling legislation. See United States Dep't of Commerce, *Standard State Zoning Enabling Act*, reprinted in ALI MODEL LAND DEVELOPMENT CODE app. A, 212 (Tent. Draft No. 1, 1968) (draftsmen's explanatory note) [hereinafter cited as Standard Act]. See generally, R. ANDERSON & B. ROSWIG, *PLANNING, ZONING & SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE 50 STATES* (1966). The Standard Act and variations thereon are discussed in I N. WILLIAMS, *supra* note 9, ch. 18 (chart presentation at 361-70), and in Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 367-80 (1965). In recent years some states have enacted zoning and planning statutes that depart significantly from the wording of the Standard Act. See R. ELICKSON & A.D. TARLOCK, *supra* note 53, at 37.

fire, panic, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.⁵⁵

Of these objectives, population density control is the one most commonly cited in support of zoning ordinances defining family with reference to the legal and biological composition of the domestic unit.⁵⁶ Apparently, it is argued that traditional-family ordinances will prevent overcrowding because traditional families tend to be self-limiting and unrelated groups do not.⁵⁷ A number of other zoning objectives are also closely associated with controlling the density of development.⁵⁸ Problems of traffic and parking are frequently given as reasons for the adoption of zoning restrictions authorizing only conventional families to reside in a district⁵⁹ because a group of unrelated individuals would allegedly be more likely to create traffic and parking problems than an unrelated group of the same size.⁶⁰ Another standard concern is the problem of increased noise.⁶¹ For instance, the raucous behavior of fraternities,⁶² and of unrelated groups in resort communities,⁶³ has apparently prompted the adoption of restrictive definitions of family. Lo-

55. Standard Act, *supra* note 54, §3.

56. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 499-500 (1977) (plurality); *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 912 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883, 884 (9th Cir. 1973); *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29, 33 (1979), *vacated*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981); *Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n*, 265 S.W.2d 374, 378 (Mo. 1954).

57. *See, e.g.*, *Timberlake v. Kenkel*, 369 F. Supp. 456, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975); Brief for Appellants at 32, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). *But see* Note, "Burning the House to Roast the Pig": *Unrelated Individuals and Single Family Zoning's Blood Relation Criterion*, 58 CORNELL L. REV. 138, 156 n.102 (1972).

58. One goal, adequate provision for light and air, is not usually linked with traditional-family ordinances. *But see* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (discussing "the blessings . . . of clean air").

59. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 500 (1977) (plurality); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 18 (1974); *Larson v. Mayor of Spring Lake Heights*, 99 N.J. Super. 365, 369, 240 A.2d 31, 33 (Law Div. 1968).

60. *See* *City of Des Plaines v. Trottnier*, 34 Ill. 2d 432, 437, 216 N.E.2d 116, 119 (1966).

61. *See, e.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 18 (1974); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 245, 281 A.2d 513, 515 (1971).

62. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 530, 213 N.W. 835, 837-38 (1927) (describes standard view of fraternity behavior). The definition of family found in one model ordinance would restrict occupancy of a housekeeping unit to related persons. The commentary to the ordinance explains: "[t]he definition is definitely intended to prevent fraternity

cal councils hope that with parental or other supervision will come peace and quiet.⁶⁴ In some cases, avoiding an undue burden on public services has also been cited in support of traditional-family regulations,⁶⁵ an argument apparently associated with the density rationale.

It has frequently been said that traditional-family zoning provisions further the goal of protecting property values.⁶⁶ It has been argued that an "end of single-family housing will make the community less aesthetic, will result in more traffic and more children, will reduce the quality of police, fire, transportation, and educational services and, consequently, will drive property values down."⁶⁷ Another economic rationale often used to support ordinances excluding all but traditional families or a limited number of unrelated individuals is that this type of ordinance ensures the availability of appropriate accommodations for traditional families by preventing the rental (or sale) of houses to groups of unrelated persons who, because of their independent sources of income, might be able to pay a higher price than traditional families.⁶⁸ In other words, zoning ordinances with traditional-family definitions allegedly preserve the structure of housing costs and prevent inflated property and rental prices.⁶⁹

and sorority houses . . . from taking on a single-family status." F. BAIR & E. BARTLEY, *supra* note 50, at 80.

63. See, e.g., Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970).

64. See Larson v. Mayor of Spring Lake Heights, 99 N.J. Super. 365, 369-70, 240 A.2d 31, 33 (Law Div. 1968) (Public officials felt problems "were due largely to the absence of parental or other supervision and control within the premises.").

65. See Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977) (plurality) (school system); Timberlake v. Kenkel, 369 F. Supp. 456, 460, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975) (services in general).

66. See, e.g., Timberlake v. Kenkel, 369 F. Supp. 456, 460, 465, 466, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975); Larson v. Mayor of Spring Lake Heights, 99 N.J. Super. 365, 370, 240 A.2d 31, 34 (Law Div. 1968); City of Newark v. Johnson, 70 N.J. Super. 381, 387, 175 A.2d 500, 503 (Essex County Ct., Law Div. 1961). For a general discussion of protecting property values, see E. BASSETT, *supra* note 1, at 52-53 (protection of values should remain distinct from the increase of values, as the latter is not a proper purpose of zoning).

67. Timberlake v. Kenkel, 369 F. Supp. 456, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975).

68. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 18-19 (1974); Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 912-13 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir. 1973). Of course, depending on the quality of housing in a given district, not all traditional families may find it economically feasible to participate. See, e.g., Rademan v. City of Denver, 186 Colo. 250, 253, 526 P.2d 1325, 1327 (1974) (two traditional families jointly purchasing house, neither family capable of effecting purchase without the financial assistance of the other). Thus, as with other types of residential zoning, it appears that ordinances limiting areas to traditional families can potentially have an exclusionary effect.

69. See Timberlake v. Kenkel, 369 F. Supp. 456, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975). Courts considering this type of ordinance as enacted by

Less conventional zoning goals also allegedly support traditional-family ordinances. The extent to which the zoning power may be exercised in furtherance of municipal aesthetics has long occupied courts and commentators alike.⁷⁰ In the early years an aesthetic purpose alone would not be adequate support for a zoning ordinance, although aesthetic purposes could be recognized if a regulation was primarily based on considerations of public health and safety.⁷¹ Ultimately, however, the Supreme Court signaled in *Berman v. Parker*⁷² that governments could pursue aesthetic objectives. Mr. Justice Douglas stated that the "concept of the public welfare is broad and inclusive" and then elaborated: "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."⁷³

Two decades later, in *Village of Belle Terre v. Boraas*,⁷⁴ Douglas again recognized the legitimacy of aesthetic objectives in a similarly lyrical passage:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.⁷⁵

Particularly noteworthy for our purposes, however, is that the majority in *Belle Terre* adopted this passage in the course of upholding a traditional-family ordinance.⁷⁶

resort communities have accepted that groups of unrelated persons are able to pay more rent than conventional families. See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 245, 281 A.2d 513, 515 (1971); *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 344, 271 A.2d 430, 431 (App. Div. 1970).

70. See generally 1 N. WILLIAMS, *supra* note 9, ch. 11.

71. See, e.g., *Welch v. Swasey*, 214 U.S. 91, 107-08 (1909); Opinion of the Justices, 234 Mass. 597, 604, 127 N.E. 525, 528 (1920); E. BASSETT, *supra* note 1, at 97.

72. 348 U.S. 26 (1954).

73. *Id.* at 33. "*Berman* was not, strictly speaking, a zoning case, but involved issues of eminent domain. Nonetheless, it has been cited frequently in subsequent zoning decisions as support for the broad scope of the police power." *Developments in the Law—Zoning*, *supra* note 11, at 1443 n.8.

74. 416 U.S. 1 (1974).

75. *Id.* at 9.

76. See also *Timberlake v. Kenkel*, 369 F. Supp. 456, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975) (citing aesthetic objective in support of a traditional-family ordinance). Aesthetic concerns have achieved more acceptance as proper zoning goals in recent years. See 1 N. WILLIAMS, *supra* note 9 § 11.21; *Developments in the Law—Zoning*, *supra*

A similarly amorphous concept, closely related to aesthetics, is that of the "character of the community" or "neighborhood character," the preservation of which is frequently said to underlie ordinances limiting residential areas to traditional families.⁷⁷ Unquestionably there is a physical aspect to neighborhood character.⁷⁸ The exclusion of industry and businesses certainly aids in establishing the character of a residential district, and *Belle Terre* speaks of noise, open space, population density, and traffic as elements that in part determine community character.⁷⁹ Other decisions indicate that the stability of residential occupancy is also a factor.⁸⁰ And rather minor physical matters often determine whether a given land use will comport with a neighborhood's character.⁸¹ Nevertheless, the notion of community character is not limited to the quality of the physical urban environment. The concept includes less tangible elements: "Protection of character covers many physical, social, economic, and psychological objectives that affect people's choices."⁸² Thus, zoning becomes a regulatory tool shap-

note 11, at 1448. As "classifications . . . not based primarily on physical characteristics," NATIONAL COMMISSION ON URBAN PROBLEMS, *supra* note 24, at 219, aesthetic concerns arguably support zoning based on other intangible qualities such as the composition of a household in a dwelling unit.

77. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 550 (1977) (White, J., dissenting); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 131, 610 P.2d 436, 440, 164 Cal. Rptr. 539, 543 (1980) (en banc); *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644, 651 (Mo. Ct. App. 1975); *Berger v. State*, 71 N.J. 206, 223, 364 A.2d 993, 1002 (1976); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974). Although zoning to preserve neighborhood character has traditionally been thought to be a legitimate purpose of zoning, it has not gone uncriticized. *See* 1 N. WILLIAMS, *supra* note 9, § 15.07; Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 333-34 (1955). Nor have the courts allowed neighborhood character to be pursued at the expense of other values. *See Developments in the Law—Zoning*, *supra* note 11, at 1452-57.

78. *See Developments in the Law—Zoning*, *supra* note 11, at 1450-51.

79. *Belle Terre*, 416 U.S. at 9. Though open space is primarily a physical characteristic related to density controls, it may have symbolic weight as an abstract notion of developmental quality determined by elements like "privacy, amenity, and compatibility." *See* NATIONAL COMMISSION ON URBAN PROBLEMS, *supra* note 24, at 206 (1969).

80. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 516 (1977) (Stevens, J., concurring); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974).

81. *See* NATIONAL COMMISSION ON URBAN PROBLEMS, *supra* note 24, at 219:

Perhaps the greatest classification problem, though, stems from the sheer number of factors that can influence compatibility—such matters as exact location, topography, the design of the site and the building, the location of automobile access points, maintenance, and details of operation (how late a store stays open at night, whether there is an exhaust filter on the pizza oven). Some of the details that determine compatibility may vary over time—the quiet little drugstore that used to close at 10:30 now stays open all night and sells a special ice cream concoction that attracts teenagers and their cars until the small hours. The nicely maintained gas station changes hands, and the new owner leaves tires lying around and hangs up fluttery pennants.

82. *Id.*; *see also* M. McLEAN, ZONING BUFFERS: SOLUTION OR PANACEA? 3 (1960) ("psychological factors" evaluated in determining compatibility).

ing not only the physical character of the neighborhood, but "the socioeconomic character of a community" as well.⁸³

In this context, aiming to preserve a certain community character implies zoning for social control. For example, in *Belle Terre* the Court refers to "family values" and "youth values."⁸⁴ A purpose of the municipal code considered in another case was "to promote and encourage a suitable environment for family life."⁸⁵ These vague phrases invite ideological interpretations, and this possibility must be considered: that zoning restrictions limiting residential districts to traditional families actually have ideological goals.

Like all police power regulations, zoning ordinances must relate to the "public health, safety, morals or general welfare."⁸⁶ The first section of the Standard State Zoning Enabling Act explicitly duplicates this requirement.⁸⁷ Consequently, one might anticipate efforts to support traditional-family ordinances on the basis that such regulations further public morals on issues such as the cohabitation of unrelated adults.⁸⁸ Traditional-family ordinances enacted by resort communities have been said to be aimed in part at the immoral behavior of unrelated groups (fornication in cars parked on public streets, for instance).⁸⁹ Nevertheless, these regulations have sought more to ameliorate the generally inconsiderate behavior of these groups than to deal specifically with moral concerns. Nor have the attempts to support these ordinances relied primarily on the rationale of protecting public morals; indeed, non-resort communities have explicitly disavowed any intention to influence the moral behavior of cohabiting unrelated adults, or to preserve the moral fiber of the community.⁹⁰ A

83. Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 LAW & CONTEMP. PROBS. 5, 11 (1979). For instance, the zoning power can preserve a small New England town's "charm." *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 959 (1st Cir. 1972).

84. *Belle Terre*, 416 U.S. at 9.

85. *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29, 33 (1979), *vacated*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981).

86. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Adkins v. Children's Hosp.*, 261 U.S. 525, 548 (1923).

87. Standard Act, *supra* note 54, § 1.

88. See Cope, *Zoning: The Definition of Family*, 62 ILL. B.J. 30, 31 (1973).

89. See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 245, 281 A.2d 513, 515 (1971); *Larson v. Mayor of Spring Lake Heights*, 99 N.J. Super. 365, 369, 240 A.2d 31, 33 (Law Div. 1968).

90. See, e.g., *Timberlake v. Kenkel*, 369 F. Supp. 456, 465 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975); *Boraas v. Village of Belle Terre*, 476 F.2d 806, 814 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974). Arguments that local governments had the moralistic objective of excluding unrelated couples by means of traditional-family ordinances falter in the face of the usual exceptions made for a limited number of unrelated persons. See, e.g., *Village of Belle*

disclaimer of this kind seems wise, because at least one court has explicitly stated that a zoning objective based on the fear "that groups of unrelated persons hazard an immoral environment for families with children" would not be legitimate.⁹¹

Though the protection of morals has not figured prominently in zoning goals,⁹² municipalities defining family with respect to the legal and biological interrelationships of household members may in fact be pursuing ideological goals not far removed from the moralistic objectives noted above. These municipalities can be seen as seeking to provide affirmatively for the traditional family and all the values and ideals normally associated with it, rather than as simply prohibiting unmarried cohabitations. Thus, when Mr. Justice Douglas spoke of "family values" and "youth values" in the *Belle Terre* case, he referred to a municipality's allegedly legitimate interest in establishing a preserve where the ideological virtues that accompany family living might flourish.⁹³ Other cases could be read in a similar manner.⁹⁴

Clearly the law affords the family a favored position in a number of contexts,⁹⁵ including constitutional protection for both its nuclear and extended forms.⁹⁶ Furthermore, courts have long associated the social values of family life with the very concept of zoning controls. As was noted in a leading California case: "we think it may be safely and sensibly said that justification for residential zoning may, in the last

Terre v. Boraas, 416 U.S. 1, 8 (1974); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 139 n.2, 610 P.2d 436, 445 n.2, 164 Cal. Rptr. 539, 548 n.2 (1980) (en banc); see also *supra* note 40.

91. *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 133, 610 P.2d 436, 441, 164 Cal. Rptr. 539, 544 (1980) (en banc); cf. Wilkinson & White, *Constitutional Protection for Personal Life-Styles*, 62 CORNELL L. REV. 563, 568 (1977) ("Law is a vehicle by which democratic majorities reaffirm shared moral aspirations and summon society's allegiance to a common set of behavioral goals. Deploying the Constitution to undermine conventional precepts of domestic morality is a step not lightly taken.").

92. See *supra* text accompanying notes 86-91; 1 N. WILLIAMS, *supra* note 9, § 8.03 (1974); *Developments in the Law—Zoning*, *supra* note 11, at 1445.

93. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); see also *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 146 (E.D.N.Y. 1972), *aff'd*, 416 U.S. 1 (1974).

94. See, e.g., *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 912 (N.D. Cal. 1970), *aff'd per curiam*, 487 F.2d 883 (9th Cir. 1973); *Rademan v. City of Denver*, 186 Colo. 250, 254-55, 526 P.2d 1325, 1327 (1974); *Town of Durham v. White Enters.*, 115 N.H. 645, 649, 348 A.2d 706, 709 (1975).

95. See, e.g., *Town of Durham v. White Enters.*, 115 N.H. 645, 649, 348 A.2d 706, 709 (1975). The author of a legal manual for individuals who wish to pursue a communal style of living opens by noting that one of his fundamental assumptions is that the legal system in the United States is designed to maintain "cohesive, socially productive family units." L. GOLDSTEIN, *COMMUNES, LAW & COMMONSENSE* 1 (1974). Cf. Wilkinson & White, *supra* note 91, at 595 ("Preserving the strength of this basic, organic unit [the nuclear, heterosexual family] is a central and legitimate end of the police power").

96. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality).

analysis, be rested upon the protection of the civic and social values of the American home."⁹⁷ Many commentators have also tied family values to zoning. In the first edition of his treatise on zoning, James Metzenbaum asserts that "[a] proper administration of zoning laws will go far toward preserving the American Home—that institution which has been referred to repeatedly as the backbone and the mainstay of our country."⁹⁸ And in his *Euclid* brief Alfred Bettman noted that people seek to purchase their own homes because they prefer to raise their children in a moral environment.⁹⁹

Ultimately, however, it is difficult to assess the strength of the association between the social values of family life and the upholding of traditional-family ordinances by the judiciary.¹⁰⁰ For instance, some judges have read *Belle Terre* and its language of "family values" and "youth values" to refer only to the creation of an appropriate physical environment for family living.¹⁰¹ Others have seen the decision of the

97. *Miller v. Board of Pub. Works*, 195 Cal. 477, 492-93, 234 P. 381, 386 (1925), *appeal dismissed*, 273 U.S. 781 (1927). The court went on to specify some of these values:

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. With ownership of one's home comes recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community and increased pride in personal achievement which must come from personal participation in projects looking toward community betterment.

Id. at 493, 234 P. at 387; *see also* *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 144 Minn. 13, 20, 176 N.W. 159, 162 (1920), *rev'g* 144 Minn. 1, 174 N.W. 885 (1919); *City of Bismarck v. Hughes*, 53 N.D. 838, 851-52, 208 N.W. 711, 716-17 (1926); *Fraser v. Fred Parker Funeral Home*, 201 S.C. 88, 96-97, 21 S.E.2d 577, 581 (1942) (action in nuisance).

98. J. METZENBAUM, *supra* note 36, at 8. Metzenbaum was counsel for the municipality in the *Euclid* case. Another early commentator suggested that districts zoned only for residences provided "more moral surroundings." Note, *Delimitation of the State Police Power as to Building Restrictions*, 26 YALE L.J. 151, 152 (1916).

99. A. BETTMAN, *Euclid Brief*, reprinted in CITY AND REGIONAL PLANNING PAPERS 175 (1946). The explanation for the almost unquestioning solicitude afforded the single-family detached dwelling may very well lie in the tenets of social anthropology. According to one author, "[a] sacred quality endows both the family and its 'home,' sacred in the sense of being set apart from the mundane and having a distinctive aura." C. PERIN, *supra* note 16, at 47.

100. *See generally* Williams & Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre and Berman*, 29 RUTGERS L. REV. 73, 79-80 (1975); Note, *supra* note 34, at 1476-77. Clearly the Village of Belle Terre sought to have ideological goals associated with its ordinance. "An abundance of stable families to provide an environment comports with parents' ideals for raising their children is an end which the ordinance does in fact promote." Brief for Appellants at 15, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

101. *See* *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 799-800, 171 Cal. Rptr. 738, 746-47 (1981) (viewing promotion of family values entirely in terms of creating an appropriate physical environment); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 304-05, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974) (suggesting *Belle Terre* was primarily concerned with the pre-

Supreme Court as contemplating intangible concepts independent of the physical aspects of urban design.¹⁰² The word "values" used in *Belle Terre* and in other cases¹⁰³ certainly suggests that ideological goals were thought to be at stake.

In general, many of the broad range of zoning goals associated with traditional family ordinances—notably those of protecting the community character, aesthetics, and promoting abstract notions associated with family life—are rather far removed from the explicit concerns of the founders of zoning. At the same time, however, there remains a reluctance to wander too far from the traditional health and safety goals. Density control and related matters are still the most common goals used to support traditional-family ordinances, and in no case has such a regulation been supported with no reference at all to the tangible aspects of the urban environment. Thus, this more established branch of zoning for direct social control retains its roots in the physical rationales for zoning.

C. *Enter the Courts: Constitutional Issues and Substantive Review.*

Judicial review in other areas of the law may create controversy, but "it has always been recognized that it is an essential part of the judicial function" for courts to watch over the actions of local governments.¹⁰⁴ Perhaps the activist attitude of the courts reveals a fundamental "fear of popular majorities."¹⁰⁵ In any event, each judicial examination of a zoning ordinance weighs public interest against pri-

vention of transiency); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 519 n.15 (1977) (Stevens, J., concurring).

102. See *Town of Durham v. White Enters.*, 115 N.H. 645, 649, 348 A.2d 706, 709 (1975) (traditional family ordinance upheld in spite of the "fact that unrelated group use does not constitute a different [physical] use than that by the blood related family group"); see also *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29, 32-33 (1979) (report of chief associate planner finding "no difference in land use impact between a related family of 10 and an unrelated family of 10"), *vacated*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981); cf. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 145 (E.D.N.Y. 1972) ("The question ultimately posed is whether it is lawful to have a one-family dwelling zoning district which excludes equally small household groups who impose no greater burdens of use on the land, the building or the surroundings than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children."), *aff'd*, 416 U.S. 1 (1974).

103. See, e.g., *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 128, 610 P.2d 436, 438, 164 Cal. Rptr. 539, 541 (1980) (en banc) ("Valid laws can, of course, be written to help promote and protect values that family life enhances.").

104. *Williams*, *supra* note 77, at 318; see also E. FREUND, *THE POLICE POWER* § 63, at 57 (1904).

105. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 641, 670 (1909).

vate deprivation, and in so doing defines the legitimate objectives of planning and the limits of the police power.¹⁰⁶

A court always has the option of determining that a traditional-family ordinance exceeds the power delegated to the municipality in the enabling legislation.¹⁰⁷ Nevertheless, courts have reviewed traditional-family zoning restrictions almost exclusively on constitutional bases.¹⁰⁸ The outcomes have varied greatly, in part because some state courts construe state constitutions as affording protections that differ somewhat from the guarantees included in the federal Constitution. For example, the highest court in New Jersey refused to follow the Supreme Court's decision in *Belle Terre*, noting that a New Jersey court may interpret its state constitution as it sees fit.¹⁰⁹ Furthermore, federal courts, unlike their state counterparts, hesitate to interfere in zoning matters because zoning is an exercise of the police power reserved to the states.¹¹⁰ But the constitutional principles involved, whether originating from federal or state guarantees, are similar and invite a more integrated approach to these cases in order to determine when a traditional-family ordinance should survive review.

1. *Due Process*. The Court in *Euclid* stated the basic test of substantive due process under the fourteenth amendment, declaring that a zoning ordinance violates due process if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."¹¹¹ State courts express tests of substantive

106. See THE NEW ZONING at xxii (N. Marcus & M. Groves ed. 1970).

107. This assumes, of course, that the municipality does not zone pursuant to home rule powers. In one well-known Illinois case (not involving home rule) the court invalidated a zoning ordinance, holding that the ordinance was *ultra vires*. This left the state legislature free to amend the enabling statute to explicitly permit the local government to zone for direct social control with respect to traditional families, and the legislature did so. See *City of Des Plaines v. Trottnier*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966), and its ultimate consequence, *Village of River Forest v. Midwest Bank & Trust Co.*, 12 Ill. App. 3d 136, 138, 297 N.E.2d 775, 776 (1973) (interpreting ILL. REV. STAT. 1967, c. 24, § 11-13-1(9)); see also *State v. Baker*, 81 N.J. 99, 119-20, 405 A.2d 368, 376 (1979).

108. This is true despite the well-worn maxim that a court will not decide an issue on constitutional grounds if statutory grounds will serve as well, see *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (concurring opinion), quoted in *Moore v. City of E. Cleveland*, 431 U.S. 494, 526 (1977) (Burger, C.J., dissenting); *State v. Baker*, 81 N.J. 99, 118-21, 405 A.2d 368, 376-78 (1979) (Moun-tain, J., dissenting).

109. *State v. Baker*, 81 N.J. 99, 112, 405 A.2d 368, 374 (1979); see also *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 n.3, 610 P.2d 436, 440 n.3, 164 Cal. Rptr. 539, 543 n.3 (1980) (en banc); *Holy Name Hosp. v. Montroy*, 153 N.J. Super. 181, 185, 379 A.2d 299, 301 (Law Div. 1977); ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW 123 (R. Fishman ed. 1978).

110. See *Rose, Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, in AFTER MOUNT LAUREL 331 (J. Rose & R. Rothman eds. 1977).

111. *Euclid*, 272 U.S. at 395; see also E. FREUND, *supra* note 104, § 20, at 15. Freund makes an interesting comment on the meaning of reasonableness: "In discussing this question we may

due process in similar terms;¹¹² the primary concern is that a measure bear a reasonable relation to a legitimate governmental objective.¹¹³ As in analysis pursuant to the equal protection clause,¹¹⁴ substantive due process review becomes more rigorous when a zoning ordinance intrudes upon "fundamental" liberties. For example, in *Moore v. City of East Cleveland*¹¹⁵ a zoning restriction that defined family so as to make it a crime for a grandmother to live with two of her grandsons impinged upon "freedom of personal choice in matters of marriage and family life"¹¹⁶ and prompted a plurality of the Supreme Court to engage in a searching appraisal of the ordinance. Mr. Justice Powell, writing for the plurality, conceded that the goals said to justify the ordinance—preventing overcrowding, minimizing traffic and parking con-

safely discard all arguments drawn from the assumption that unreasonable means absurd or plainly arbitrary; statutes which deserve that designation are not much more apt to occur than judicial decisions of the like character." *Id.* § 63, at 58 (footnote omitted). The counsel for the municipality in *Euclid* wrote in the preface to his treatise on zoning that in every act associated with zoning the "guiding rule should be reasonableness." 1 J. METZENBAUM, *THE LAW OF ZONING* at v (2d ed. 1955). Cf. H. Werner, *The Constitutionality of Zoning Regulations*, in 12 *STUDIES IN THE SOCIAL SCIENCES* 52 (1924) ("[t]he point to be emphasized in all zoning is reasonableness"). Another commentator states more generally that "[d]ue process of law" comes to mean reasonable law, in the Court's opinion." Corwin, *supra* note 105, at 663.

112. See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 251, 281 A.2d 513, 518 (1971).

113. See Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 Nw. U.L. REV. 417, 419 (1976) (substantive due process "refers to the principle that a law adversely affecting an individual's life, liberty, or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate governmental objective").

114. Cf. E. FREUND, *supra* note 104, § 611, at 632 ("The two ideas [of due process and equal protection] are closely associated in the minds of the courts."). For a discussion of the analysis given traditional-family zoning ordinances under the equal protection clause see *infra* text accompanying notes 129-62.

115. 431 U.S. 494 (1977).

116. *Id.* at 499. The ordinance at issue in *Moore* included the following definition:

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) Husband or wife of the nominal head of the household.

(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of household, provided, however, that such unmarried children have no children residing with them.

(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual.

Id. at 496 n.2. Mrs. Moore was living with her son and his son. A second grandson of Mrs. Moore, a cousin of the first, came to live with the household after his mother's death and thus the ordinance was contravened. *Id.* at 496-97.

gestion, and avoiding undue financial burden on the school system—were legitimate governmental objectives, but held that the measure in question “serve[d] them marginally, at best.”¹¹⁷ Consequently, the East Cleveland ordinance could not survive the rational basis test under the Court’s heightened substantive due process review. In contrast, when the Court reviewed a more usual type of traditional-family ordinance that permitted any number of related individuals to live together, the majority had no difficulty in finding a relationship between the ordinance and its alleged objectives.¹¹⁸

Rational relationship tests imposed in the course of substantive due process review have not always been so easily satisfied in the state courts. When confronted with an ordinance limiting a household to individuals legally or biologically related, or to no more than four unrelated individuals, the New Jersey Supreme Court in *State v. Baker*¹¹⁹ held that the measure violated the state’s constitutional guarantee of due process.¹²⁰ Employing an analysis of a sort that frequently appears in review pursuant to the equal protection clause, the *Baker* court concluded that the municipality could have accomplished its goals by less restrictive means.¹²¹

Other New Jersey cases have also displayed little judicial deference to local governing bodies in the substantive due process review of traditional-family ordinances.¹²² Zoning restrictions are, however, normally presumed to be valid; the legislative judgment will prevail if the validity of the zoning classification is “fairly debatable.”¹²³ The *Euclid*

117. *Id.* at 499-500. Parents from surrounding areas had been sending their children to live with relatives in East Cleveland to take advantage of the superior public school system available there. See R. ELLICKSON & A.D. TARLOCK, *supra* note 53, at 894. See generally Brief for Appellant at 57 n.43, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

118. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The municipal goals cited were primarily the historical zoning concerns of controlling population density, traffic congestion and noise.

119. 81 N.J. 99, 405 A.2d 368 (1979).

120. *Id.* at 114, 405 A.2d at 375. In a footnote the court indicated that the ordinance also violated the right of privacy guaranteed by the state constitution. *Id.* at 114 n.10, 405 A.2d at 375 n.10.

121. *Id.* at 114, 405 A.2d at 375.

122. See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970); see also Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976). Recent exclusionary zoning opinions in New Jersey seem to seriously and unnecessarily violate the principle that “law reform decisions . . . ought to be framed in terms that are as minimally intrusive of the ordinary democratic process as possible.” *Id.* at 804.

123. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). One commentator asserts that the presumption of validity “should remain the strongest in those cases where courts are least equipped to balance the competing interests,” and that “legitimately debatable policy

Court also allowed for the "inclusion of a reasonable margin to insure effective enforcement."¹²⁴ In this vein, it is often asserted that a court does not sit as a zoning board of appeals.¹²⁵ Yet in the infamous *Moore* case, in which the municipality criminally prosecuted a grandmother for living with her two grandsons and thus impinged upon a "fundamental" personal liberty, the Court disavowed any presumption of validity.¹²⁶ Some courts may even reverse the presumption of validity when assessing traditional-family ordinances. One New Jersey court, in considering a measure enacted by a resort community to combat "group rentals," clearly indicated that the usual burden had shifted: "Before this court will uphold as reasonable a police prohibition as pervasive as the present one, its necessity in relation to the evil involved will have to be shown . . . at least to the extent of resurrecting the presumption of validity."¹²⁷

decisions in areas requiring the application of technical expertise to empirical data should enjoy a very strong presumption of validity." Travaglio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST. L.J. 295, 315 n.135 (1979). Another author has stated that "[t]raditional courts defer to local legislative judgment for several reasons: the separation of powers, a perceived lack of judicial expertise in land use matters, and the desire to allow local governmental flexibility in meeting changing conditions with innovative responses." Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585, 588-89 (1981) (footnotes omitted); see also A. BETTMAN, *supra* note 99, at 178 (discussing the capacity of local governing bodies).

124. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 388-89.

125. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *Robinson v. City of Bloomfield Hills*, 350 Mich. 425, 430, 86 N.W.2d 166, 169 (1957).

126. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality). Most courts considering the usual sort of traditional-family ordinance have applied the presumption of validity. See, e.g., *Rademan v. City of Denver*, 186 Colo. 250, 526 P.2d 1325 (1974); *Town of Durham v. White Enters.*, 115 N.H. 645, 348 A.2d 706 (1975); *City of Newark v. Johnson*, 70 N.J. Super. 381, 175 A.2d 500 (Essex County Ct., Law Div. 1961); *People v. Kalayjian*, 76 Misc. 2d 1097, 352 N.Y.S.2d 115 (Sup. Ct. 1973); *Town of North Hempstead v. Griffen*, 71 Misc. 2d 864, 337 N.Y.S.2d 318 (Sup. Ct. 1972). But cf. *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970) (court referred to presumption of validity but struck down ordinance).

127. *Larson v. Mayor of Spring Lake Heights*, 99 N.J. Super. 365, 375, 240 A.2d 31, 37 (Law Div. 1968). *Larson* involved an ordinance enacted pursuant to the municipality's general police power, but this does not appear to have had any bearing on the issue of the presumption of validity. See also *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 243 n.1, 281 A.2d 513, 514 n.1 (1971). This reversal of presumptive validity may help explain the attitude of the New Jersey courts and their particularly vigorous substantive due process review of traditional-family ordinances. With the burden on the local government to establish the relationship of the ordinance to its desired goals, the municipality stands in a position similar to that in which it would find itself were its measure subjected to active equal protection analysis. This helps to explain the similarity of the ends and means analysis employed by the New Jersey courts in their substantive due process review to the ends and means examination that frequently occurs in the course of judicial appraisal under the equal protection clause. Compare *State v. Baker*, 81 N.J. 99, 107-14, 405 A.2d 368, 371-75 (1979) with *Boraas v. Village of Belle Terre*, 476 F.2d 806, 817 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974).

The presumption of validity has been reversed in other zoning cases, which may indicate a trend toward less judicial deference to local legislation, and which some commentators have applauded.¹²⁸ It may be argued that the balance between public interest and private liberty is best preserved by compelling a municipality to explain why it has zoned in a particularly restrictive manner. Certainly this approach, or variations of it, should not be immediately discarded in the search for means of preventing abuses in zoning for direct social control.

2. *Equal Protection.* Zoning is at its very heart a system of classification, and there is a potential for inequality in the operation of any legislative system of classification.¹²⁹ As a result, judges often appraise the fairness of distinctions drawn in a zoning ordinance by using the equal protection clause of the fourteenth amendment and analogous provisions of state constitutions. Equal protection analysis has traditionally followed a "two-tiered" formula.¹³⁰ The first level of review requires that the challenged classification aim at a legitimate governmental purpose and, as the Court noted in *Belle Terre*, that the classification is "'reasonable, not arbitrary . . . and bears a rational relationship to a [permissible] state objective.'" ¹³¹ Moreover, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it";¹³² further, the party attacking the classification bears the burden of showing a lack of rational relationship.¹³³

If the legislative classification turns on some constitutionally "suspect" class, such as race, or impinges upon some constitutionally protected "fundamental right," a second, higher level of equal protection analysis comes into play. The challenged law must then survive "strict

128. See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 180-81, 336 A.2d 713, 728, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Entire World?* in *LAND USE CONTROLS* 360, 360-63 (D. Listokin ed. 1974); Sager, *supra* note 11, at 784-85 (1969); Note, *The General Public Interest vs. The Presumption of Zoning Ordinance Validity: A Debatable Question*, 50 J. URB. L. 129 (1972); Comment, *The Presumption of Constitutionality and the Law of Zoning*, 1971 WASH. U.L.Q. 673.

129. E. FREUND, *supra* note 104, § 611, at 634 notes that "the idea of equality excludes in principle both particular burdens and special privileges, but admits of reasonable classification."

130. See generally Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

131. 416 U.S. at 8; see also *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1919) ("classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike"); *Town of Durham v. White Enters.*, 115 N.H. 645, 648-49, 348 A.2d 706, 708 (1975).

132. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

133. See *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 281, 364 A.2d 1016, 1033 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977).

scrutiny": not only must the enactment further a legitimate state objective, it must also promote a "compelling state interest."¹³⁴ Under this analysis, the burden of proof shifts to the party seeking to *justify* the classification.¹³⁵ Obviously a legislative classification is more likely to survive review under the first tier of analysis than under the second, particularly because it will often prove difficult to show that a traditional-family ordinance has a rational relationship to a compelling state interest—such as traffic safety—that could not be more easily preserved by less intrusive regulations—such as parking codes or one-way streets.¹³⁶

There is some suggestion that the rigid two-tiered formula is being replaced by a more flexible analysis.¹³⁷ The court of appeals in *Belle Terre* adopted this approach.¹³⁸ In 1974 a federal district court also employed a more flexible approach in appraising the validity of a traditional-family ordinance. This approach involved weighing "the nature of the unequal classification attacked, the nature of the adversely affected rights, and the governmental interest urged in support of the classification."¹³⁹ This flexible equal protection analysis is similar to the substantive due process review utilized by the New Jersey courts when appraising traditional-family ordinances.¹⁴⁰ Although both of these methodologies subject the regulations to less strict scrutiny than the "compelling state interest" test, they nevertheless place a substantial burden on the municipality to support its classification with fact rather than possibility.¹⁴¹

134. See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1968).

135. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). As Mr. Justice Marshall noted, "the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden. . . ." *Id.* at 18.

136. See *infra* text accompanying notes 147-62.

137. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 551 (1977) (plurality) (recognition of a "somewhat less strict standard" than strict scrutiny); J. NOWAK, R. ROTUNDA, & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 525-26 (1978 & Supp. 1979); Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

138. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 814 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974). For a discussion of the test propounded by the court of appeals, see Note, *Boraas v. Village of Belle Terre: The New, New Equal Protection*, 72 MICH. L. REV. 508 (1974).

139. *Timberlake v. Kenkel*, 369 F. Supp. 456, 465 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975).

140. See *supra* notes 119-23 and accompanying text.

141. The court in *Timberlake v. Kenkel*, 369 F. Supp. 456 (E.D. Wis. 1974) held that the ordinance in question violated the equal protection clause of the fourteenth amendment and was

In most instances, however, courts have used the traditional two-tiered equal protection analysis, and have found that traditional-family ordinances do not impinge on any constitutionally protected fundamental right.¹⁴² Thus, they avoid the second level of analysis: so-called strict scrutiny. For example, in *Belle Terre*¹⁴³ the zoning restriction prohibited six unrelated students who attended a local university from living together. A majority of the Supreme Court examined a number of fundamental interests, including rights of association, privacy, or travel, and found that these rights were not burdened by the ordinance.¹⁴⁴ Some state courts will, however, treat certain rights as fundamentally protected under their respective state constitutions, even when the federal Constitution provides no such protection.¹⁴⁵ In California and New Jersey, broad interpretations of the right of privacy have proved particularly effective in overturning traditional-family ordinances.¹⁴⁶

Under both strict scrutiny and the lesser level of equal protection analysis, the rational relationship test must be met.¹⁴⁷ In administering

therefore unconstitutional; see also *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974).

142. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality), with the peculiar definition of family considered therein, is an exception.

143. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

144. Some commentators have criticized the Supreme Court's failure to perceive that freedom of association and other civil liberties were at stake in *Belle Terre*. See, e.g., Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 686-92 (1980); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 187-89 (1977-1978). Several state courts have followed *Belle Terre*, however, even when a traditional-family ordinance prevented groups from maintaining communal living arrangements in connection with a common religious orientation, see, e.g., *Radeinan v. City of Denver*, 186 Colo. 250, 526 P.2d 1325 (1974); *Town of Durham v. White Enters.*, 115 N.H. 645, 348 A.2d 706 (1975), thus raising claims of interference with the constitutionally protected right of free exercise of religion. See *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29 (1979), *vacated*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981); *Association for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976).

145. For example, New Jersey courts will employ a more strict scrutiny if a zoning ordinance impedes the right to decent housing. See *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 287, 364 A.2d 1016, 1037 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977). In contrast, access to housing is not a fundamental right under the federal Constitution. See *Lindsey v. Normet*, 405 U.S. 56 (1972). Mr. Justice Brennan has applauded the efforts of state courts to construe the protections afforded by their respective state constitutions more broadly than counterpart provisions of the federal Constitution have been interpreted. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

146. See *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980) (en banc); *State v. Baker*, 81 N.J. 99, 114 n.10, 405 A.2d 368, 375 n.10 (1979).

147. Courts often neglect to state which branch of equal protection analysis they use in a particular case—this omission is possibly evidence of the general lack of a clear constitutional doctrine in zoning litigation as a whole. See R. ELLICKSON & A.D. TARLOCK, *supra* note 53, at 62; 1 N. WILLIAMS, *supra* note 9, § 4.03, at 93.

this test, courts frequently assess whether less restrictive or more appropriate regulatory means could have achieved the same ends. In so doing, the courts seem to be shedding their judicial role and projecting themselves into the council chambers of the various municipalities to contemplate alternative courses of legislative action. For example, with respect to the goal of maintaining rent structures and ensuring that traditional families are not priced out of the market, the Court of Appeals for the Second Circuit in *Belle Terre* thought that this goal could be better served by a system of rent controls.¹⁴⁸ Other admittedly legitimate zoning goals have also been described as more properly achieved by means other than traditional-family ordinances. Problems of traffic and parking congestion are said to be more effectively solved by limiting the number of cars per dwelling unit,¹⁴⁹ prohibiting on-street parking,¹⁵⁰ enforcing general traffic and noise ordinances,¹⁵¹ and requiring off-street parking.¹⁵² "Noise and morality," one court notes, "can be dealt with by enforcement of police power ordinances and criminal statutes" rather than by zoning.¹⁵³

Similarly, many courts doubt the relationship of traditional-family ordinances to the goal of density control. They suggest solutions to overcrowding such as limiting occupancy in relation to available sleeping or bathroom facilities,¹⁵⁴ or the amount of habitable floor space,¹⁵⁵

148. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 817 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974). In his dissent in *Belle Terre* Mr. Justice Marshall also suggested the adoption of rent controls. 416 U.S. at 20. The court may have been too hasty in suggesting this alternative: rent controls are no panacea and may only compound the problems of the poor and others seeking low-cost housing. See B. SIEGAN, *OTHER PEOPLE'S PROPERTY* 25-27 (1976). There is the additional problem of whether a given municipality has the authority to adopt rent controls. See Brief for Appellants at 35, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

149. See, e.g., *Boraas v. Village of Belle Terre*, 476 F.2d 806, 817 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 133, 610 P.2d 436, 441, 164 Cal. Rptr. 539, 544 (1980) (en banc).

150. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 520 n.16 (1977) (plurality).

151. See, e.g., *Larson v. Mayor of Spring Lake Heights*, 99 N.J. Super. 365, 374, 240 A.2d 31, 36-37 (Law Div. 1976).

152. See, e.g., *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 133, 610 P.2d 436, 441, 164 Cal. Rptr. 539, 544 (1980) (en banc).

153. *Id. accord*, *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 799, 171 Cal. Rptr. 738, 746 (1981) (characterizing such ordinances as "closing-the-barn-door-after-the-horse-is-out measures").

154. See, e.g., *Timberlake v. Kenkel*, 369 F. Supp. 456, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975); *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 797, 171 Cal. Rptr. 738, 745 (1981); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 254, 281 A.2d 513, 520 (1971).

155. See, e.g., *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 133, 610 P.2d 436, 441, 164 Cal. Rptr. 539, 544 (1980) (en banc); *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 797, 171 Cal. Rptr. 738, 745 (1981).

or by restricting the number of bedrooms in a dwelling structure,¹⁵⁶ or "by limiting each household to a specified number of adults, two or three perhaps, without limitation on the number of dependent children."¹⁵⁷

These various ends and means analyses demonstrate that many courts will hold local governments to a relatively high standard of precision in exercising municipal zoning power. Because the observations that traditional families tend to be self-limiting, are less transient, and generate less traffic than unrelated groups do not "reflect[] . . . universal truth[s],"¹⁵⁸ a local council often cannot pursue objectives of density, traffic control, and neighborhood stability through the use of traditional-family zoning. Many courts will not countenance what they consider the "underinclusiveness and overinclusiveness" of these ordinances.¹⁵⁹ According to these courts, the discredited ordinances do more than merely incorporate "a reasonable margin to insure effective enforcement."¹⁶⁰ Nor will these courts uphold such ordinances on the ground that "the police power ought to comprehend crude and unsuccessful programs as well as perfect and successful ones."¹⁶¹ This attitude of review, possibly even more than shifting the burden of proof,¹⁶² tends to prevent municipal experimentation with traditional-family ordinances.

3. *The "Functional Family."* One specialized form of review analyzes the rationality of the characteristics an ordinance may use to distinguish families from other collective groups. Some state courts, most notably those of New York and New Jersey, in addition to striking down traditional-family ordinances, have ruled that a local governing body may deal only with certain characteristics of the traditional family in regulating the membership of household units. In essence, municipalities may not make distinctions between traditional families and

156. See, e.g., *Boraas v. Village of Belle Terre*, 476 F.2d 806, 817 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974).

157. *Belle Terre*, 416 U.S. at 19 (Marshall, J., dissenting) (footnote omitted). In *Moore v. City of E. Cleveland*, 431 U.S. 494, 520 n.16 (1977) (plurality), Mr. Justice Stevens remarked that "[t]o prevent overcrowding, a community can certainly place a limit on the number of occupants in a household . . . in absolute terms"

158. *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 437, 216 N.E.2d 116, 119 (1966). The notion of faulting legislative classifications for failing to reflect universal truths recalls the "irrebuttable presumption doctrine" discussed in Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

159. See, e.g., *State v. Baker*, 81 N.J. 99, 110, 405 A.2d 368, 373 (1979).

160. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

161. Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROBS. 199, 212 (1955).

162. See *supra* note 127 and accompanying text.

domestic groups that, in the opinion of these courts, display all the pertinent qualities of a traditional family and therefore constitute "functional families."

In the course of striking down a traditional-family ordinance, the Supreme Court of New Jersey remarked in a recent opinion that "the core concept underlying single family living is not biological or legal relationship but, rather, its character as a single housekeeping unit."¹⁶³ The court has elsewhere indicated that a municipality maintaining a "family environment," a legitimate goal, may concern itself only with "stability" and "permanence," matters largely involving the impact of land uses on the physical environment.¹⁶⁴ To this end "boarding houses, dormitory and institutional living" and similar uses could be excluded.¹⁶⁵ By permitting councils to interfere with the internal structure of domestic units only so far as to require a bona fide single housekeeping unit, the New Jersey courts seem to place community character and ideological goals beyond the reach of the police power as applied through single-family zoning.¹⁶⁶

The New York courts have adopted a more discerning approach. They have defined the functional equivalent of a family in the context of applying traditional-family ordinances to "group homes"—dwellings used for housing such groups as mental retardates and neglected and abandoned children.¹⁶⁷ In *City of White Plains v. Ferraioli*,¹⁶⁸ the domestic unit in a group home for neglected and abandoned children consisted of an adult married couple, their two children, and ten foster children, seven of whom were siblings. In reviewing this unit under an ordinance requiring legal and biological relationships, the court observed that "[z]oning is intended to control types of housing and living

163. *State v. Baker*, 81 N.J. 99, 108, 405 A.2d 368, 372 (1979).

164. *Berger v. State*, 71 N.J. 206, 225, 364 A.2d 993, 1003 (1976).

165. *Id.*; see also *Holy Name Hosp. v. Montroy*, 153 N.J. Super. 181, 379 A.2d 299 (1977); *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 350, 271 A.2d 430, 435 (App. Div. 1970) (suggesting that resort community might validly yet effectively curtail problem of "group rentals" by requiring that groups of unrelated individuals constitute bona fide single housekeeping units).

166. The New Jersey position denies recognition, at least through the use of the zoning power, to values which some commentators attribute to a variety of enduring relationships in *unrelated* groups as well as in the traditional family, but which do not inhere in every bona fide single housekeeping unit. As the following discussion demonstrates, it seems the same charge could not be leveled at the New York courts.

167. There has been no suggestion that the New York courts would not adhere to the functional family approach where a group home was not involved. The establishment of a group home may, however, involve policy questions and state interests that would not attach to the establishment of all households comprised of unrelated people. See *Developments in the Law—Zoning*, *supra* note 11, at 1577-78 ("social importance of [these] small institutions").

168. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

and not the genetic or intimate internal family relations of human beings."¹⁶⁹ The court held that the minimal arrangement required to meet the ordinance's definition of family was "a group headed by a householder caring for a reasonable number of children as one would be likely to find in a biologically unitary family."¹⁷⁰ The court clearly permitted a proper concern for "outward appearances" and the largely physical aspects of stability and permanence. But it also considered the strength of the domestic bonds and the internal structure of the household unit in assessing whether it had before it a functional family: the arrangement was "akin to a traditional family, which also may be sundered by death, divorce, or emancipation of the young."¹⁷¹

All of these cases¹⁷² demonstrate a judicially imposed limitation on the zoning power: municipalities cannot create classifications distinguishing traditional families from domestic groups that, from a land use point of view, are their functional equivalents.¹⁷³ Assuming that

169. *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

170. *Id.* at 306, 313 N.E.2d at 759, 357 N.Y.S.2d at 453.

171. *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452. In a subsequent case, *Group House v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978), the New York Court of Appeals again suggested that a municipality might validly look to the internal structure of a group home in addition to its external appearance. The proposed group home in question consisted of two surrogate parents and seven children who would be drawn from the community because of their unhappy home life. The children would return to their natural families if and when this became possible. The court carefully examined the characteristics of the domestic unit, including its stability and permanency, but also used language of more intangible objectives when it stated that the group home "would in no way detract from the family and youth values which one-family zoning is intended to protect," and in fact, "might actually support and further those values even more effectively than certain natural families." *Id.* at 273, 380 N.E.2d at 210, 408 N.Y.S.2d at 381. The dissenting judge enumerated the relevant considerations, stating that "[u]ltimately, the question is whether in theory, size, appearance, and structure the home is set up to emulate a family." *Id.* at 277, 380 N.E.2d at 213, 408 N.Y.S.2d at 383 (Breitel, C.J., dissenting). *Cf.* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 989-90 (1978) (arguing that traditional family functions inhere in a wide variety of enduring relationships and that governmental interference with any such relationship should be precluded unless compellingly justified); Note, *Group House of Port Washington v. Board of Zoning & Appeals: Encroachment of Community Residences Into Single-Family Districts*, 43 ALB. L. REV. 539, 544 (1979) (suggesting that the court looked to the overall purpose and intended effect of the group home).

172. See also, e.g., *Hessling v. City of Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *State ex rel. Ellis v. Little*, 520 S.W.2d 644 (Mo. Ct. App. 1975); *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); *Incorporated Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (Sup. Ct. 1977); *Children's Home v. City of Easton*, 417 A.2d 830 (Pa. Commw. Ct. 1980); *Hopkins v. Zoning Hearing Bd.*, 423 A.2d 1082 (Pa. Commw. Ct. 1980).

173. The New York courts, unlike the New Jersey courts, require more than the outward appearance of a single housekeeping unit in their classification of family-like aggregates. A Wisconsin court has distinguished between attempts "to duplicate the biological family" on the one hand, and attempts "to duplicate the family life style" on the other. *Browndale Int'l, Ltd. v. Board of Adjustment*, 60 Wis. 2d 182, 205, 208 N.W.2d 121, 123 (1973), cert. denied, 416 U.S. 936 (1974). *Browndale* and a recent Ohio case, *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407

some ideological values attach to the traditional family and the traditional family only, the functional family doctrine suggests that these ideological values are not goals that justify the use of the police power to regulate land use. These cases seem to illustrate the desire of some courts to limit zoning to the regulation of relatively tangible aspects of the urban environment and the furtherance of more traditional objectives of the police power, such as those which largely motivated the first comprehensive zoning effort in New York City.

4. *Mitigating Factors: The "Escape Hatches."* Any scheme of legislative classification might, in the appropriate circumstances, be impugned for its rigidity. A zoning ordinance permitting no group of unrelated individuals to live within its borders might appear to operate unfairly against a major sector of society, thus making the ordinance constitutionally infirm. Arguably, however, there are a number of devices and considerations that would mitigate the alleged rigidity of traditional-family ordinances and thereby aid them in passing constitutional muster. For example, traditional-family ordinances almost invariably include an exception for a limited number of unrelated individuals living together in a housekeeping unit. This exception has received a mixed reception in the courts. In a case considering an ordinance permitting groups related by a "domestic bond" other than birth or marriage, one court observed that where "the zoning restriction does not totally exclude occupancy of persons unrelated by blood or marriage ties from all type residential districts, the legislative classification does not deny equal protection."¹⁷⁴ Most traditional-family ordinances limit the number of unrelated individuals permitted to occupy a dwelling. The zoning measure in *Belle Terre* set the limit at two. The Supreme Court did not consider this an unjustifiably arbitrary choice: "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."¹⁷⁵ In contrast, a New Jersey court held that a traditional-family ordinance unreasonably restricted the right of

N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981), suggest that a relevant consideration in determining whether a household is the functional equivalent of a family is the purpose for which the members have been brought together. The court in *Browndale* found that the primary purpose of the therapeutic homes at issue was commercial. The *Garcia* court concluded that the group home in question was established primarily for the care and training of its occupants. Consequently, the domestic units in both cases were not deemed to be families.

174. *People v. Kalayjian*, 76 Misc. 2d 1097, 1100, 352 N.Y.S.2d 115, 118 (Sup. Ct. 1973).

175. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (footnote omitted). The exception for unrelated individuals permitted Mr. Justice Douglas to distinguish *Belle Terre* from *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (denial of foodstamps to households containing unrelated individuals is improper). See 416 U.S. at 8 n.6. Some commentators have

unrelated people to share housekeeping facilities and found "no significant amelioration of such unreasonableness in allowing occupancy by two unrelated people."¹⁷⁶

Other devices which inject flexibility into the system—the variance and the special exception or conditional use permit—might appear to significantly lessen any alleged arbitrariness of a traditional-family ordinance. But the few cases on the subject suggest that the availability of a variance procedure will not adequately ameliorate the effect of an otherwise unconstitutional traditional-family ordinance.¹⁷⁷ As one Supreme Court Justice said: "We have now passed well beyond the day when illusory escape hatches could justify the imposition of burdens on fundamental rights."¹⁷⁸ No case has yet fully considered the conditional use question, but the discretionary nature of the permit process could prove problematic when the identity of land users is so obviously at issue.¹⁷⁹

If the chief argument against traditional-family ordinances is that they unfairly limit the housing choices of unrelated groups, the availability of alternative housing for these groups in other districts within the municipality or the surrounding region may mitigate the alleged unfairness. The lower courts considered this issue in the *Belle Terre* case. *Belle Terre*, a small Long Island village,¹⁸⁰ was zoned in its entirety for traditional families, with an exception for domestic units con-

criticized the ease with which the Court reconciled *Moreno* and *Belle Terre*. See, e.g., Wilkinson & White, *supra* note 91, at 584-87.

176. *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 349, 271 A.2d 430, 434 (App. Div. 1970).

177. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 497 n.5, 511-13 (1977) (plurality); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 135-37, 610 P.2d 436, 443-44, 164 Cal. Rptr. 539, 546-47 (1980) (en banc).

178. *Moore v. City of E. Cleveland*, 431 U.S. 494, 513 (1977) (Brennan, J., concurring). Apparently, East Cleveland had advised Mrs. Moore that she would probably receive a variance, but the legal-aid society lawyers representing her wished to test the constitutional issues and persuaded her not to apply for it. See R. ELLICKSON & A.D. TARLOCK, *supra* note 53, at 894; cf. Brief for Appellee at 18, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality) ("Relief, possibly with some stipulation(s) would probably have been granted.") (footnote omitted).

179. See, e.g., *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29, 39 (1979) (alleged that religious family group was "excluded by bureaucratic interposition from living in any zone in Chula Vista"), *vacated*, 115 Cal. App. 3d 785, 795-96, 171 Cal. Rptr. 738, 744 (1981) (vesting discretion in planning commission as to establishment of "group residence" created "infirmity" in conditional use permit system); see also *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 134-35, 610 P.2d 436, 442-43, 164 Cal. Rptr. 539, 545-46 (1980) (en banc) (argument that lifestyle of unrelated households could be preserved by conditional use permit for boarding house not accepted). Similar distrust of administrative discretion appears in decisions discussing variances. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 512-13 (1977) (plurality).

180. *Belle Terre* contained approximately 220 homes and 700 inhabitants in a land area of less than one square mile. 416 U.S. at 2.

sisting of two unrelated individuals. Six unrelated students attending a nearby university were residing together in one of the village's houses in violation of the zoning ordinance. To the federal district court, the fact that the students could either obtain similar housing in nearby communities or take up residence on campus where dormitory space was plentiful meant that "no substantial constitutional question [was] presented"¹⁸¹ because there was "no present threat exclusion from Belle Terre would deny to the plaintiff students the right to live as the group that they are."¹⁸² But a majority of the court of appeals took a different view: to the appeals court, limiting the geographical scope of an unconstitutional ordinance did not make the statute less objectionable. The majority noted that neighboring municipalities might adopt similar ordinances and that some had already done so.¹⁸³

Expulsion from one's home is a serious sanction.¹⁸⁴ Fairness, however, does not require unfettered choice.¹⁸⁵ zoning has always limited dwelling choices and operated to prevent people from locating in particular sectors of a community. Furthermore, regional considerations have increasingly entered into judicial appraisals of zoning ordinances.¹⁸⁶ In short, to recognize municipal autonomy as a worthwhile value, the availability of alternative housing should not be summarily rejected as a factor in assessing the validity of traditional-family ordinances.¹⁸⁷

181. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 148-49 (E.D.N.Y. 1972), *aff'd*, 416 U.S. 1 (1974).

182. *Id.* at 147; *see also* *Moore v. City of E. Cleveland*, 431 U.S. 494, 550 (1977) (White, J., dissenting).

183. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 817-18 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974); *see also* *Timberlake v. Kenkel*, 369 F. Supp. 456, 468 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975) ("This argument [that there is other housing available] is not persuasive because it assumes that the original classification was a rational one. . . . I have found that it was irrational, and an irrational classification is not saved because one can escape its irrationality by living elsewhere.").

184. *See Doyle, Retirement Communities: The Nature and Enforceability of Residential Segregation by Age*, 76 MICH. L. REV. 64, 95 n.125 (1977).

185. *See Heyman, Innovative Land Regulation and Comprehensive Planning*, in *THE NEW ZONING*, *supra* note 106, at 65.

186. *See, e.g.,* *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); Blumstein, *supra* note 83, at 15-35; *Developments in the Law—Zoning*, *supra* note 11, at 1635-41. Regional considerations were used in the past as well, although at times to uphold the validity of unfairly restrictive municipal land use controls. *See* Burchell, Listokin, & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, in *NEW DIMENSIONS OF URBAN PLANNING: GROWTH CONTROLS* 36 (J. Hughes ed. 1974).

187. A number of cases appear to support this view. *See, e.g.,* *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 912 (N.D. Cal. 1970), *aff'd per curiam*, 487 F.2d 883 (9th Cir. 1973); *City of Clula Vista v. Pagard*, 159 Cal. Rptr. 29, 39 (1979), *vacated*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981); *People v. Renaissance Project, Inc.*, 36 N.Y.2d 65, 70, 324 N.E.2d 355, 357, 364

D. *The Avoidance of Abuses and the Balancing of Values.*

Although courts have at their disposal a multitude of tools with which to dissect traditional-family zoning ordinances, these tools should be used with restraint. Courts must balance important values when reviewing traditional-family ordinances: at the very least, a community's right to determine its own destiny must be measured against an individual's interest in choosing his or her own lifestyle. The cases reveal no unified policy of review. Some courts champion the public interest; others, private rights. The preferable middle way should structure analysis of traditional-family ordinances so that judicial intervention may prevent abuses. But this intervention should be neither haphazard nor insensitive to the value of local autonomy.

At times the approach of reviewing courts has caused two public interests to conflict: the public interest in controlling population density opposes the public interest in maintaining the integrity of the family. As noted previously, both concerns have at least some validity as zoning goals.¹⁸⁸ For instance, one Supreme Court Justice has suggested that absolute density control—limiting the number of people allowed to live in a single-family dwelling—is proper and potentially less intrusive than a traditional-family ordinance.¹⁸⁹ But if such density controls threatened to split a family it should be appropriate to relax the restrictions, within the bounds of public health requirements, so as to allow the family to live in one dwelling. *Moore* suggests that even the extended family has a favored constitutional position. Yet, is there a difference between an ordinance that permits any number of related individuals to live as a household but limits the number of unrelated persons who may do so, and an ordinance that ties occupancy to available floor space but relaxes the standards to permit related individuals to reside together?¹⁹⁰ In their rush to overturn traditional-family ordinances and suggest supposedly more appropriate means to accomplish the desired ends, the courts sometimes appear to be the ones who are "burn[ing] the house to roast the pig."¹⁹¹

Furthermore, some ends may be achieved by no means other than a traditional-family ordinance. The ideological goals associated with

N.Y.S.2d 885, 887 (1975); see also Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 390-91 (arguing that the availability of alternative housing in the metropolitan area should have been considered in *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977)).

188. See *supra* text accompanying notes 56-58, 127-40.

189. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 520 n.16 (1977) (Stevens, J., concurring); see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 19 (1974) (Marshall, J., dissenting).

190. See *Town of Durham v. White Enters.*, 115 N.H. 645, 648, 348 A.2d 706, 708 (1975).

191. *Larson v. Mayor of Spring Lake Heights*, 99 N.J. Super. 365, 374, 240 A.2d 31, 36 (Law Div. 1968).

the traditional family can only be promoted by limiting a residential district exclusively to legally and biologically related groups, with possible exceptions for small numbers of unrelated individuals.¹⁹² In addition, there are aspects of the community character of a single family neighborhood that cannot be preserved by conventional density, traffic, and other controls relating to physical aspects.¹⁹³ Such abstract and intangible objectives have received little attention from courts engaged in their own ends and means analyses.

Because zoning ordinances requiring that domestic units be legally and biologically related can radically interfere with the lifestyle choices of some, it seems appropriate to insist that municipalities present a factual basis for the legislative classification imposed in this sort of regulation. This suggests a departure from the usual judicial appraisal of zoning restrictions in two ways. First, local governing bodies would have the burden of justifying their regulatory action; in other words, the usual presumption of validity would be reversed, at least to some extent.¹⁹⁴ Second, requiring that the factual bases underlying a traditional-family ordinance be revealed would imply an intermediate level of substantive review: higher than the usual due process and first level

192. One commentator argues that for a community pursuing the ends that Belle Terre sought to achieve with its ordinance, "there exists no palatable alternative to bright-line distinctions between families and other groups. No system of individualized hearings could adequately predict which living units present substantial risks of community harm, nor could any such system avoid outrageous intrusiveness in gathering its information." Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1053 (1979).

193. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 539 n.9 (1977):

The appellant makes much of East Cleveland Housing Code § 1351.03 (1966), which prescribes a minimum habitable floor area per person; she argues that because the municipality has chosen to establish a specific density control the single-family ordinance can have no role to play. It is obvious, however, that § 1351.03 is directed not at preserving the character of a residential area but at establishing minimum health and safety standards.

Id. (Stewart, J., dissenting) (emphasis added).

Professor Tribe suggests the sort of reasoning a municipality might employ in arguing that it required a traditional-family ordinance to preserve its character and that no less restrictive regulatory alternatives were available to it:

The government, moreover, may insist that . . . the very presence of significant numbers of student or other non-family groups (if one such group has a right to move in, why not two? twenty?) will gradually alter the character of life in the community, not simply because of everyone's knowledge about what sorts of people live behind the drawn shades but because the entire fabric of cultural, economic, and social existence inevitably responds to the tastes and preferences of those who make up any given population. Thus one might, for example, expect a change in the character of the entertainments shown at a neighborhood theatre after the composition of the neighborhood has changed; such collective changes cannot be avoided simply by looking the other way. *Nor can they be reduced to any compendium of discrete harms avoidable, one by one, through less restrictive alternatives than zoning out identified types of persons.*

L. TRIBE, *supra* note 171, at 983 (emphasis added).

194. See *supra* text accompanying notes 123-27.

equal protection analysis, but somewhat lower than the compelling state interest test.¹⁹⁵

By applying this standard, courts could ensure that a municipality harbors no predominant bad motive—such as a desire to make life difficult for “alternative” families—in enacting a particular zoning scheme. Moreover, the burden of indicating the underlying motive would fall on the party best able to easily and accurately discharge that burden. Local governments would not, however, face the almost insuperable task of meeting the second tier of equal protection analysis or the brand of substantive due process review applied by some New Jersey courts in appraising traditional-family ordinances.¹⁹⁶ In this way, the suggested standard respects the value of local autonomy.

Even if a municipality can justify the legislative classification found in a traditional-family ordinance with a fact-basis argument, such a regulation could still harbor the potential for abuse. For instance, a large metropolitan area zoned entirely for traditional families might prompt even the most enthusiastic supporter of local autonomy to balk. A court should, however, be more sympathetic to a similar regulation that provided places in the region for alternative families to reside in accommodations of acceptable quantity and quality. Even a variance or conditional use scheme, if it adopted adequately detailed objective standards for granting the remedy and was administered openly and fairly, might soften the effect of a city-wide traditional-family ordinance sufficiently to validate the ordinance. The availability of alternative housing should be a crucial factor in determining the validity or invalidity of a traditional-family ordinance. To argue otherwise seems inflexible and unnecessarily hostile to the idea of permitting a municipality to determine its own destiny.

A local government can take this approach one step further by providing a plan for a balanced housing stock adequate for the needs of both traditional and non-traditional living groups. In turn, a plan for a balanced housing stock could form part of a larger comprehensive plan for the community. An appropriate comprehensive plan would not only address housing needs in terms of allotting adequate sites for both related and unrelated groups, but would also contain much of the factual material upon which the distinction between the related and unrelated groups was based.

A comprehensive plan can incorporate each of the factors that a court should consider in reviewing a traditional-family ordinance: fact bases, availability of alternative housing, and planning for alternative

195. See *supra* notes 130-35 and accompanying text.

196. See *supra* notes 120-22, 134-35 and accompanying text.

housing. Whether denominated due process, equal protection, or some other standard of substantive review, an examination of single-family zoning by a court benefits from the application of a flexible conceptual framework relying upon these factors. Municipalities would also benefit from adopting this framework as a guide to preparing and drafting zoning for single-family districts. And as will be seen, this framework fits equally well with other varieties of zoning for direct social control—such as age-restrictive zoning.

III. ZONING FOR DIRECT SOCIAL CONTROL: AGE RESTRICTIONS

A. *Development of Age-Restrictive Zoning.*

Age-restrictive zoning ordinances authorize land users to live in a dwelling area, or exclude them, on the basis of their age. Such ordinances are a comparatively recent innovation.¹⁹⁷ In 1965 a Connecticut court considered a zoning amendment creating "A Senior Citizen Planned Community District."¹⁹⁸ The ordinance, which required tracts of land containing at least 400 acres for such projects, imposed special occupancy restrictions:

[T]he occupancy of such a community shall be restricted to persons who are fifty years of age or over, subject to certain exceptions, such as a spouse under fifty years married to one over that age, children over eighteen years, residing with at least one parent over fifty years, and adults under fifty years if his or her presence is required to minister to an occupant over fifty years of age.¹⁹⁹

The court noted that it had found "no precedent in Connecticut or elsewhere" for this type of zoning ordinance.²⁰⁰ During the past decade, however, cases considering age-restrictive zoning have become more prevalent, although they are still relatively few in number.²⁰¹ Appar-

197. The development of zoning provides an excellent example of the law's ability to evolve. As the urban environment has increased in complexity, the police power has expanded to meet the new legal needs. See R. WALKER, *THE PLANNING FUNCTION IN URBAN GOVERNMENT* 50 (2d ed. 1950); Baker, *The Constitutionality of Zoning Laws*, 20 ILL. L. REV. 213, 242, 250 (1925).

198. *Hinman v. Planning & Zoning Comm'n*, 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965).

199. *Id.* at 127, 214 A.2d at 132.

200. *Id.* at 128, 214 A.2d at 133.

201. See, e.g., *Bell v. Planning & Zoning Comm'n*, 174 Conn. 493, 391 A.2d 154 (1978); *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976); *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); *Campbell v. Barraud*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977); *Apfelbaum v. Town of Clarkstown*, 104 Misc. 2d 371, 428 N.Y.S.2d 387 (Sup. Ct. 1980). Age-restrictive ordinances authorizing the creation of retirement communities are probably more common than the small number of reported decisions considering them would suggest. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 236 n.4, 364 A.2d 1005, 1009 n.4 (1976).

ently age-restrictive ordinances exemplify the increasing trend to employ zoning for direct social control.²⁰²

Age-restrictive zoning has occurred in connection with the establishment of planned communities designed specifically for the elderly. These projects, often called retirement communities, usually feature low density developments, are designed on a relatively large scale, and may consist of a variety of building types, including low- and even high-rise apartments,²⁰³ duplexes and single-family homes,²⁰⁴ and mobile homes.²⁰⁵ They frequently incorporate such features as recreational and medical facilities,²⁰⁶ central dining areas,²⁰⁷ security

202. The pressures in this direction may be both demographic and market-related. In 1955 Professor Williams noted an increase in age segregation in the urban environment. *See* Williams, *supra* note 77, at 331. It is worth noting, however, that Williams saw segregation of residential districts by age groups occurring because "most new areas are developed primarily for young married couples with young children." *Id.*; *see also* Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 266-67, 364 A.2d 1016, 1025-26 (1976) ("As a consequence of declining birth rates and longer life expectancies, the elderly are increasing both in absolute numbers and in relative proportion to the total population.") (citations omitted), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); Travaglio, *supra* note 123, at 319. Commentators with both governmental and market perspectives now recognize that the elderly have special housing needs. *See* Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 267-68, 364 A.2d 1016, 1026-27 (1976) (citing sources), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); Melman, *Housing for the Aged—The Government Response: An Analysis of the Missouri Boarding House for the Aged Law*, 8 URB. LAW. 123, 123-25 (1976). They realize that a critical shortage of appropriate housing exists. *See* Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 272-73, 364 A.2d 1016, 1028-29 (1976) (citing sources), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977). One result has been legislation at both the state and federal levels. *See id.* at 273, 364 A.2d at 1029; Maldini v. Ambro, 36 N.Y.2d 481, 484-85, 330 N.E.2d 403, 406, 369 N.Y.S.2d 385, 389, *appeal dismissed and cert. denied*, 423 U.S. 993 (1975); Melman, *supra*, at 125-30 (description of federal legislative responses to the problem of housing for the elderly). Another response is the use of private agreements such as restrictive covenants or condominium agreements to exclude children from developments. *See, e.g.*, Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974); White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979); Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 236 n.3, 364 A.2d 1005, 1009 n.3 (1976) (while litigation was pending, the effect of age-restrictive zoning ordinance was sought to be achieved through the use of restrictive covenants). The demand for developments restricted to the elderly is increasing. *See, e.g.*, R. NELSON, ZONING AND PROPERTY RIGHTS 42-43 (1977); Doyle, *supra* note 184, at 64. For an account of how the residents of Sun City, California, petitioned their local government for the creation of an age-restricted zone and the imposition of that classification upon their residential districts, see Holmes & Brown, *The Age Restricted Residence: Legitimate Exclusionary Zoning for the Future*, 13 LOY. L.A. L. REV. 921, 945-47 (1980).

203. *See, e.g.*, Troy, Mich., Zoning Ordinance art. VI, §§ 5.42(5), 5.45(6), reprinted in C. CRAWFORD, *supra* note 44, at 139.

204. *See, e.g.*, Elrod, *Housing Alternatives for the Elderly*, 18 J. FAM. L. 723, 740-41 (1979-80) (general description of retirement communities).

205. *See, e.g.*, Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); Elrod, *supra* note 204, at 740-41.

206. *See, e.g.*, Elrod, *supra* note 204, at 740-41.

207. *See, e.g.*, Pioneer Trust & Sav. Bank v. County of Cook, 49 Ill. App. 3d 630, 640, 365 N.E.2d 913, 918-19 (1977), *rev'd*, 71 Ill. 2d 510, 377 N.E.2d 21 (1978).

systems,²⁰⁸ low-gradient walks, hand rails, and ramps.²⁰⁹ The occupancy restrictions in ordinances directed toward these projects also vary widely, but generally the minimum age for occupancy is at least fifty-two.²¹⁰ Such regulations often include exceptions for some persons who do not satisfy the minimum age requirement, such as spouses²¹¹ or children above a certain age (usually eighteen).²¹² Of course, some ordinances make no exception for under-age spouses²¹³ and, with respect to children, limit the number²¹⁴ or exclude them altogether.²¹⁵

Traditionally, local governments have treated homes for the aged and nursing homes as disfavored uses and sometimes have attempted

208. *Id.* at 640, 365 N.E.2d at 919.

209. *See, e.g.*, *Bell v. Planning & Zoning Comm'n*, 173 Conn. 223, 224 n.1, 377 A.2d 299, 299 n.1 (1977) (reproducing zoning amendment establishing elderly housing regulations).

210. *See* Elrod, *supra* note 204, at 742. For cases considering ordinances imposing an age minimum of fifty-two, see *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976); *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); *Maryland-National Capital Park & Planning Comm'n v. Rossinor Corp.*, 265 Md. 267, 288 A.2d 898 (1972). For an ordinance specifying a minimum age of fifty-five, see *Campbell v. Barraud*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977). For an ordinance specifying sixty-two, see *Troy, Mich., Zoning Ordinance art. II, § 5.2 (79)*, reprinted in C. CRAWFORD, *supra* note 44 at 130. At least one ordinance specifies a lower limit: fifty years of age. *See* *Hinman v. Planning & Zoning Comm'n*, 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965). Municipalities have in some instances adopted zoning measures that authorize retirement communities but do not include any minimum age requirement for occupancy. *See, e.g.*, *Maldini v. Ambro*, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *appeal dismissed and cert. denied*, 423 U.S. 993 (1975).

211. *See, e.g.*, *Taxpayers Ass'n v. Weymouth Township*, 125 N.J. Super. 376, 379, 311 A.2d 187, 188 (App. Div. 1973) (ordinance required younger spouse to be 45 years of age), *rev'd*, 71 N.J. 249, 364 A.2d 1016 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); *Campbell v. Barraud*, 58 A.D.2d 570, 572, 394 N.Y.S.2d 909, 912 (1977) (no minimum age requirements for younger spouse).

212. *See, e.g.*, *Taxpayers Ass'n v. Weymouth Township*, 125 N.J. Super. 376, 379, 311 A.2d 187, 188 (App. Div. 1973) (eighteen), *rev'd*, 71 N.J. 249, 364 A.2d 1016 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976) (nineteen); *Campbell v. Barraud*, 58 A.D.2d 570, 572, 394 N.Y.S.2d 909, 912 (1977) (nineteen); *Holmes & Brown, supra* note 202, at 946 n.91 (quoting ordinance excluding anyone under eighteen years of age). *But see* *Point Pleasant, N.J., Code ch. 109-54, § 20 (1969)*, quoted in Note, *Zoning for the Elderly and Family Rights*, 23 CATH. LAW. 118, 129 n.83 (1978) (no age limit for children if at least one parent is above the age minimum). Some age-restrictive ordinances admit any adult, whether related or not, if his presence is necessary to minister to an occupant over the age minimum. *See, e.g.*, *Hinman v. Planning & Zoning Comm'n*, 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965); *Campbell v. Barraud*, 58 A.D.2d 570, 572, 394 N.Y.S.2d 909, 912 (1977); *Manalapan, N.J., Amendment to Zoning Ordinance no. 1, art. V (August 1970)*, quoted in Note, *supra*, at 119 n.11.

213. *See* *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 234, 364 A.2d 1005, 1007-08 (1976).

214. *See id.* (limit of one child).

215. *See* *Troy, Mich., Zoning Ordinance art. II, § 5.2 (79)*, reprinted in C. CRAWFORD, *supra* note 44, at 130.

to exclude them from certain districts.²¹⁶ The recent age-restrictive ordinances, however, seek to affirmatively provide for the elderly.²¹⁷ Other community policies may conflict with this impulse. For example, a number of states have legislation that prohibits discrimination against children in rental and lease arrangements.²¹⁸ In some circumstances courts have looked to these provisions as expressing a public policy against unequal treatment in housing between families with children and those without.²¹⁹ Nevertheless, recent cases upholding age-restrictive zoning measures that permit the creation of retirement communities have not considered this type of broad public policy²²⁰ and, in practice, courts may pay little heed to these statutes.²²¹

Some states also have general civil rights legislation prohibiting discrimination on the basis of age.²²² In two recent cases upholding ordinances containing minimum age requirements, courts, by looking to more specific legislative provisions dealing with housing and real estate that omitted such prohibitions and by recognizing the public policy of encouraging the construction of housing for the elderly, determined that general statutory prohibitions against age discrimination did not apply.²²³ Other states have enacted legislation that explicitly

216. See, e.g., *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Women's Kansas City St. Andrew Soc'y v. Kansas City*, 54 F.2d 1071 (W.D. Mo. 1931), *rev'd*, 58 F.2d 593 (8th Cir. 1932). See generally 2 N. WILLIAMS, *supra* note 9, §§ 58.11-15.

217. For possible reasons behind this change in attitude, see *supra* note 202.

218. See O'Brien & Fitzgerald, *Apartment for Rent—Children Not Allowed: The Illinois Children in Housing Statute—Its Viability and a Proposal for Its Comprehensive Amendment*, 25 DE PAUL L. REV. 64, 66 n.11 (1975) (listing statutes); Note, *Housing Discrimination Against Children: The Legal Status of a Growing Social Problem*, 16 J. FAM. L. 559, 565-71 (1977-78) [hereinafter cited as *Housing Discrimination Against Children*].

Some municipalities have enacted ordinances restricting discrimination against children in rental housing, but the effectiveness of these measures is questionable. See Dunaway & Blied, *Discrimination Against Children in Rental Housing: A California Perspective*, 19 SANTA CLARA L. REV. 21, 51 (1979). An extensive list of state and local legislation prohibiting discrimination in rental housing against families with children is provided in Note, *Why Johnny Can't Rent—An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829, 1829 n.4 (1981) [hereinafter cited as *Why Johnny Can't Rent*].

219. See *Duggan v. County of Cook*, 60 Ill. 2d 107, 116-17, 324 N.E.2d 406, 411 (1975); *Gilman v. City of Newark*, 73 N.J. Super. 562, 591, 180 A.2d 365, 381 (Law Div. 1962); *Boyd H. Wood Co. v. Finkelstein*, 193 Misc. 315, 84 N.Y.S.2d 459 (Sup. Ct. 1948). Such statutes are not directly enforceable in a situation involving a sale rather than a rental. *Riley v. Stoves*, 22 Ariz. App. 223, 226-27, 526 P.2d 747, 750-51 (1974).

220. See *Housing Discrimination Against Children*, *supra* note 218, at 601-02.

221. See O'Brien & Fitzgerald, *supra* note 218, at 86 (concluding that Illinois legislation is not viable).

222. *Housing Discrimination Against Children*, *supra* note 218 at 572-75.

223. See *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 285 n.16, 364 A.2d 1016, 1035 n.16 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); *Campbell v. Barraud*, 58 A.D.2d 570, 572, 394 N.Y.S.2d 909, 913 (1977).

recognizes the validity of age restrictions.²²⁴ In the vast majority of states, however, the legislature has not articulated a policy with respect to age restrictions on land use; as a consequence, the task of determining the validity of age-restrictive zoning has fallen upon the courts.

Interestingly, the wide variation of judicial opinion found on the question of the validity of traditional-family ordinances does not appear in similar appraisals of age-restrictive zoning. State courts noticeably hostile to traditional-family ordinances often support measures containing age restrictions and other related occupancy requirements. But though they generally uphold age-restrictive zoning, courts have noted that age-restrictive ordinances can unfairly exclude certain members of society from a community.²²⁵ Some cases have suggested means by which this abusive capability of such zoning might be minimized. These suggested safeguards are similar to the ones discussed in connection with traditional-family zoning,²²⁶ and their potential applicability and effectiveness in the context of both types of zoning deserve further examination. First, however, age-restrictive zoning should be considered in terms of its goals and its ability to survive substantive review.

B. *Purported Goals of Age-Restrictive Zoning.*

Like traditional-family zoning ordinances, age-restrictive ordinances encouraging retirement communities seek to satisfy housing needs both with respect to relatively intangible matters and with respect to more traditional concerns involving physical aspects of the residential environment. One of the latter, long counted among the conventional purposes of zoning, is noise control. Resort communities

224. For example, New Hampshire excepts from its prohibition of age discrimination "the sale or rental of dwellings which are [sic] pursuant to a plan for a retirement or similar community establishment limited to persons over a certain age, not less than forty-five years." N.H. REV. STAT. ANN. § 354-A: 8(V-b)(d) (Supp. 1979); see also ARIZ. REV. STAT. ANN. §§ 33-1317(B), 33-303(B) (Supp. 1980); *Why Johnny Can't Rent*, *supra* note 218, at 1842 n.67 (citing other examples of similar legislation). See generally Comment, *Neither Seen Nor Heard: Keeping Children Out of Arizona's Adult Communities Under Arizona Revised Statutes Section 33-1317(B)*, 1975 ARIZ. ST. L.J. 813.

225. The courts also recognize that all zoning has an exclusionary aspect. See, e.g., *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976):

Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest*.

Id. (footnote omitted) (emphasis in original).

226. See *supra* text accompanying notes 194-96.

have attempted to eradicate the boisterous behavior of groups of unrelated youths occupying seasonal dwellings by enacting ordinances requiring legal and biological relationships in domestic units,²²⁷ but retirement communities often desire to avoid the noise accompanying the presence of *any* younger individuals. As several cases note, the elderly wish to escape the "irritations from the boisterousness of young children and some older children."²²⁸

Retirement communities under age-restrictive zoning also often attempt to address the specialized housing needs of the elderly by incorporating design features that recognize the physical infirmities accompanying aging. Testimony in one case indicated that, among other things, the elderly desire more concentrated services and public transportation facilities.²²⁹ Other simpler adjustments include ramps, health care facilities, and recreation planning.²³⁰

Another goal of age-restrictive zoning is to increase the quantity of suitable housing stock.²³¹ The shortage of appropriate housing for the

227. See *supra* text accompanying notes 63-64.

228. *Campbell v. Barraud*, 85 Misc. 2d 97, 99, 376 N.Y.S.2d 380, 383 (Sup. Ct. 1975), *modified*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977); see also, e.g., *Flowers v. John Burnham & Co.*, 21 Cal. App. 3d 700, 703, 98 Cal. Rptr. 644, 645 (1971) (landlord sought to limit children in its apartments because of their "independence, mischievousness, boisterousness and rowdiness"); *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084, 1090 (Fla. Dist. Ct. App. 1977) (condominium agreement excluding children under the age of twelve because young children "are noisy, distracting and frequently an imposition upon our neighbors"), *aff'd*, 379 So. 2d 346 (Fla. 1979); *C. PERIN, supra* note 16, at 120-21; *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 245, 364 A.2d 1005, 1014 (1976).

229. *Campbell v. Barraud*, 85 Misc. 2d 97, 99, 376 N.Y.S.2d 380, 383 (Sup. Ct. 1975), *modified*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977).

230. As one government publication noted:

Plans should include more and wider walkways with fewer stairs, an interior and exterior designed to permit easy social contact, provision for common rooms, short distances between buildings, easy refuse collection, little maintenance, and well-lighted walkways and halls.

In addition, housing designed for the elderly should include such facilities as a central dining room, health care facilities and recreational facilities.

N.J. OFFICE ON AGING, A COMMUNITY GUIDE: HOUSING NEW JERSEY'S ELDERLY 4 (1971), *quoted in* *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 269, 364 A.2d 1016, 1027 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977). For an example of an ordinance that mandates many of these features, see *Bell v. Planning & Zoning Comm'n*, 173 Conn. 223, 224 n.1, 377 A.2d 299, 299 n.1 (1977); see also *Pioneer Trust & Sav. Bank v. Connty of Cook*, 49 Ill. App. 3d 630, 639-40, 365 N.E.2d 913, 918-19 (1977) (description of retirement complex), *rev'd*, 71 Ill. 2d 510, 377 N.E.2d 21 (1978). Relatively easy access to shopping is also important for the elderly. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 241, 364 A.2d 1005, 1011-12 (1976).

231. Although helping to ensure the availability of an adequate supply of housing does not generally appear as a purpose of zoning in state enabling legislation and was probably not foreseen as a necessary concern by the draftsmen of the model legislation, see R. LINOWES & D. ALLENSWORTH, *THE STATES AND LAND-USE CONTROL* 162 (1975), in recent years it has come to be thought of as a proper goal in the public regulation of land use. See, e.g., *Southern Burlington*

elderly²³² and the difficulty many in this age group encounter in attempting to satisfy their housing needs because of their often fixed and limited incomes²³³ is well documented. An age-restrictive ordinance considered in one case recited in its declaration of policy and purpose "the need for decent, safe and moderately priced housing for the elderly."²³⁴

Municipalities have also pursued larger fiscal goals through age-restrictive zoning. Local officials have candidly admitted that in adopting this sort of ordinance they "desire to obtain additional municipal revenues without placing concurrent demands upon locally financed governmental services."²³⁵ Retirement communities represent a fiscally advantageous use: they generate more tax revenues than charges on local services because of the absence of school-age residents.²³⁶ Most age-restrictive ordinances either wholly exclude children or admit only those above the age of public schooling.²³⁷

Other goals underlying age-restrictive zoning enactments resemble the traditional-family aims discussed previously. One ordinance, for instance, recited as its purpose in limiting occupancy by age the preservation of community character, specifically "the open agricultural character" of the district. A reviewing court held that the establishment of retirement communities was consistent with this purpose.²³⁸ In another case, the court suggested that limiting the occupancy of a mobile home

County NAACP v. Township of Mount Laurel, 67 N.J. 151, 175, 178-80, 336 A.2d 713, 727-28, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

232. *See, e.g.*, Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 272, 364 A.2d 1016, 1028-29 (1976) (citing sources), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977).

233. *Id.* at 268-69, 364 A.2d at 1026 (citing sources).

234. *Id.* at 259, 364 A.2d at 1022.

235. *Id.* at 290, 364 A.2d at 1038-39.

236. *See id.* at 290, 364 A.2d at 1038-39; *see also Housing Discrimination Against Children*, *supra* note 218, at 564, 595-98. There is little question that schools are expensive: educational costs comprise up to seventy percent of most local budgets. Hughes, *The Fiscal and Social Impact of Alternative Forms of Housing*, in NEW DIMENSIONS OF URBAN PLANNING, *supra* note 186, at 92. Thus, age minimums such as fifty-five are selected because people in this age group are "no longer primarily interested in a child-oriented family of their own." Campbell v. Barraud, 85 Misc. 2d 97, 100, 376 N.Y.S.2d 380, 383 (Sup. Ct. 1975), *modified*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977).

237. *See, e.g.*, Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 364 A.2d 1005 (1976) (ordinance allowed one child of 19 years of age or over). Apparently one New Jersey municipality has gone to the extreme of developing direct social control zoning to ensure it is not deluged by school-age children: the municipality "actually limits occupancy of units in multifamily buildings to one preschool-age child per unit and forbids any occupancy by school-age children." R. BABCOCK & F. BOSSELMAN, *supra* note 11, at 9; *see also Williams & Norman*, *supra* note 11, at 488 n.24.

238. *See Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 233-34, 364 A.2d 1005, 1007 (1976).

park to the elderly could substantially reduce the traffic that might otherwise result from this sort of development.²³⁹ Off-street parking requirements are often relaxed in housing developments for the elderly because this age group possesses significantly fewer automobiles.²⁴⁰ Other physical standards have been similarly reduced in recognition of the unique characteristics in the elderly's use of residential land.²⁴¹ These various objectives for the most part address the physical aspects of the urban environment. Furthermore, they all involve relatively traditional zoning concerns. But these ordinances also pursue more intangible, less traditional ends.

Supporters of age-restrictive zoning regulations often seek to provide an environment that meets the special social and psychological needs of the elderly.²⁴² "Though special social and psychological needs of the elderly are perhaps less obvious than their physical needs," remarked one court, "they are no less real."²⁴³ Retirement communities have attempted to encourage friendship and social contact through their physical design.²⁴⁴ An age-homogeneous resident population may also serve this end, because the elderly are less mobile and require "readily accessible companionship," or need help in adjusting to the "social and psychological effects of retirement."²⁴⁵ Age-homogeneous communities may also foster a "sense of security" and reduce "the fear of criminal victimization."²⁴⁶ More simply, age-segregation is said to have a positive influence on the "mental well-being" and morale of the elderly.²⁴⁷

239. See *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 279, 364 A.2d 1016, 1033 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977).

240. See Nelson, *Exclusionary Zoning on the Basis of Age*, 28 LAND USE L. & ZONING DIG. 5, 5 (No. 10 1976); *McCarran v. Town Plan & Zoning Comm'n*, 161 Conn. 65, 282 A.2d 900 (1971). Ironically, neighboring residents who challenged one zoning ordinance authorizing a retirement community claimed that the proposed development would increase traffic in the neighborhood. *Maldini v. Ambro*, 36 N.Y.2d 481, 486, 330 N.E.2d 403, 406, 369 N.Y.S.2d 385, 390, *appeal dismissed and cert. denied*, 423 U.S. 993 (1975).

241. See Nelson, *supra* note 240, at 5-6.

242. See, e.g., *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 245, 364 A.2d 1005, 1014 (1976); *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 269-70, 364 A.2d 1016, 1027 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); *Campbell v. Barraud*, 58 A.D.2d 570, 572, 394 N.Y.S.2d 909, 912 (1977).

243. *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 269-70, 364 A.2d 1016, 1027 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977).

244. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 240 & n.8, 364 A.2d 1005, 1011 & n.8 (1976); see also Williams, *supra* note 77, at 321-22.

245. *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 270, 364 A.2d 1016, 1027 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977).

246. *Id.* at 271, 364 A.2d at 1028.

247. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 245, 364 A.2d 1005, 1014 (1976) (quoting commentator).

The reported cases clearly indicate that ideological goals are considered to underlie age-restrictive zoning to a significant extent; a desire to meet the social and psychological needs of the elderly has been explicitly identified as a substantial regulatory motivation. In contrast, although there are strong suggestions that courts have associated ideological goals with traditional-family ordinances, it is impossible to state positively that this has occurred. Moreover, the purported goals of age-restrictive zoning seem startlingly specialized. They differ from other measures regulating physical standards, and even from traditional-family ordinances, to the extent that they focus on the welfare of a relatively narrow group. The next section explores how the judiciary has treated the various objectives of age-restrictive zoning.

C. *Substantive Review of Age-Restrictive Zoning.*

1. *The Enabling Acts.* As noted earlier, courts evaluate traditional-family ordinances almost exclusively on constitutional grounds.²⁴⁸ In contrast, courts have, to a significant extent, assessed age-restrictive zoning on the basis of whether the legislation delegating the zoning power to the relevant municipality authorizes such measures. This has occurred even under enabling statutes fashioned after the Standard State Zoning Enabling Act, which broadly grants power to zone "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community."²⁴⁹

The first case to consider age-restrictive zoning found that the measure exceeded the municipality's authority under the Enabling Act. In *Hinman v. Planning & Zoning Commission*,²⁵⁰ a Connecticut court held that the state legislature had authorized municipalities to adopt only regulations "designed for the benefit of all of the people of a community" and had not conferred the power to "zon[e] for classes of people."²⁵¹ Later cases have also examined age-restrictive zoning in terms of the "general welfare." One reason for this is that age-restrictive zoning appears to promote the interests of a relatively narrow group, and has consequently given rise to charges of "spot zoning."²⁵²

248. See *supra* note 108 and accompanying text.

249. Standard Act, *supra* note 54, § 1.

250. 26 Conn. Snpp. 125, 214 A.2d 131 (C.P. 1965).

251. *Id.* at 128-29, 214 A.2d at 133.

252. See, e.g., *Taxpayers Ass'n v. Weymouth Township*, 71 N.J. 249, 261-62, 364 A.2d 1016, 1023 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977); *Campbell v. Barraud*, 85 Misc. 2d 97, 98, 376 N.Y.S.2d 380, 382 (Sup. Ct. 1975), *modified*, 58 A.D.2d 570, 571, 394 N.Y.S.2d 909, 911-12 (1977). Factors which may betray the presence of spot zoning are set out in R. ELLICKSON & A.D. TARLOCK, *supra* note 53, at 241-42. In dismissing these claims of spot zoning courts have considered it significant that large tracts of land have been allocated for retirement communities.

The concept of the "general welfare" is open-ended; if "regulatory power may be exercised not only to stop harmful occurrences, but also to require actions that enhance the social, economic, and physical environment . . . the potential scope of valid regulation is enlarged considerably."²⁵³ Over the years state courts and the Supreme Court have given expansive interpretations of the concept of the general welfare in land use cases.²⁵⁴ After reviewing various studies and reports on the housing and other social problems of the elderly, the Supreme Court of New Jersey dismissed any notion that the age-restrictive zoning ordinance before it in *Taxpayers Association v. Weymouth Township* promoted the interests of too narrow a group; it noted that "the concept of the 'general welfare' in land use regulation is quite expansive, and encompasses the provision of housing for *all categories of people*, including the elderly."²⁵⁵ In this light, age-restrictive zoning may help advance the public welfare by "bringing about 'the greatest good of the greatest number.'"²⁵⁶ Age-restrictive zoning cannot, however, be sustained on this rationale if it particularly burdens another group in the population, a possibility examined later in this article.²⁵⁷

An issue underlying all zoning for direct social control, the distinction between the regulation of land use and the regulation of land users, has proved especially troublesome in the context of age-restrictive zoning. Initially, the lower courts in New Jersey invalidated ordinances imposing minimum age requirements because the enabling legislation authorized only regulation of the physical aspects of land

See *Campbell v. Barraud*, 85 Misc. 2d 97, 99, 376 N.Y.S.2d 380, 382 (Sup. Ct. 1975), *modified*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977). The court in *Weymouth Township* defined spot zoning as "the use of the zoning power to benefit particular private interests rather than the collective interests of the community." "General welfare" tests aim directly at this practice.

253. Heyman, *supra* note 185, at 45-46. Cf. CITIZENS' ZONE PLAN CONFERENCE, CHICAGO 26-27 (1920) (report of proceedings Dec. 16-17, 1919) (health includes the promotion of comfort).

254. See e.g., *Weymouth Township*, 71 N.J. at 265, 364 A.2d at 1024 ("the term is inmutable and reflects current social conditions"); see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). See generally 1 N. WILLIAMS, *supra* note 9, § 13.03, at 285 (notion of general welfare expands in accordance with the views of judges).

255. 71 N.J. at 275, 364 A.2d at 1030 (emphasis in original) (footnote omitted); see also *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 238, 364 A.2d 1005, 1010 (1976); *Maldini v. Ambro*, 36 N.Y.2d 481, 487, 330 N.E.2d 403, 407, 369 N.Y.S.2d 385, 391, *appeal dismissed and cert. denied*, 423 U.S. 993 (1975) ("meeting this community shortage of suitable housing accommodations for its population, including an important segment of that population with special needs is such [a proper governmental] objective") (no minimum age requirement imposed in ordinance); ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, *supra* note 109, at 123.

256. E. FREUND, *supra* note 104, at 5.

257. See *infra* text accompanying notes 307-08.

use.²⁵⁸ The state Supreme Court, however, adopted a different position in *Weymouth*,²⁵⁹ concluding that "ordinances which regulate use by regulating identified users are not inherently objectionable."²⁶⁰ The court also noted that zoning need not be rigidly confined to the physical aspects of the urban environment.²⁶¹ Instead, "ordinances adopted under the zoning enabling act must bear a real and substantial relationship to the regulation of land within the municipality."²⁶²

The *Weymouth* standard might imply that a zoning ordinance may not pursue exclusively ideological goals and must have some relationship to the physical use of land.²⁶³ A more relevant inquiry is not whether wholly ideological objectives underlie a zoning ordinance, but whether such objectives involve legitimate government interests and whether the measure in question actually advances those interests. Perhaps the *Weymouth* test addresses this latter question as well, by requiring a municipality to show the fact bases underlying its ordinances.²⁶⁴ But the phrasing of the test—which also echoes constitutional standards requiring that an impugned regulation bear a rational relationship to a legitimate governmental objective—does not clearly require fact bases analysis.²⁶⁵

2. *Equal Protection: Weymouth Township.* Constitutional appraisal of age-restrictive zoning has, for the most part, proceeded along lines of equal protection rather than substantive due process analy-

258. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 135 N.J. Super. 97, 99, 342 A.2d 853, 855 (App. Div. 1975), *rev'd*, 71 N.J. 230, 364 A.2d 1005 (1976); *Taxpayers Ass'n v. Weymouth Township*, 125 N.J. Super. 376, 380-81, 311 A.2d 187, 189 (App. Div. 1973), *rev'd*, 71 N.J. 249, 364 A.2d 1016 (1976), *appeal dismissed and cert. denied*, 430 U.S. 977 (1977).

259. "[A]s a conceptual matter regulation of *land use* cannot be precisely disassociated from regulation of *land users*." 71 N.J. at 277, 364 A.2d at 1031 (emphasis in original). The same view was expressed in the companion case. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 244-45, 364 A.2d 1005, 1013 (1976); see also 1 N. WILLIAMS, *supra* note 9, §13.05, at 289.

260. 71 N.J. at 277, 364 A.2d at 1031 (footnote omitted). The court relied on *Maldini v. Ambro*, 36 N.Y.2d 481, 487-88, 330 N.E.2d 403, 407-08, 369 N.Y.S.2d 385, 391-92, *appeal dismissed and cert. denied*, 423 U.S. 993 (1975).

261. 71 N.J. at 278, 364 A.2d at 1032.

262. *Id.* at 264, 364 A.2d at 1024. A similar test was adopted in the companion case, *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 243, 364 A.2d 1005, 1013 (1976).

263. See generally *Developments in the Law—Zoning*, *supra* note 11, at 1455-57. The problem with this explanation is that none of the cases cited as illustrations of the application of the new test considered a zoning restriction pursuing wholly ideological ends. In fact, none of the cited cases investigated the extent to which ideological goals may be served by a zoning measure enacted pursuant to state enabling legislation.

264. See *id.* at 1456-57.

265. But cf. *State v. Miller*, 83 N.J. 402, 414-15, 416 A.2d 821, 827 (1980) (suggesting that court in *Weymouth Township* really had meant to require an examination of the factual bases of the municipality's action).

sis.²⁶⁶ The most elaborate equal protection analysis in any age-restrictive zoning case appears in *Weymouth*. Using a conventional two-tiered approach, the *Weymouth* court first considered whether the age restriction at issue infringed upon any "fundamental" right so as to trigger strict scrutiny. Noting that housing has not been deemed a fundamental right under the fourteenth amendment of the federal Constitution,²⁶⁷ the court moved on to other concerns.²⁶⁸ This rather curt treatment of the fundamental rights question stands in contrast to the extensive treatment of this issue by commentators²⁶⁹ and other judges.²⁷⁰ In *Franklin v. White Egret Condominium, Inc.*,²⁷¹ the plaintiffs challenged a condominium agreement excluding children under the age of twelve as a violation of the equal protection clause of the fourteenth amendment. The Florida District Court of Appeal found a number of fundamental rights involved: the right to travel, the right to marry, the right to procreate and the right to marital privacy.²⁷² If a private agreement imposing an age limit impairs such rights, *a fortiori* a public zoning regulation imposing a similar requirement would also be constitutionally infirm.

Most courts have resisted the claim that any sort of zoning might infringe the constitutionally protected right to travel.²⁷³ A majority of the Supreme Court summarily dismissed the right to travel claim made in the attack on the traditional-family ordinance that was considered in

266. Substantive due process considerations have not figured largely in judicial appraisals of age-restrictive zoning. The decision of the Supreme Court of New Jersey in *Weymouth Township* demonstrates this: the court held that the suit's due process claim was "little more than a restatement" of the equal protection challenge. 71 N.J. at 288, 364 A.2d at 1037. This passage of the opinion aptly demonstrates how, conceptually speaking, the two branches of constitutional substantive review have been closely associated; see also Travalio, *supra* note 123, at 310 n.112. It is evident that the concepts of substantive due process and equal protection of the laws were also closely associated in *Shepard v. Woodland Township Comm. & Planning Bd.*, the companion case to *Weymouth Township*. See 71 N.J. at 247, 364 A.2d at 1015.

267. See *Lindsey v. Normet*, 405 U.S. 56 (1972).

268. *Riley v. Stoves*, 22 Ariz. App. 223, 228 n.2, 526 P.2d 747, 752 n.2 (1974), reached a similar conclusion in considering a restrictive covenant that limited residence in a subdivision to residents above a certain age. But see *Adrian Mobile Home Park v. City of Adrian*, 94 Mich. App. 194, 288 N.W.2d 402 (1979) (age-restrictive provision in special use permit invalidated).

269. See, e.g., Doyle, *supra* note 184, at 76-79, 89-97; Travalio, *supra* note 123; Comment, *supra* note 224, at 821-31; Note, *supra* note 212.

270. See *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977) (age restrictive condominium agreement), *aff'd*, 379 So. 2d 346 (Fla. 1979).

271. *Id.* (constitutional issues apparently arising pursuant to state action theory).

272. 358 So. 2d at 1088. In denying a petition for rehearing the court indicated that a plethora of fundamental rights were infringed by the age restriction. The "panoply of rights associated with family life" were again enumerated and in greater detail, but this time the right to travel was added to the list. *Id.* at 1089-90.

273. See Doyle, *supra* note 184, at 76-78.

Belle Terre.²⁷⁴ The attitude of the courts is understandable. All zoning regulations to some extent interfere with a person's right to travel and settle where he wishes; recognizing the right to travel argument could subject all land use controls to the second tier of equal protection scrutiny with its concomitant compelling state interest test—an ordeal that few ordinances could survive.²⁷⁵

The argument that age restrictions interfere with the bundle of rights associated with family life is more troublesome. The Supreme Court's careful treatment of the unique traditional-family ordinance struck down in *Moore v. City of East Cleveland*²⁷⁶ indicates the degree of constitutional solicitude that may attach to the family. A number of commentators have noted that an age-restrictive zoning ordinance might exclude a family from an area because one or more of the family members fails to meet the age minimum.²⁷⁷ Nevertheless, when the age-restrictive condominium agreement at issue in the *Franklin* case finally came before the Supreme Court of Florida, *Moore* presented no barrier to such land use schemes.²⁷⁸ In distinguishing *Moore*, the court appeared to be influenced by the limited geographic scope of the age-segregated community.²⁷⁹ The significance of spatial factors in determining whether age-restrictive zoning is being employed in an abusive fashion is a matter which will be taken up more extensively in due course.²⁸⁰

In *Weymouth*, the New Jersey Supreme Court also addressed the question of whether the legislative classification of age restriction involved a "suspect" criterion, which would trigger heightened scrutiny under the fourteenth amendment. It concluded that age is not a suspect

274. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

275. See *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 602-04, 557 P.2d 473, 484-85, 135 Cal. Rptr. 41, 52-53 (1976); Comment, *Zoning, Communities and Equal Protection*, 1973 URB. L. ANN. 319, 324; cf. L. TRIBE, *supra* note 171, at 955-56 (qualitative as opposed to quantitative land use controls should be immune to challenge on right to travel basis so long as they do not discriminate against new residents).

276. 431 U.S. 494 (1977) (plurality). See generally *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1161-97 (1980).

277. See, e.g., Doyle, *supra* note 184, at 89-97.

278. See *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346, 351 (Fla. 1979) ("We reject the view that *Moore v. City of East Cleveland* absolutely prohibits this type of limitation. We note that Congress has established age limitations in recognizing the need for senior citizen housing by including an age minimum of sixty-two years for occupancy of certain housing developments.") (citations omitted).

279. *Id.* at 351; see also Travaño, *supra* note 123, at 315. But see Doyle, *supra* note 184, at 95 n.125.

280. See *infra* text accompanying notes 341-46.

criterion.²⁸¹ Although a relatively early case found age along with "race, color, creed or physical condition"²⁸² an irrelevant zoning consideration, later cases dealing specifically with age-restrictive ordinances have, like the court in *Weymouth*, specifically held that age is not a suspect criterion. One case distinguishes old age from the suspect classifications because of the changeability of a person's age.²⁸³ Realistically speaking, however, age is a relatively immutable characteristic, not significantly different at a given point in time from a classification like race.²⁸⁴

Other grounds justify distinguishing age restrictions from the type of classification contained in a racial segregation ordinance. Suspect criteria turn on more than the mere immutability of a characteristic.²⁸⁵ In the context of zoning for the elderly, the minimum age requirement should be analyzed both from the point of view of the young people excluded by the limitation and from the standpoint of the elderly who fall within the restriction. The young people excluded from a retirement community by an age-restrictive ordinance are generally neither a minority nor politically powerless, nor do they have a history of unequal treatment in regard to housing. Thus, it is difficult to argue that the age restriction is a suspect classification because it unfairly burdens this group.²⁸⁶ From the viewpoint of the elderly who meet the minimum age requirement, the ordinance appears beneficial to their interests. Indeed, one court described an ordinance establishing a

281. 71 N.J. at 281-82, 364 A.2d at 1034 (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) and other cases).

282. *Central Management Co. v. Town Bd.*, 47 Misc. 2d 385, 387, 262 N.Y.S.2d 728, 731 (Sup. Ct.), *aff'd*, 24 A.D.2d 881, 264 N.Y.S.2d 1011 (1965).

283. See *Maldini v. Ambro*, 36 N.Y.2d 481, 488, 330 N.E.2d 403, 408, 369 N.Y.S.2d 385, 392 (" 'Senior citizenship' may be more appropriately regarded as a stage in life within the normal expectancy of most people than as an unalterable or obstinate classification like race . . . religion or economic status.") (citations omitted), *cert. denied*, 423 U.S. 993 (1975); see also *Campbell v. Barraud*, 58 A.D. 2d 570, 572, 394 N.Y.S. 2d 909, 912 (1977) ("Age is not a 'suspect' criterion and old age, or senior citizenship, merely 'marks a stage that each of us will reach if we live out our normal span.'") (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976)); Travalio, *supra* note 123, at 322.

284. See Doyle, *supra* note 184, at 75 n.43 ("In one sense, of course, age is mutable, since everyone who enjoys a normal lifespan will experience old age. But in other ways age is immutable. No one can, at any given moment, change his age. And no one who is old can become young again.").

285. See *Weymouth Township*, 71 N.J. at 281 n.15, 364 A.2d at 1034 n.15; *Developments in the Law—Equal Protection*, *supra* note 130, at 1124-27.

286. See Doyle, *supra* note 184, at 75; see also Travalio, *supra* note 123, at 329. It is possible, however, that in the appropriate circumstances age-restrictive zoning could have an exclusionary effect which would qualify somewhat the analysis in the text, even if a suspect classification would not thereby be created. See *infra* notes 307-09 and accompanying text for a discussion of the exclusionary potential of age-restrictive zoning.

retirement community district as an action "to correct social and historical patterns of housing deprivation."²⁸⁷ Hence, key elements of a suspect classification are absent.²⁸⁸

Having determined that the zoning regulations at issue in *Weymouth* implicated neither fundamental rights nor suspect criteria for purposes of fourteenth amendment analysis, the court applied the first level of equal protection scrutiny. This required the parties challenging the age-restrictive zoning to prove that it lacked a rational relationship to a legitimate state objective. The *Weymouth* plaintiffs failed to discharge this burden. Weymouth Township's choice of fifty-two as the minimum age for residency was somewhat arbitrary, but the court asserted that this was "necessarily" so, because "[a]ny choice of a specific figure inevitably excludes some persons who might plausibly be admitted and includes others who might plausibly have been excluded."²⁸⁹ Citing the Supreme Court's decision in *Belle Terre*, the court characterized the choice of a minimum age as a legislative determination "which ought not be disturbed by the judiciary unless it exceeds the bounds of reasonable choice."²⁹⁰ Furthermore, the imposition of appropriate age

287. *Maldini v. Ambro*, 36 N.Y. 2d 481, 485-86, 330 N.E. 2d 403, 406, 369 N.Y.S. 2d 385, 390, *appeal dismissed and cert. denied*, 423 U.S. 993 (1975); *cf.* *Travalio*, *supra* note 123, at 322 ("Age-segregated housing looks more like a societal recognition that a particular segment of the society has special needs that can only be met in a certain way, rather than smacking of political repression.").

288. The same considerations would of course not apply to an age-restrictive ordinance that sought to exclude the elderly. *See* *Travalio*, *supra* note 123, at 324; *cf.* *Weymouth Township*, 71 N.J. at 285, 364 A.2d at 1036 (Pursuant to the New Jersey constitution, it has been "held that age, at least where the classification burdens the young rather than the old, is not a 'suspect' criterion."). *But see* *Apfelbaum v. Town of Clarkstown*, 104 Misc. 2d 371, 420 N.Y.S.2d 387 (Sup. Ct. 1980) (denying plaintiff's motion for summary judgment declaring unconstitutional zoning provisions that required age-restricted developments for the elderly to be limited in size and dispersed throughout the community. The court seemed to be influenced by the fact that the challenged provisions were part of the municipality's comprehensive zoning plan).

289. 71 N.J. at 284, 364 A.2d at 1035.

290. *Id.* at 284, 364 A.2d at 1035. The courts have almost invariably found a sufficient relationship between minimum age requirements and the purported ends of zoning for the elderly. In a New York case, for example, the court found that the specific age-restriction was "essential to the achievement of the purpose of the planned retirement community ordinance, and its rational application" because otherwise there would be no guarantee that the group for which the housing had been designed would occupy the development. *Campbell v. Barraud*, 58 A.D.2d 570, 572, 394 N.Y.S.2d 909, 912 (1977) ("It is illogical to encourage the construction of housing geared to the specialized needs of the elderly and then prohibit its exclusive use by such group. Moreover, occupancy restrictions of this nature also ensure that all of the original comprehensive planning and effort will not go for naught after the development has become fully operational."); *see also* *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 246, 364 A.2d 1005, 1014 (1976). Commentators have noted that without minimum age requirements, the elderly might lose out in a competition with "[y]oung couples, singles, and students [who] will also gravitate toward this type of small, low-cost housing." Nelson, *supra* note 240, at 6; *see also* Note, *Weymouth Township: Age Restrictions in Zoning*, 31 ARK. L. REV. 707, 718 (1978). Moreover, if the occu-

restrictions appears to be the most effective means of achieving goals of retirement communities.

Having completed its federal equal protection clause review, the court analyzed the *Weymouth* age restriction pursuant to the principles of equal protection ensconced in the state constitution. The court ultimately concluded that the ordinances would survive even close judicial scrutiny under the state constitution, because the legislative classification was "based upon real factual distinctions, and also [bore] a real and substantial relationship to the ends which the municipality [sought] to accomplish by that classification."²⁹¹ The court's discovery of factual grounds for the challenged age restrictions tends to explain the contrastingly aggressive stance that the New Jersey court has displayed in reviewing traditional-family ordinances, where it evidently has been unable or unwilling to make a similar finding with respect to the definitions of "family" contained in those regulations. Furthermore, as a passage in the companion case to *Weymouth*, *Shepard v. Woodland Township Committee & Planning Board*²⁹² illustrates, the court consciously wished to circumscribe its review of age-restrictive measures:

[I]t is a major question to decide whether the aged should live in special segregated areas, or scattered among the general population; a decision on this is likely to be phrased in terms of a land-use decision. Why should the courts invoke judge-made policy to preclude responsible local officials from implementing such policies?²⁹³

pancy of retirement communities was not limited to the elderly, the relaxation of physical standards, such as off-street parking requirements, which is often permitted for such developments, would no longer be appropriate. See, Nelson, *supra* note 240, at 5-6.

291. 71 N.J. at 287, 364 A.2d at 1037. At another point in the opinion the court admits that it could not be said that the age limitation of fifty-two was "unreasonable or without a factual basis." *Id.* at 284, 364 A.2d at 1035. In support of this assertion the court pointed out that many persons experience a decline in net income at this age, that the median ages at which men and women become grandparents are fifty-seven and fifty-four respectively, and that Americans increasingly retire in their fifties. *Id.* at 284-85, 364 A.2d at 1035.

292. 71 N.J. 230, 364 A.2d 1005 (1976). The ordinance considered in *Shepard* imposed an occupancy limit of three people in any residential unit. This numerical restriction was not keyed to available floor space, or some other physical standard, as the court suggested would be appropriate in the course of overturning traditional-family ordinances, see, e.g., *State v. Baker*, 81 N.J. 99, 110, 405 A.2d 368, 373 (1979), nor did the *Shepard* court require the municipality to justify the need for the occupancy restriction, see Doyle, *supra* note 184, at 81 n.70 ("Neither the New Jersey Supreme Court nor the courts below addressed the issue of how the restriction on number of residents promoted the welfare of elderly housing consumers."); cf. *Molino v. Mayor of Glassboro*, 116 N.J. Super. 195, 204, 281 A.2d 401, 405-06 (Law Div. 1971) ("There is also a right to live as a family, and not be subject to a limitation on the number of members of that family in order to reside any place. Such legal barriers would offend the equal protection mandates of the Constitution.").

293. *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. at 248, 364 A.2d at 1015-16 (emphasis deleted) (quoting 1 N. WILLIAMS, *supra* note 9, § 1.11 at 22). It would appear that Professor Williams disagrees with the manner in which his treatise was cited: "The language

In examining traditional-family ordinances, the New Jersey courts inquire whether each non-related household excluded from a residential district by the particular definition of "family" would in fact display the undesirable characteristics of such living units generally. Because not all of the unrelated groups excluded by a traditional-family ordinance exhibit the purportedly unwanted qualities, the New Jersey courts have often struck down such zoning restrictions as overbroad.²⁹⁴ But when confronted with age-restrictive ordinances, the same courts have not inquired whether all of those excluded would have been undesirable residents from the viewpoint of the proposed retirement community. Instead, the courts have ignored the individuality of excluded persons and have recited principles of judicial restraint, leaving legislative line-drawing to elected officials. In the end, the attitudes of New Jersey's courts, and the courts of at least one other state,²⁹⁵ seem inconsistent. This suggests at least two possible approaches to zoning for direct social control. Paralleling this choice of attitudes, the expansion of the police power with respect to traditional-family zoning has been halted in a number of states while its scope may still be widening in regard to age segregation in housing.

*D. The Non-Elderly Who Wish to Exclude Children:
"Adult-Only" Developments.*

Children have been described as "a lightning rod of social friction."²⁹⁶ Understandably, the elderly have often desired to avoid youthful neighbors through the creation of retirement communities. But non-elderly adults have also displayed a desire to live apart from children, "reflected in the skyrocketing number" of housing complexes now prohibiting children as residents.²⁹⁷ Various commentators have recognized that younger adults may have legitimate reasons for wanting to live in a child-free environment and a legitimate right to pursue

omitted . . . makes it clear that this passage was arguing in favor of heterogeneity, not homogeneity and segregation." 2 N. WILLIAMS, *supra* note 9, § 50.16, at 50 n. 111.55 (1981 Supp.).

294. See, e.g., *State v. Baker*, 81 N.J. 99, 405 A.2d 368 (1979); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971).

295. There is a similar unevenness of approach in the manner in which New York courts have dealt with traditional-family ordinances and age-restrictive zoning. Compare *Group House v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978) and *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) with *Campbell v. Barraud*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (Sup. Ct. 1977).

296. C. PERIN, *supra* note 16, at 120.

297. See *Housing Discrimination Against Children*, *supra* note 218, at 561; see also R. NELSON, *supra* note 202, at 42-43; Holmes & Brown, *supra* note 202, at 948-49 & n.97; *Why Johnny Can't Rent*, *supra* note 218, at 1829, 1835.

this objective, at least by means of private agreement.²⁹⁸ On the other hand, in *Molino v. Mayor of Glassboro*²⁹⁹ a lower New Jersey court held an attempt to exclude children indirectly by means of zoning restrictions invalid. Glassboro sought to discourage families with children from locating within its borders by sharply curtailing the number of bedrooms permitted in apartment units. The zoning ordinance provided that at least seventy percent of all units could have no more than one bedroom and included other provisions designed to exclude families with children. The town had adopted the ordinance with the avowed fiscal motive of limiting its number of school-age children so as to reduce education costs and the concomitant burden on local tax revenues.

The *Molino* court might not have overturned the ordinance so readily had it affirmatively provided for the adults in the municipality who wished to live in a child-free environment. Such an ordinance, limited in geographic scope and promoting a physical design suitable to the social and other needs of younger adults, would be similar to age-restrictive zoning for retirement communities.³⁰⁰

Cases dealing with restrictive covenants and condominium agreements provide the closest analogy to this possibility. *White Egret Condominium, Inc. v. Franklin*,³⁰¹ for example, involved a condominium agreement prohibiting residency by children under the age of twelve.

298. "Adults who wish to live in . . . adult-only housing developments . . . also have constitutional and statutory rights which must be respected." Dunaway & Blied, *supra* note 218, at 50; see also *Housing Discrimination Against Children*, *supra* note 218, at 570, 606; O'Brien & Fitzgerald, *supra* note 218, at 89; *Why Johnny Can't Rent*, *supra* note 218, at 1839 ("Restrictions on child discrimination also infringe the interests of renters who desire to live apart from children. . . . [T]he age classifications used by most landlords are not arbitrary and should, if possible, be respected.") (footnote omitted).

299. 116 N.J. Super. 195, 281 A.2d 401 (Law Div. 1971). But see *Malamar Assocs. v. Board of County Comm'rs*, 260 Md. 292, 272 A.2d 6 (1971) (bedroom restrictions upheld as a valid means of controlling density).

300. The two types of zoning might be distinguished, however, on the grounds that unlike the elderly, younger adults are not politically and economically weak, have not been historically disadvantaged when it comes to housing, and, in reality, do not have housing "needs" but have something more on the order of housing "preferences." But cf. the testimony of the plaintiff in a case upholding a restrictive covenant limiting the use of lots in a subdivision to persons 21 years of age and older, suggesting why an eligible resident might seek out such an environment for bona fide health reasons:

In the first place we searched for quite some time to find an adult area that suited us; was quiet especially for my wife in her condition. Two specialists in California advised her due to her condition to move into a quiet area. She has a nervous condition and an arthritic condition. So the best place we figured out to move for her benefit would be to move to Arizona. And we searched in many places around here and due to these restrictions and being away and quiet this was our number one choice for residing here.

Riley v. Stoves, 22 Ariz. App. 223, 226, 526 P.2d 747, 752 (1974).

301. 379 So. 2d 346 (Fla. 1979), aff'g 358 So.2d 1084 (Fla. Dist App. 1978).

Admittedly, the restriction was not a zoning ordinance enacted under the police power, but rather a private agreement entered into by each of the owners in the condominium development.³⁰² But because theories of state action can subject private restrictions on land use to the requirements of the fourteenth amendment,³⁰³ the review of the private age restrictions parallels the scrutiny that the same restrictions would have received if contained in zoning ordinances. By upholding such restrictions, the cases suggest that age-restrictive zoning for the non-elderly adult might encounter a less rocky road in the course of judicial appraisal than might, at first, be thought.³⁰⁴

Furthermore, at least one jurisdiction already deems the provision of child-free housing for adults a legitimate state interest. An Arizona statute makes it a criminal offense for a person to rent or lease his property in violation of a restrictive covenant against the sale of such property to persons having a child or children living with them, or to rent to persons with children when his property lies within a subdivision designed, advertised, and used as an exclusively adult subdivision.³⁰⁵ This legislation allows the creation of land use controls, functionally equivalent to zoning ordinances, excluding children from residential areas and raises similar constitutional issues.³⁰⁶ The Arizona legislation aptly demonstrates how the perceived scope of the police power in this area continues to expand, and shows that regulatory goals will be-

302. See *id.* at 350; see also *Riley v. Stoves*, 22 Ariz. App. 223, 226-27, 526 P.2d 747, 750-51 (1974).

303. See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); cf. *L. TRIBE*, *supra* note 171, at 978 ("judicial enforcement of an anti-commune covenant would probably have to meet the same constitutional tests as those applicable to [a traditional family] ordinance") (footnote omitted); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1669 (1971) ("Restrictive covenants covering large areas thus verge so closely on being zoning ordinances that courts should be willing to view them as state action, and apply the same standards of equal protection suggested here for zoning ordinances."). But see *Doyle*, *supra* note 184, at 97-105 (questioning whether state action theory applicable to imposition of private age restrictions); *Travalio*, *supra* note 123, at 325-31 (assessing whether state action theory applicable to age-restrictive covenants); *id.* at 332-34 (discussing applicability of state action theory to condominium rules).

304. Cf. *Why Johnny Can't Rent*, *supra* note 218, at 1839 n.60 (suggesting that a claim that child exclusion is unconstitutional is unlikely to succeed).

305. See ARIZ. REV. STAT. ANN. § 33-1317(B) (Supp. 1981):

No person shall rent or lease his property to another in violation of a valid restrictive covenant against the sale of such property to persons who have a child or children living with them nor shall a person rent or lease his property to persons who have a child or children living with them when his property lies within a subdivision which subdivision is presently designed, advertised and used as an exclusive adult subdivision. A person who knowingly rents or leases his property in violation of the provisions of this subsection is guilty of a petty offense.

See also ARIZ. REV. STAT. ANN. § 33-303(B) (Supp. 1981).

306. See generally Comment, *supra* note 224.

come increasingly sophisticated as the particular housing preferences of discrete sectors of the population receive legislative recognition.

E. *The Potential for Abuse and Methods of Avoiding It.*

1. *The Potential for Abuse.* In dealing with age-restrictive zoning authorizing retirement communities, some courts have expressed the fear that local governments will so strongly desire to achieve fiscal benefits that they will enact age-restrictive zoning for exclusionary purposes. "To put it bluntly," remarked one court, "a municipality could so regulate its zoning districts as to virtually exclude all but senior citizens, high income younger families, and industrial and commercial users, thereby ensuring the benefits of a large tax base."³⁰⁷ As additional cause for concern, retirement communities appear to serve mostly semi-affluent whites.³⁰⁸

In spite of these dangers, courts have not struck down age-restrictive ordinances on the basis of their potential or actual exclusionary impact, largely because the parties objecting to the regulations have not pressed such theories.³⁰⁹ Nevertheless, the cases have implied a method for avoiding the exclusionary potential of age-restrictive zoning for the elderly. They have also provided some indication of how to ensure that the legislative classifications imposed in these ordinances are not in themselves abusive. This section examines these safeguards—safeguards previously suggested in the section on traditional-family zoning.

2. *Fact Bases.* In a recent opinion, the Supreme Court of New Jersey described the analysis earlier employed in *Weymouth* to ensure that ordinances adopted under the enabling act bear a real and substantial relationship to the regulation of land within the municipality:

307. *Campbell v. Barraud*, 58 A.D.2d 570, 573, 394 N.Y.S.2d 909, 913 (1977); see *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. at 248-49, 364 A.2d at 1016; *Weymouth Township*, 71 N.J. at 288-96, 364 A.2d at 1037-42. The exclusionary potential of senior citizen zoning was recognized in the message accompanying the New Jersey Governor's veto of a state bill explicitly authorizing age-restrictive zoning. The message is quoted in *Weymouth Township*. *Id.* at 291-92, 364 A.2d at 1039. The infamous Mount Laurel zoning scheme included an age-restrictive senior citizen classification. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 168-69, 336 A.2d 713, 722, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

308. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. at 242 & n.10, 364 A.2d at 1012 & n.10; Elrod, *supra* note 204, at 741-42.

309. See *Campbell v. Barraud*, 58 A.D.2d 570, 573, 394 N.Y.S.2d 909, 913 (1977); *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. at 248-49, 364 A.2d at 1016; *Weymouth Township*, 71 N.J. at 294, 364 A.2d at 1040.

While recognizing the municipality's desire to satisfy the social and psychological needs of the elderly . . . we required the municipality to articulate tangible, specific objectives promoted by the zoning measure—there the unusual physical and economic needs of the elderly. . . . *We then carefully examine the factual bases of the municipality's conclusion that reserving mobile homes for the elderly in fact served those specific ends.*³¹⁰

Although the “fact bases” test of *Weymouth* was developed to assess the limits of the zoning power under the relevant enabling legislation, it resembles tests formulated to determine the constitutionality of zoning.³¹¹ For example, in *Belle Terre*, the Court of Appeals for the Second Circuit stated that “the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute.”³¹² The fact bases test also recalls the various ends and means analyses employed in a number of the traditional-family ordinance cases.³¹³

Fact bases defenses—demonstrating the facts underlying a legislative classification and showing that the ordinance is factually related to its purported objective—have often succeeded in cases challenging age-restrictive ordinances authorizing retirement communities. A Connecticut court, in a comparatively early case invalidating such a measure, remarked that no credible evidence had been adduced to demonstrate the need for age-restricted housing for the elderly.³¹⁴ In contrast, the Supreme Court of New Jersey in *Weymouth* and *Shepard* had available several studies, reports of governmental hearings, and other data³¹⁵ that lent credence to the suggestion that the elderly have unique housing needs and thereby upheld the age classifications contained in the ordinances. The court could also conclude that the respective ordi-

310. *State v. Miller*, 83 N.J. 402, 414-15, 416 A.2d 821, 827 (1980) (emphasis added). One is left with the impression that it was some time after the *Weymouth Township* decision before the New Jersey court discovered that it had engaged in the analytical approach described. The court cites *Developments in the Law—Zoning*, *supra* note 11, at 1456-57, wherein the authors sought to rationalize the *Weymouth Township* court's behavior in regard to the real and substantial relationship to land use test. In *Miller* the court evidently adopted this explanation of *Weymouth Township*.

311. Indeed, the discussion in *State v. Miller* of the fact bases approach occurred in the context of a description of strict constitutional scrutiny. *See* 83 N.J. 402, 414-15, 416 A.2d 821, 827-28 (1980).

312. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 814 (2d Cir. 1973) (emphasis in original), *rev'd*, 416 U.S. 1 (1974). The court of appeals was specifically rejecting the traditional two-tiered equal protection analysis. *See supra* text accompanying notes 130-36.

313. *See supra* text accompanying notes 147-57.

314. *See Hinman v. Planning & Zoning Comm'n*, 26 Conn. Supp. 125, 129, 214 A.2d 131, 133 (1965).

315. Many of these resources are listed in *Weymouth Township* at 71 N.J. at 267-68, 364 A.2d at 1026.

nances actually responded to the goal of authorizing housing to satisfy the unique physical, psychological, and social needs of senior citizens.³¹⁶

The fact bases test formulated in *Weymouth* is not really new. The relation of a zoning ordinance to the public health, safety, morals, or general welfare is essentially a question of fact in which courts have always expressed an interest.³¹⁷ Alfred Bettman explains,

Zoning cases raise in peculiarly urgent shape the problem of the extent to which the question of constitutionality is decided from the four corners of the measure or is one upon which evidence may be received and considered [F]act issues are necessarily involved in the issue of reasonableness Our constitutional procedure would itself be unreasonable and arbitrary, if it were to permit a court to declare a zone plan unreasonable and arbitrary without hearing the facts upon which the plan was based and the principles which went into its making.³¹⁸

The founders and early practitioners of zoning took particular care to amass factual material: first, to help formulate a rational zoning plan and, second, to support the scheme in the event it came under attack in the courts.³¹⁹ However, as one respected commentator has stated, the problem of zoning for appropriate amenity levels "is laced with . . . real but vague psychological elements."³²⁰ Consequently, "[i]t is too much ever to expect watertight standards here."³²¹ But fact bases are probably particularly important when a municipality uses zoning for direct social control. Such zoning by definition concerns the identity of land users and is readily susceptible to prejudicial uses. Moreover, most zoning for direct social control is of relatively recent origin, and "[t]he real obligation to base zoning provisions on fact comes when a new zoning technique is introduced."³²² Therefore, when confronted with direct social control zoning, a court should examine the factual basis for the legislative classification imposed and assess whether the measure in fact furthers its purported goals. In this

316. See *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. at 240-42, 364 A.2d at 1010-12; *Weymouth Township*, 71 N.J. at 273-75, 364 A.2d at 1029-30.

317. See A. BETTMAN, *The Fact Bases of Zoning*, in CITY AND REGIONAL PLANNING PAPERS, *supra* note 99, at 45.

318. Bettman, *supra* note 23, at 856-57; cf. Landels, *Zoning: An Analysis of Its Purposes and Its Legal Sanctions*, 17 A.B.A. J. 163, 167 (1931) (arguing that zoning in particular should not be judged by theoretical standards but by the concrete conditions which induced it); Williams, *supra* note 77, at 319 ("what is needed in planning law is a super-Brandeis-brief approach").

319. See, e.g., CITIZENS' ZONE PLAN CONFERENCE, CHICAGO, *supra* note 253, at 86; A. BETTMAN, *supra* note 99, at 181-83.

320. Toll, *Zoning for Amenities*, 20 LAW & CONTEMP. PROBS. 266, 269 (1955).

321. *Id.*

322. M. McLEAN, *supra* note 82, at 7.

fashion, the court can help ensure that the regulation is not used in an abusive fashion.³²³

3. *Comprehensive Planning.* A fact bases analysis could be performed through a requirement traditionally imposed in zoning enabling legislation. Section 3 of the Standard State Zoning Enabling Act states: "Such regulations shall be made in accordance with a comprehensive plan"³²⁴ The extent to which the comprehensive planning requirement can accommodate the fact bases test and aid in the avoidance of regulatory abuse is considered here.³²⁵

At the least, comprehensive planning articulates the goals of a municipality's land use scheme, and communicates them to the courts when litigation arises.³²⁶ For example, the New York Court of Appeals in upholding a retirement community ordinance was satisfied that the ordinance was based on the town's previously formulated goal of providing for the needs of the elderly because of the goal's explicit inclusion in the town's comprehensive plan.³²⁷ Thus, comprehensive planning can aid a court in performing a fact bases analysis. With the purported goals of the zoning scheme clearly stated, the issue of whether the challenged ordinance in fact furthers those objectives in a reasonable fashion comes into sharp focus.³²⁸

Comprehensive planning may also help to ensure the legitimacy of land use goals. One court has stated that, without a comprehensive plan, "there can be no rational allocation of land use" and that such a plan "is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll."³²⁹ In

323. The burden of proof to show fact bases—or lack thereof—is probably as important as the test itself. See *infra* text accompanying notes 347-62.

324. Standard Act, *supra* note 54, § 3.

325. In practice the import of the comprehensive plan requirement has not been clearly defined and often has not been accorded much weight by reviewing courts. See Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69, 82-83 (1975). Furthermore, the traditional comprehensive plan requirement contained in the Standard Act has been replaced with tailor-made language by a number of states. See R. ELICKSON & A.D. TARLOCK, *supra* note 53, at 403-06. Insofar as these new statutory provisions require that comprehensive planning precede the enactment of a zoning ordinance (whether embodied in a separate document or not), the analysis in the text is unaffected by these developments.

326. See Elliott, *Introduction to THE NEW ZONING* at xxii (N. Marcus & M. Groves ed. 1970).

327. See *Maldini v. Ambro*, 36 N.Y.2d 481, 485 & n.1, 330 N.E.2d 403, 405-06 & n.1, 369 N.Y.S.2d 385, 389 & n.1, *cert. denied*, 423 U.S. 993 (1975).

328. Cf. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1158, 1174 (1955) (when a municipality has a comprehensive plan that publicly sets out its objectives, an arbiter of land use disputes can assess the reasonableness of the implementing ordinances more effectively).

329. *Udell v. Haas*, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 901, 288 N.Y.S.2d 888, 893-94 (1968). See R. NELSON, *supra* note 202, at 79 ("For many communities, a formal comprehensive plan has

Weymouth, the Supreme Court of New Jersey noted that illegal "spot zoning" was likely to occur when a municipality ignored the enabling legislation's comprehensive plan requirement.³³⁰ In *Shepard*, the same court found it reassuring that the age limitation imposed in the challenged ordinance was part of a comprehensive scheme for land development.³³¹ The inclusion of a traditional-family ordinance in a comprehensive plan was of some importance to a lower New York court upholding the ordinance.³³²

A planning requirement alone, however, cannot insure against arbitrariness. A zoning authority could disregard the facts or act on them capriciously and "[t]he municipal plan may be just as arbitrary and irresponsible as the municipal zoning ordinance if that plan reflects no more than the municipality's arbitrary desires."³³³ But the facts amassed in the planning process are useful in determining whether a municipality has acted arbitrarily and, as noted above, because comprehensive planning encourages the clear articulation of goals, it helps courts assess whether legislative action advances those objectives.

Finally, if a court administers a fact bases test in accordance with the statutory requirement that zoning regulations follow a comprehensive plan, or, as was the case in *Weymouth*, with reference to the limits of the zoning power as delegated by state enabling legislation, the invalidation of an ordinance for not satisfying the standard would respect the value of local autonomy. The decision would not preclude either local governments or the state legislature from adopting a land use restriction exercising the challenged type of direct social control with proper factual support.³³⁴ The state court decisions that have overturned traditional-family ordinances on substantive due process and other constitutional grounds do not demonstrate a similar respect for

provided important assurance to the judiciary that land-use regulations were being employed for a broad—"planned"—public interest."); Heyman, *supra* note 185, at 57 (planning helps governments show that regulations are necessary to accomplish desirable social objectives).

330. 71 N.J. at 261-62, 364 A.2d at 1023.

331. 71 N.J. at 246-47, 364 A.2d at 1014-15.

332. *People v. Kalayjian*, 76 Misc. 2d 1097, 1099, 352 N.Y.S.2d 115, 118 (App. Term 1973).

333. *R. BABCOCK*, *supra* note 24, at 123. *Cf. Hinman v. Planning & Zoning Comm'n*, 26 Conn. Supp. 125, 129, 214 A.2d 131, 133 (C.P. 1965) (although vested with wide discretion in creating a comprehensive plan a municipality "is not vested with unlimited authority, even in an endeavor to promote what it believes to be best to promote health and general welfare").

334. *Cf. Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 720 (1964) ("Indeed, avoidance of constitutional questions is a primary purpose of permitting courts to invalidate an exercise of municipal power on the ground that it goes beyond the initiative conferred by a grant of home rule.") (footnote omitted); Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 MINN. L. REV. 669, 688 (1976) ("The courts can also avoid deciding serious constitutional issues by construing the local action to be unauthorized.") (footnote omitted).

local autonomy. Had they applied a statutory basis of review, these courts could have examined the existing data allegedly supporting the requirement³³⁵ and, if unconvinced, simply found the fact bases lacking. Such review leaves municipalities free to adopt such regulations when they can marshal sufficient factual support. It also allows a state legislature to provide a clear statutory signal that the impugned regulatory classification meets with its approval,³³⁶ thus shielding the regulation from attack based on lack of statutory authorization.³³⁷

4. *Comprehensive Plan for Balanced Housing Stock and Alternative Sites.* Among other things, a comprehensive plan can specifically provide for a balanced housing stock within the municipality. In *Weymouth*, the Public Advocate argued that because the age-restrictive zoning at issue posed an exclusionary threat, it should be sustained only within the context of a comprehensive housing plan.³³⁸ Although the court did not remand the case for further hearings about the municipality's housing stock, it did express the view that "the Public Advocate's recommendation that zoning for planned housing developments for the elderly be permitted only as part of a comprehensive municipal plan for a balanced housing stock presents a reasonable mechanism for averting the potentially exclusionary effects of such zoning."³³⁹

This sort of comprehensive housing plan has often been used in efforts to allocate low- and moderate-income housing throughout a municipality or region.³⁴⁰ Such plans are based on the principle that the general welfare "contemplates housing for *all categories of people* in both the community and the surrounding region."³⁴¹

Related to the notion of a balanced housing stock is whether the availability of alternative housing should affect the validity of an age-restrictive ordinance or other type of direct social control zoning. If

335. See, e.g., Lupu, *supra* note 192, at 1053 & nn.338 & 339 (citing sources).

336. See *State v. Baker*, 81 N.J. 99, 118-21, 405 A.2d 368, 377-78 (1979) (Mountain, J., dissenting) (discussing *City of Des Plaines v. Trotter*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966)). In criticizing this position, Professor Williams has suggested that turning the matter over to the state legislature only places it in the hands of the "dominant suburban forces." See 3 N. WILLIAMS, *supra* note 9, §66.13f at 34-35 (Supp. 1981).

337. Cf. Bruff, *supra* note 334, at 688 ("a holding that statutory authorization is absent has the effect of inviting legislative consideration of the appropriateness of a particular local program").

338. 71 N.J. at 288, 364 A.2d at 1037.

339. *Id.* at 293, 364 A.2d at 1040.

340. See generally H. FRANKLIN, D. FALK & A. LEVIN, IN-ZONING 145-75 (1974); M. DANIELSON, *supra* note 12, at 242-78; R. BABCOCK & F. BOSSELMAN, *supra* note 11, at 108-31.

341. *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. at 238, 364 A.2d at 1010 (emphasis in original); *Weymouth Township*, 71 N.J. at 293, 364 A.2d at 1040 (developing municipalities must provide, by their land use regulations, "the opportunity for an appropriate variety and choice of housing for all categories of persons who may desire to live there.").

excluded individuals can obtain similar housing nearby, they would seem to have no more cause to complain about a given zoning restriction than if it represented part of a comprehensive scheme specifically addressed to the problem of achieving a fair balance in housing allocation. Nevertheless, the concept of alternative housing sites has received a mixed reception in cases considering the validity of traditional-family ordinances.

In contrast, courts appraising the validity of age-restrictive land use controls other than zoning have upheld private restrictions of limited geographic scope when no showing was made of a shortage of housing for families with children.³⁴² And the Supreme Court of New Jersey in *Weymouth* thought it "obvious that the seriousness of any exclusionary threat will depend upon the circumstances of each case, including in particular the relationship which the population, area, and available vacant land within the municipality bears to that within the areas occupied by the senior citizens communities."³⁴³

The number of alternative housing opportunities in an urban area is vitally relevant to the issue of the exclusionary impact of an ordinance. The relevance of alternative housing to the issue of legislative classification, however, presents a more controversial³⁴⁴ and delicate problem. For instance, to argue that the availability to a racial minority of ample housing should sustain the legislative classification contained in a segregation ordinance would be to return to the doctrine of *Plessy v. Ferguson*.³⁴⁵ But if the legislative classification involved a less invidious distinction, such as that between relatedness and unrelatedness in a traditional-family ordinance, or that between one age and another in a retirement community measure, neither distinction being clearly suspect under the equal protection clause, the availability of alternate housing should carry more weight.³⁴⁶

342. See *Riley v. Stoves*, 22 Ariz. App. 223, 228, 526 P.2d 747, 752 (1974); *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084, 1092 (Fla. Dist. Ct. App. 1978) (Letts, J., dissenting), *aff'd*, 379 So. 2d 346 (Fla. 1979).

343. 71 N.J. at 292, 364 A.2d at 1039.

344. Compare *Doyle*, *supra* note 184, at 95 n.125 ("Expulsion from one's home, even if alternative housing is available, is a sanction sufficiently serious to warrant . . . constitutional protection.") with *Travalio*, *supra* note 123, at 315 & n.138 (If the result of age-restrictive ordinances is not unreasonable, such ordinances should be upheld as long as the age restrictions apply to only a small portion of the municipality.).

345. 163 U.S. 537 (1896). Courts have sometimes embraced the notion of regionalism, which is closely related to the concept of alternative housing sites, to uphold exclusionary land use controls. See *Burchell, Listokin & James*, *supra* note 186, at 36-37; see also *Feller, Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655, 667-73 (1971).

346. Cf. *L. TRIBE*, *supra* note 171, at 989:

If . . . it can be demonstrated that a community's efforts to preserve its character [through a traditional family ordinance] do not operate to freeze out alternatives indefi-

When an ordinance exercising direct social control comes before a court, the judge inevitably faces competing values: he must balance municipal self-determinism against individual freedom in domestic associations. The court may find the factual basis for the legislative classification a little weak, or it may find some misalignment between ends and means. If so, the validity of the ordinance may depend on whether suitable alternative housing is available for the excluded individual. If the excluded individual can obtain suitable alternative housing, the ordinance's unscientific design or less than exacting operation might be tolerable. But if in addition to its general shoddiness the ordinance has the effect of closing the doors of an urban area to a certain group, or of substantially reducing the group's housing choices, the measure should be struck down. Courts should consider this sort of balancing process in seeking to adequately recognize the competing values at stake when appraising zoning for direct social control.

5. *Presumptions and Burdens of Proof.* As noted earlier, zoning regulations are traditionally presumed valid.³⁴⁷ Courts upholding retirement community ordinances have generally relied on, or at least used the rhetoric of, this presumption.³⁴⁸ Furthermore, the party challenging a zoning ordinance traditionally has the burden of establishing its invalidity.³⁴⁹ In recent years, however, in attempting to prevent the unjust exercise of municipal zoning power, courts have sometimes

nately or to exclude them from an area wider than a few square miles, such efforts should be regarded as entitled to at least some constitutional protection from the imposed uniformity of state or federal law.

Michelman, *supra* note 144, at 196-97 (discussion of concept embodied in the question: "Why should the plaintiffs [in *Belle Terre*] prevail—at least as long as they can, without great loss or inconvenience, live nondisruptively somewhere else?").

347. See 1 R. ANDERSON, *AMERICAN LAW OF ZONING* §3.14 (2d ed. 1976); Comment, *supra* note 128.

There are many policy reasons behind the strong presumption of constitutionality traditionally applied to zoning ordinances. A zoning ordinance is a legislative decision, to be accorded the same deference as state or federal legislation. The local municipal governing body ordinarily has more knowledge of local affairs and expertise in fashioning ordinances to suit local conditions. Finally, the presumption acts to protect the municipality from harassing attacks on its zoning plans. It seems hardly justified to discard the traditional presumption of constitutionality simply because it is easier for a plaintiff to challenge the ordinance or because it might be administratively more convenient.

Id. at 676 (footnotes omitted).

348. See *Weymouth Township*, 71 N.J. at 264, 364 A.2d at 1024; *Maldini v. Ambro*, 36 N.Y.2d 481, 484, 330 N.E.2d 403, 405, 369 N.Y.S.2d 385, 389, *cert. denied*, 423 U.S. 993 (1975).

349. See 1 R. ANDERSON, *supra* note 347, § 3.16; see, e.g., *Campbell v. Barraud*, 58 A.D.2d 570, 571, 394 N.Y.S.2d 909, 912 (1977) (age-restrictive ordinance).

abandoned the presumption of validity and shifted the burden of proof.³⁵⁰

Courts have made the most notable modifications in the traditional rules about presumptions and burdens of proof in the context of cases dealing with exclusionary land use schemes.³⁵¹ One court specifically observed that traditional presumptions should be eradicated and the customary burden of proof shifted when assessing an age-restrictive ordinance shown to be exclusionary.³⁵² But the presumption of validity has also played a role in the judicial assessment of the legislative classifications contained in zoning restrictions. In *Euclid*, the Supreme Court suggested the standard of proof required to overcome the traditional presumption: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control"³⁵³

There are at least two reasons why a court might impose the burden of demonstrating the validity of classifications contained in a zoning ordinance on a municipality. One reason is the potential for abuse of such ordinances.³⁵⁴ Public restrictions dictating who may live where are a radical alteration of traditional property rules; the restricting body should show some solid basis for such novel intervention. Furthermore, "[i]t would appear that a requirement of articulation will expose local parochialism when it is contrary to the public interest and force local legislators to consider carefully their reasons for enacting an ordinance when larger public interests may be at stake."³⁵⁵ A second reason is that the municipality is usually the party best able to indicate the purpose and circumstances prompting a zoning law.³⁵⁶ Presumably, the local governing body is best equipped to reveal the planning studies or other factual materials, if any, on which it based its legislative line-drawing.

350. See, e.g., Bosselman, *supra* note 128, at 260-62; Note, *supra* note 128, at 147; Note, *Land-Use Controls: Is there a Place for Everything?*, 6 Sw. U.L. REV. 607, 629-33 (1974); Comment, *supra* note 128.

351. See generally 1 R. ANDERSON, *supra* note 347, § 3.19.

352. See *Weymouth Township*, 71 N.J. at 295 n.20, 364 A.2d at 1041 n.20.

353. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

354. For example, courts have been compelled to assume a particularly active role in attempting to ensure that group homes are not unfairly excluded from preferred residential districts by traditional family ordinances. See, e.g., *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. Ct. App. 1975); *Abbott House v. Village of Tarrytown*, 34 A.D.2d 821, 312 N.Y.S.2d 841 (1970) (mem.).

355. Feiler, *supra* note 345, at 702.

356. See generally, James, *Burdens of Proof*, 47 VA. L. REV. 51, 60 (1961). The principle that the party with the readier access to a given fact in question may justifiably be allocated the burden is not the only consideration that influences the allocation of the burden and "it is by no means always controlling." *Id.*; cf. Note, *Legitimate Use Exclusions Through Zoning: Applying a Balancing Test*, 57 CORNELL L. REV. 461, 475 (1972) (by removing the burden of proof from the challenger it "is placed upon the municipality, the party with the particular expertise").

A court deciding to shift the burden of proof onto a municipality must also decide the extent of this shift. It could simply impose on the municipality the burden of production; to prevent the invalidation of its zoning regulation the municipality would have to adduce some evidence of the purpose of the legislative classification and the factual data upon which it was grounded, but the ultimate burden of proving that the restriction is unreasonable would remain with the challenging party.³⁵⁷ On the other hand, the risk of nonpersuasion might also be placed on the municipality, requiring that it fully demonstrate the validity of its zoning ordinance.³⁵⁸

In assessing the validity of direct social control zoning such as age-restrictive and traditional-family ordinances, some courts understandably desire to shift at least the burden of production to the municipality.³⁵⁹ Because the concerns underlying these ordinances are intangible, and the impact that they can have on residential lifestyles is far-ranging, courts should seek the best source of evidence of the goals and factual bases of a given ordinance. But shifting the burden of persuasion as well would devalue local autonomy³⁶⁰ and would represent a much more radical departure from the traditional rule.

To whatever extent any burden-shifting occurs, it could be effected by at least two different means. A municipality could be required to satisfy a fact bases test in the context of administering the requirement, found in most zoning enabling acts, that regulations "be made in accordance with a comprehensive plan."³⁶¹ Requiring the presentation of such a plan could effect a shift in the burden. On the other hand, some courts appraising traditional-family ordinances have removed the presumption of validity, or have shifted the burden, in the course of active substantive review pursuant to the due process or equal protection³⁶² clauses of the fourteenth amendment or comparable provisions of state

357. See generally Comment, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U.L. REV. 499, 500-01 (1980).

358. See generally, 1 R. ANDERSON, *supra* note 347, § 3.18, at 117. The two distinct meanings of "burden of proof" are succinctly discussed in *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 568-69, 468 P.2d 290, 300-01 (1970).

359. Cf. L. TRIBE, *supra* note 171, at 989 ("But the embedding of a choice within a close human relationship or network of relationships should always be regarded as significantly increasing the burden of justification for those who would make the choice illegal or visit it with some deprivation.") (emphasis deleted).

360. Cf. Comment, *supra* note 128, at 679 ("The presumption of constitutionality surrounding zoning ordinances rests on the assumption that zoning is best left in local hands.") (footnote omitted). Shifting the burden to this extent would also undercut any notion of judicial restraint.

361. Standard Act, *supra* note 54, §3.

362. Cf. Note, *supra* note 350, at 623 ("It has been suggested that the equal protection clause could be used to strip zoning of its presumption of validity.") (footnote omitted).

constitutions. Through either means the burden-shifting could occur without any radical departure from the usual methods of judicial appraisal of zoning ordinances.

IV. ZONING FOR DIRECT SOCIAL CONTROL: INDIGENTS, STUDENTS, RACIAL MINORITIES, AND BEYOND

A. *Inclusionary Zoning.*

Professor Norman Williams has defined exclusionary land use controls as "those which interfere seriously with the availability of housing for low- and moderate-income people in areas where such housing is much needed."³⁶³ The converse of this definition describes inclusionary land use controls: regulations that promote the availability of housing for low- and moderate-income people where there is a need for such housing.³⁶⁴ At one time the law imposed no affirmative duty to exercise zoning power in an inclusionary fashion.³⁶⁵ In recent years, however, some state courts have imposed a legal duty on municipalities to administer land use in such a way as to encourage housing for low- and moderate-income groups.³⁶⁶ Additionally, certain local³⁶⁷ and state governments³⁶⁸ have adopted inclusionary land use programs.

Inclusionary land use techniques include variances, special permits, conditional zoning, incentive zoning, and planned unit develop-

363. 2 N. WILLIAMS, *supra* note 9, §64.10, at 666. Some commentators use the term "exclusionary" to mean "restrictive" or "particularly restrictive." For example, 1 P. ROHAN, *ZONING AND LAND USE CONTROLS* (1978), includes discussion of traditional-family ordinances and age-restrictive zoning in a chapter on exclusionary land use controls. *See id.*, §§3.04 & 3.05[1]. The use of "exclusionary" in this broad sense is problematic; the term connotes abuse, and one should not state categorically that traditional-family ordinances and age-restrictive zoning are abusive. Hence, it is preferable to use "exclusionary" in the narrower sense of Professor Williams' definition. This article employs this definition.

364. *Cf. Comment, Board of Supervisors v. DeGroff Enterprises, Inc.: A Case of Inclusionary Zoning*, 60 IOWA L. REV. 413, 416 (1974) ("Unlike exclusionary zoning, inclusionary zoning refers to ordinances which open the suburban market to lower income people").

365. *See* H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 340, at 1.

366. *See* H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 340, at 209; Pazar, *Constitutional Barriers to the Enactment of Moderately Priced Dwelling Unit Ordinances in New Jersey*, 10 RUT.-CAM. L. REV. 253 at 253, 257-59 (1979); *Comment, supra* note 364, at 420-21.

367. *See* Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432, 1436 (1974). Professor Kleven notes that the "reasons for this change in attitude are not yet entirely clear." He suggests as possibilities the desire of suburban municipalities to 1) avoid exclusionary zoning litigation; 2) satisfy the housing needs of retiring residents or adult children of present residents; or 3) attract with appropriate housing opportunities lower-paid workers who are needed in the relevant area. *See also* Rose, *The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) is the Latest Technique of Inclusionary Zoning*, 3 REAL EST. L.J. 176 (1974).

368. *See* Kleven, *supra* note 367, at 1436 n.7; Pazar, *supra* note 366, at 255 n.11.

ments. When used in the appropriate manner, all of these can encourage the construction of low- and moderate-income housing.³⁶⁹ Zoning for direct social control can also accomplish this end. This technique for inclusionary results has variously been called the "mandatory percentage of moderately priced dwelling ordinance" (MPMPD),³⁷⁰ "moderately priced dwelling unit ordinance" (MPDU),³⁷¹ and simply "inclusionary zoning" or the "inclusionary ordinance."³⁷² These inclusionary ordinances seek to increase the supply of low- and moderate-income housing by requiring developers to include a stipulated amount of such housing in their residential construction projects or by encouraging developers to voluntarily incorporate such housing in their projects.³⁷³ Mandatory measures generally attempt to compensate the developer for producing lower cost units by granting him relaxed zoning restrictions, government subsidies, or density bonuses. Voluntary ordinances usually contain incentive zoning provisions.³⁷⁴ The most interesting feature of these ordinances is that they generally limit the sale or rental of the designated units to low- or moderate-income families.³⁷⁵ Thus a new application of zoning for direct social control arises: land users can live in specified dwelling units on the basis of income level, a normally stable personal characteristic explicitly identified in these ordinances. Inclusionary ordinances "overtly intend . . . to benefit a class of persons on the basis of their economic station in life rather than on the basis of the distinguishing features of the land they own or occupy."³⁷⁶

The inclusionary ordinance adopted by the Board of Supervisors of Fairfax County, Virginia, is similar to many other regulatory efforts in this area³⁷⁷ and was the first such ordinance to be subjected to litigation.³⁷⁸ The measure was adopted as an amendment to the municipality's zoning ordinance on June 30, 1971, and was the first measure of its

369. See H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 340, at 113-43; Comment, *supra* note 364, at 416-17; Note, *Municipalities and the Increasing Need for Low and Moderate Income Housing*, 28 WASH. & LEE L. REV. 408 (1971).

370. See Rose, *supra* note 367.

371. See Pazar, *supra* note 366.

372. See Kleven, *supra* note 367; Comment, *supra* note 364.

373. See Kleven, *supra* note 367, at 1437; Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1028 (1976).

374. See Fox & Davis, *supra* note 373, at 1028.

375. See, e.g., H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 340, at 131.

376. *Id.* at 106.

377. Other municipalities' ordinances do vary in their details. See generally *id.* at 131-41; Fox & Davis, *supra* note 373, at 1036-65; Kleven, *supra* note 367, at 1439-48; ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, *supra* note 109, at 584-85; see also Pazar, *supra* note 366, at 253 n.2 (quoting ordinance of Cherry Hill, New Jersey).

378. See *Board of Supervisors v. DeGroff Enters.*, 214 Va. 235, 198 S.E.2d 600 (1973).

kind to be enacted in the United States.³⁷⁹ It required a developer of fifty or more dwelling units in certain zones to commit himself, before re-zoning or site plan approval, to build at least fifteen percent of the units as low- and moderate-income dwellings.³⁸⁰ The amendment further provided that, on completion of the project, the developer could sell the designated units only to persons of low and moderate income at prices not exceeding governmental guidelines.³⁸¹ The scheme relied on government housing subsidies³⁸² and, in all but exceptional cases, afforded developers a density bonus to aid in reducing the fiscal burden of building the low-cost units.³⁸³

The Virginia Supreme Court invalidated Fairfax County's inclusionary ordinance in *Board of Supervisors v. DeGroff Enterprises*.³⁸⁴ The court found that the intention of the state's zoning enabling act "was to permit localities to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group."³⁸⁵ It concluded that the Fairfax amendment improperly involved "socio-economic zoning" and further exceeded the bounds of the enabling legislation by seeking to "control the compensation for the use of land."³⁸⁶ The court also held that, in requiring developers to rent or sell the designated units at "prices not fixed by a free market," the inclusionary scheme amounted to a taking without compensation in violation of the Virginia constitution.³⁸⁷

379. See Kleven, *supra* note 367, at 1439. Like other zoning for direct social control, inclusionary zoning is of recent origin.

380. The relevant definitions of low- and moderate-income housing were those promulgated by the Fairfax County Housing and Redevelopment Authority and the United States Department of Housing and Urban Development. See *Board of Supervisors v. DeGroff Enters.*, 214 Va. 235, 235-36, 198 S.E.2d 600, 601 (1973). For more extensive descriptions of the Fairfax County amendment, see Kleven, *supra* note 367, at 1439-42; Comment, *supra* note 364, at 417-18.

381. See *Board of Supervisors v. DeGroff Enters.*, 214 Va. 235, 236, 198 S.E.2d 600, 601 (1973).

382. See Kleven, *supra* note 367, at 1439 & n.18.

383. See *id.* at 1440.

384. 214 Va. 235, 198 S.E.2d 600 (1973). A companion case to *DeGroff* was *Board of Supervisors v. Lukinson*, 214 Va. 239, 198 S.E.2d 603 (1973). In a per curiam opinion the court followed the result in *DeGroff* for the same reasons expressed therein. A case which considered inclusionary conditions attached to a special permit for the construction of an apartment development was *Middlesex & B. St. Ry. v. Board of Aldermen*, 371 Mass. 849, 359 N.E.2d 1279 (1977). The Massachusetts court invalidated the inclusionary condition on the basis that the board had exceeded its statutory authority. *Id.* at 1284.

385. 214 Va. at 238, 198 S.E.2d at 602.

386. *Id.*

387. *Id.*

The *DeGroff* decision has been criticized³⁸⁸ and with good reason. As this article has pointed out, all zoning has inherent socioeconomic implications.³⁸⁹ The Standard Act and legislation based upon it delegates power very broadly and may confer upon municipalities the full extent of the state's police power with respect to the regulation of land use.³⁹⁰ Commentators have noted that the socioeconomic features of inclusionary zoning resemble those of age-restrictive ordinances which affirmatively provide housing opportunities for the elderly,³⁹¹ and courts have usually been sympathetic to age-restrictive zoning.³⁹² But the extensive use of enabling legislation like Virginia's, a variation of the Standard Act, could give *DeGroff* widespread influence in future judicial appraisals of inclusionary schemes.³⁹³ The consensus of the commentators is that inclusionary ordinances will not face an enabling act challenge in states such as New Jersey and Pennsylvania that have a broad conception of zoning as capable of promoting the "general welfare."³⁹⁴ *DeGroff* may reflect an archaic legal perspective: the Virginia courts have a tradition of construing narrowly delegations of authority from the state to local governments, thus being one of the few jurisdictions still adhering to the so-called Dillon's rule.³⁹⁵ One commentator

388. See generally H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 340, at 138-39; ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, *supra* note 109, at 588-92; National Committee Against Discrimination in Housing and the Urban Land Institute, Fair Housing and Exclusionary Land Use 50 (ULI Research Report 23, 1974); Comment, *supra* note 364, at 413; Note, *Socio-Economic Zoning: One Court's Response*, 35 U. PITT. L. REV. 837 (1974).

389. See, e.g. H. FRANKLIN, D. FALK & A. LEVIN *supra* note 340, at 138; ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, *supra* note 109, at 588; Rose, *supra* note 110, at 323; Note, *supra* note 388, at 841.

390. See H. FRANKLIN, D. FALK & A. LEVIN *supra* note 340, at 138; Note, *supra* note 369, at 410 ml.17 & 18.

391. See ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, *supra* note 109, at 590-91; Pazar, *supra* note 366, at 261-63.

392. See *supra* notes 197-306 and accompanying text.

393. See Comment, *supra* note 364, at 418.

394. See Rose, *supra* note 367, at 179; Pazar, *supra* note 366, at 260-61; Comment, *supra* note 364, at 423. Of course, legislatures could amend the enabling legislation to specifically authorize inclusionary objectives. See Rose, *supra* note 367, at 179; Note, *supra* note 388, at 842. Municipalities could also avoid *DeGroff* by basing inclusionary programs on home rule powers, a course some local governments have followed. See H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 340, at 138-39 ("[B]ecause of the questions raised by resting mandatory inclusionary ordinances on the state zoning enabling laws, both the Montgomery County [Maryland] and Los Angeles ordinances are authorized instead by the police powers granted to those communities under their home rule charters."); see also Pazar, *supra* note 366, at 262 n.42 (it might be argued that inclusionary ordinances are authorized in New Jersey by the state's home rule statute, N.J. STAT. ANN. § 40:48-2 (West 1967)).

395. See ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, *supra* note 109, at 588 n.447. Dillon's Rule embodies the following proposition:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express

has simply dismissed the decision as an "aberration."³⁹⁶

Despite its idiosyncratic reading of the state enabling legislation,³⁹⁷ the *DeGroff* court conceded that "providing low and moderate income housing serves a legitimate public purpose."³⁹⁸ Other courts have reached similar conclusions,³⁹⁹ and some have even imposed an affirmative duty to promulgate inclusionary controls. In the landmark *Mount Laurel* case, the Supreme Court of New Jersey ruled that a developing municipality must "plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, in order to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries."⁴⁰⁰

Inclusionary zoning demonstrates how governmental regulation increasingly promotes the interests of narrow groups in society.⁴⁰¹

words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

1 DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-49 (5th ed. 1911) (emphasis in original).

396. See Note, *Required Low-Income Housing in Residential Developments: Constitutional Challenges to a Community Imposed Quota*, 16 ARIZ. L. REV. 439, 441 n.12 (1974).

397. The constitutional implications of inclusionary zoning with respect to the taking issue, also raised by the *DeGroff* decision, have been carefully examined in other commentaries. See e.g., Fox & Davis, *supra* note 373, at 1031-32; Pazar, *supra* note 366, at 273-75; Note, *supra* note 388, at 844-49; Comment, *supra* note 364, at 424-27. But the Virginia court did not address the constitutional aspects of classifying the land users for inclusionary zoning. Income classification for such zoning would easily satisfy substantive due process: providing housing for low- and moderate income persons is a legitimate governmental goal, see Kleven, *supra* note 367, at 1509-10; Comment, *supra* note 364, at 443-44, and inclusionary measures seem the most direct way to accomplish this end. Moreover, inclusionary zoning impinges on no "fundamental" interest that might trigger more aggressive substantive due process review under the Supreme Court's plurality opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Inclusionary zoning also warrants deferential equal protection appraisal. The Supreme Court has not held classifications based on wealth alone to be suspect, see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), nor has the Court made access to housing a fundamental right, see *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972).

398. Board of Supervisors v. DeGroff Enters., 214 Va. at 237, 198 S.E.2d at 601.

399. See, e.g., Board of Appeals v. Housing Appeals Comm. in the Dep't of Community Affairs, 363 Mass. 339, 384-85, 294 N.E.2d 393, 424 (1973); Kleven, *supra* note 367, at 1505 n.227 ("There can now be no doubt about the validity of the public purpose of legislation designed to produce housing for low and moderate income people.") (citing cases); *id.* at 1508-10 (citing and discussing cases); Comment, *supra* note 364, at 420-21 (citing and discussing cases). Some state legislatures have adopted anti-exclusionary legislation. See Pazar, *supra* note 366, at 255 n.11 (citing and discussing statutes).

400. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 179, 336 A.2d 713, 728, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). The court subsequently elaborated on this affirmative duty in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 512, 371 A.2d 1192, 1207 (1977).

401. Of course, society in general benefits when all its members are housed adequately because problems such as the spread of disease and a less than fully productive workforce are

Whether this tendency is because of the rise in political interest groups' effectiveness, the increased complexity or balkanization of society, or simply because governments are exploring more regulatory areas than they did in the past is uncertain. But as a type of zoning for direct social control, the inclusionary ordinance illustrates the increasingly discerning intervention into the marketplace undertaken through public control of land use.⁴⁰²

B. *Zoning with Respect to Students.*

Housing for college and university students has long received special treatment in comprehensive zoning schemes.⁴⁰³ Some of the earliest zoning cases involved ordinances excluding fraternity and sorority houses from residential districts.⁴⁰⁴ Generally speaking, courts have supported such zoning restrictions.⁴⁰⁵ One case noted that "[s]tudent housing has been for 800 years a distinguishable subject matter for social and governmental restrictions."⁴⁰⁶

Some municipalities have, however, gone beyond the simple regulation of fraternity and sorority houses as land uses and adopted zoning ordinances explicitly identifying students as a class and imposing unique restrictions on their use of land. For example, one zoning measure provided in part that "[n]o more than four (4) students will be roomed in any one house."⁴⁰⁷ Judging from how few reported cases consider this type of ordinance,⁴⁰⁸ these zoning provisions are either rare or have failed to generate much litigation.⁴⁰⁹

Arguments of density control often support the adoption of restric-

thereby alleviated. Nevertheless, like age-restrictive zoning, inclusionary ordinances appear to confer substantial benefits on one sector of the population.

402. Review of inclusionary zoning, like review of other forms of zoning for direct social control, could benefit from fact bases analysis, presentation of a comprehensive plan, or of a plan detailing the particular balance in housing sought by the inclusionary measure. See ABA ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, *supra* note 109, at 587-88, 590 n.452; Comment, *supra* note 364, at 428. The latter are probably always available because inclusionary measures are usually conceived with regard to the housing situation in the rest of the community. Thus, placing the burden of production on the municipality would also seem appropriate.

403. See generally 2 N. WILLIAMS, *supra* note 9, §§ 58.04-58.09 (1974).

404. See, e.g., *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 213 N.W. 835 (1927); *City of Syracuse v. Snow*, 123 Misc. 568, 205 N.Y.S. 785 (Sup. Ct. 1924).

405. See 2 N. WILLIAMS, *supra* note 9, § 58.05.

406. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 148 (E.D.N.Y. 1972), *aff'd*, 416 U.S. 1 (1974), *rev'g* 476 F.2d 806 (2d Cir. 1973).

407. *Township of Ewing v. King*, 131 N.J. Super. 29, 30, 328 A.2d 242, 242 (App. Div. 1974), *rev'd on other grounds*, 69 N.J. 67, 350 A.2d 482 (1976); cf. *Provo City v. Hansen*, 585 P.2d 461 (Utah 1978) (per curiam) (considering a similar ordinance).

408. See cases cited *supra* note 407.

409. Perhaps there is little litigation because students often have limited access to local legal services.

tions on student housing.⁴¹⁰ Other arguments might include noise control, traffic control, and preservation of community character.⁴¹¹ A generally unexplored question, however, is whether local governments could zone affirmatively for direct social control with respect to students. Would a planned community restricted to occupation by college and university students represent a legitimate use of the local zoning power? "[S]tudent housing, specifically as such and oriented to the idea that students wish to live and learn together, is a matter that has been regarded as impressed with a public interest,"⁴¹² and local governments have on occasion exercised powers of eminent domain and pledged public credit to permit the construction of student housing.⁴¹³ Thus, the public interest might well support the affirmative use of zoning power for students. This group of land users have social, educational and possibly even psychological reasons for desiring to live among their peers.⁴¹⁴

Moreover, students have some special needs that the physical plan of a housing development devoted to their exclusive occupation could recognize. For one, the residents of a planned community for university students would have an interest in being located near the institution they were attending; for another, the physical design of the facility might take into account the collective recreational and social interests of this group. Conceptually, a planned community for university students would differ little from the retirement communities considered earlier in this article.⁴¹⁵

Negative restrictions on student populations are also similar to age-restrictive ordinances in that some courts have treated negative student zoning with similar deference. For example, the court in *Township*

410. See *Township of Ewing v. King*, 131 N.J. Super. 29, 31-32, 328 A.2d 242, 242 (App. Div. 1974), *rev'd on other grounds*, 69 N.J. 67, 350 A.2d 482 (1976).

411. See *supra* notes 54-103 and accompanying text.

412. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 148 (E.D.N.Y. 1972), *aff'd*, 416 U.S. 1 (1974), *rev'g* 476 F.2d 806 (2d Cir. 1973).

413. *Id.*

414. See *id.* Cf. R. NELSON, *supra* note 202, at 42-43 ("In fact, there are strong trends toward greater social segregation of living patterns generally Some examples are 'singles' apartment complexes, retirement communities, *university towns for youth*, and rural communities.") (emphasis added).

415. A planned community for university students could very well be a financially advantageous land use from a municipality's viewpoint. Because university students rarely have school-age children, a municipality could permit such a development and collect the tax revenues it generated without fear of overburdening the local school system. From the standpoint of the local tax base, it would be much better to house students in a private community authorized by an appropriate zoning restriction than to have them living in a dormitory owned by a state university, because state university property is immune from local taxation. See 16 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 44.56 (3d ed. 1979).

of *Ewing v. King*⁴¹⁶ dismissed constitutional claims against an ordinance limiting the number of students allowed in any house by stating “[z]oning ordinances are to be liberally construed in favor of the municipality,” and then relying on the traditional presumption of validity accorded zoning⁴¹⁷ to uphold the measure.

Such deference may not always be appropriate. Certainly regulatory classifications with respect to students have not been considered “suspect” for equal protection purposes. And the reasoning of the Supreme Court in *Belle Terre* suggests that the *Ewing* ordinance would not trigger strict scrutiny at the federal level by violating a fundamental right. Guarantees of fundamental rights in state constitutions have, however, been interpreted more broadly than their counterparts in the United States Constitution. Recent cases in California⁴¹⁸ and New Jersey⁴¹⁹ have held that the freedom to choose one’s domestic associates is strongly protected by privacy rights under the constitutions of those states. Therefore, in zoning for direct social control with respect to students, a municipality might have to demonstrate that the zoning advanced a compelling government interest. Moreover, a court might require a municipality to show why less restrictive means such as the active enforcement of traffic, anti-noise, and other general police power ordinances could not satisfy the goals sought to be achieved by limiting the number of student roomers.⁴²⁰ In such an inquiry, the presentation of fact bases—in a comprehensive plan or otherwise—would greatly aid a court’s review.

C. “Benign” Racial Zoning and Other Experiments.

This article has alluded to the efforts of some municipalities during the early decades of this century to separate white residential neighborhoods from their black counterparts by means of segregation ordinances.⁴²¹ Because these measures intended clearly discernible white and black residential areas they were often called “checker-board” or-

416. 131 N.J. Super. 29, 328 A.2d 242 (App. Div. 1974), *rev’d on other grounds*, 69 N.J. 67, 350 A.2d 482 (1976).

417. 131 N.J. Super. at 31, 33, 328 A.2d at 242, 244.

418. *See City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

419. *See State v. Baker*, 81 N.J. 99, 114 n.10, 405 A.2d 368, 375 n.10 (1979).

420. *See Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 254, 281 A.2d 513, 520 (1971) (dictum) (traditional-family ordinance invalidated on the basis that it was too broad in its sweep, excluding land users who did not threaten to exhibit the undesirable behavior); *Larson v. Mayor of Spring Lake Heights*, 99 N.J. Super. 365, 374, 240 A.2d 31, 36 (Law Div. 1968) (municipality should have enforced existing police power ordinances rather than enacting overbroad zoning ordinances).

421. *See supra* note 21 and accompanying text.

dinances. In 1962 Professor Boris Bittker considered a hypothetical case in which the imaginary Town of New Harmony, Illinois, enacted a checker-board ordinance designating all residential lots within the municipality alternately as "white" and "black."⁴²² Only whites could acquire and occupy a "white" lot, and only blacks could hold an interest in the property beside it. The difference between this checker-board ordinance and those of an earlier time was that New Harmony's measure was intended to promote racial integration, not segregation: New Harmony's ordinance posited that if whites and blacks were not legally compelled to live side by side, the two races would tend to live apart.

Shortly after Bittker created the "benevolent" checker-board ordinance, another commentator created a different hypothetical case, this time involving an "integration ordinance."⁴²³ In this hypothetical, the City of Bayside imposed on publicly assisted housing an occupancy ratio allotting seventy percent of the homes to whites and thirty percent to blacks. The ratio was imposed to avoid the "tipping point," the theoretical "point at which a rising proportion of nonwhites will cause whites to abandon an area,"⁴²⁴ thereby thwarting the goal of racial integration.

The hypothetical Bayside ordinance, or something very much like it, was nearly adopted in Oak Park, Illinois, in 1973.⁴²⁵ The Oak Park measure proposed creating a racially integrated community.⁴²⁶ To this end, the amendment to the municipality's Fair Housing Ordinance would have made it unlawful to sell any real estate in a designated area to a black person if thirty percent or more of the block, as defined in the regulation, was occupied by blacks.⁴²⁷ Furthermore, in multiple family dwellings of a certain size, the regulation would have made it

422. See Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

423. See Note, *The Integration Ordinance: Honi Soit Qui Mal Y Pense*, 17 STAN. L. REV. 280 (1965).

424. *Id.* at 282 n.14.

425. See Note, *The Use of Racial Housing Quotas to Achieve Integrated Communities: The Oak Park Approach*, 6 LOY. U. CHI. L.J. 164 (1975). The municipality ultimately rejected the housing quota approach in favor of a more broad-ranging plan. *Id.* at 166. The Oak Park measure was not technically a zoning ordinance. See *id.* at 164 n.3. It did, however, designate permitted land uses and their locations and thus functioned as a zoning regulation.

426. See *id.* at 165. Apparently blacks were moving into the eastern part of the municipality, and a possibility existed that, with white flight, the area would become entirely black. The proposed measure sought to avoid this result. *Id.* at 165 n.4.

427. The material provision read as follows:

24-1/2.10.3 *Limitation on Sales in Designated Area.* It shall be unlawful for any seller or any agent for any seller to knowingly sell any real property to a black person on any block in the designated area if thirty (30%) percent or more of the block between two intersecting streets on both sides of the street has been occupied by black persons.

Quoted in *id.* at 164 n.3.

unlawful to rent a unit to a black person if thirty percent or more of the units had been rented to blacks.⁴²⁸ The proposal charged the municipality's Community Relations Department with "locat[ing] comparable housing . . . in other areas of the Village of Oak Park" for any black person prevented from buying or renting accommodations in the municipality because of the amendment.⁴²⁹

Racial quotas to achieve integration in housing have received wide attention in the professional literature.⁴³⁰ Programs affirmatively seeking racial balance in housing through ceiling quotas, including integration ordinances, rely on the basic premise that integrated housing is good⁴³¹ and is legitimately pursued through quota schemes. This argument could distinguish integration ordinances from the segregation ordinance struck down in *Buchanan v. Warley*⁴³² or the racially-restrictive covenants that courts were prohibited from enforcing in *Shelley v. Kraemer*⁴³³ because the ultimate goal of integration ordinances—integration and racial balance—is desirable, whereas the *Buchanan* and *Shelley* measures were aimed at preserving undesirable

428. The wording of this provision was as follows:

24-1/2.10.4 *Rentals in Designated Area*. It shall be unlawful for any owner or any agent for an owner to knowingly rent any apartment in a multiple family dwelling of four or more units in the designated area to a black person if 30% or more of the multiple family dwellings in the building have been rented to or have been occupied by black persons. This section shall not apply to the renewal of an existing lease.

Quoted in *id.* at 164 n.3.

429. *Id.* (quoting proposed ordinance).

430. See, e.g., Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Bittker, *supra* note 422; Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531 (1963); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30 (1960); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1104-32 (1969); Note, *The Benign Housing Quota: A Legitimate Weapon to Fight White Flight and Resulting Segregated Communities?*, 42 FORDHAM L. REV. 891 (1974) [hereinafter cited as Note, *The Benign Housing Quota*]; Note, *supra* note 425; Note, *Racial and Ethnic Quotas: The Tipping Phenomenon in Otero v. New York City Housing Authority*, 4 N.Y.U. REV. L. & SOC. CHANGE 1 (1974) [hereinafter cited as Note, *Racial and Ethnic Quotas*]; Note, *supra* note 423.

431. There is support for the view that integration in housing is in the public interest. See *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977) ("This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing.") (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)); cf. Kaplan, *supra* note 430, at 389 n.54 ("One's advocacy of the benign quota is of course determined by the relative priority he gives to integration and to the benefit which will be denied those Negroes in excess of the quota."). Integration in housing may bring such benefits as integration in schools. See, e.g., G. MULLER EXCLUSIONARY ZONING 12 (1972); Note, *supra* note 423, at 281. But housing integration may also cause problems such as less political power for the minority. See Kaplan, *supra* note 430, at 397-98.

432. 245 U.S. 60 (1917).

433. 334 U.S. 1 (1948).

racial inequality.⁴³⁴ An argument of this type might well refute an attack alleging that an integration ordinance was not authorized by the relevant enabling legislation.⁴³⁵ The typical enabling act authorizes the regulation of land use to promote the "general welfare"; the laudable goal of achieving integrated housing seems to fall within the scope of this power.

The inevitable constitutional challenge would present a more difficult problem. Race has long been a suspect classification,⁴³⁶ and thus integration ordinances would receive strict scrutiny pursuant to the equal protection clause of the fourteenth amendment. Under such scrutiny the municipality would have to demonstrate that the regulation furthered a compelling state interest and was the least restrictive method of accomplishing that goal;⁴³⁷ a difficult proposition given the uncertainty over the percentage of minority representation that will cause a dwelling district to "tip" toward segregation.⁴³⁸ Furthermore, integration ordinances generally involve "ceiling" rather than "access" quotas. Access quotas, such as the one considered in the *Bakke* case,⁴³⁹ are supposedly "benign" because they directly benefit a minority group with a history of societal discrimination. In contrast, a ceiling quota requires members of the disadvantaged minority to bear the burden of achieving integrated housing.⁴⁴⁰ "Indeed," write the authors of one commentary, "the opinions in *Bakke* suggest that the Court might not be sympathetic to the use of 'benign' ceiling quotas."⁴⁴¹

434. See Bittker, *supra* note 422, at 1392, 1393-95; Hellerstein, *supra* note 430, at 536-41. But cf. Note, *supra* note 425, at 168 (suggesting that *Buchanan, Shelley* and *Reitman v. Mulkey*, 387 U.S. 369 (1967), "indicate that the Court will invalidate actions by the state which make racial distinctions the basis for access or non-access to housing").

435. See, e.g., *State v. Wilson*, 157 Fla. 342, 25 So. 2d 860 (1946) (segregation ordinance); *State v. Darnell*, 166 N.C. 300, 81 S.E. 338 (1914) (segregation ordinance).

436. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

437. Cf. *Developments in the Law—Equal Protection*, *supra* note 430, at 1106 ("The traditional standard of review of such classifications would require that the state demonstrate an overriding justification for the use of racial distinctions and show that the purpose of the action could not be accomplished by a non-racially focused alternative.") (footnote omitted).

438. See Note, *Racial and Ethnic Quotas*, *supra* note 430, at 14; Note, *Benign Quotas—Fair Housing—Affirmative Action Permits the Granting of Preference to Whites in Admission to Public Housing to Insure Racial Integration*, 20 WAYNE L. REV. 1109, 1125-26 (1974).

439. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), involved the validity of a quota system used to increase the number of minority students entering the University of California at Davis Medical School.

440. See Rubinowitz & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U.L. REV. 491, 565 (1979); Note, *The Benign Housing Quota*, *supra* note 430, at 900.

441. See Rubinowitz & Trosman, *supra* note 440, at 559 n.258.

Obviously benign racial quotas of either type raise a multitude of difficult legal and social issues. To incorporate a quota scheme into a zoning ordinance, a local governing body would have to believe in the value of integrated housing with sufficient fervor to accept the public criticism and legal attacks inevitably attending the adoption of such a measure. A desire to avoid such repercussions probably contributed to the Village of Oak Park's eventual retreat from its proposed integration ordinance.⁴⁴² Nevertheless, the integration ordinance remains a potential application of zoning for direct social control.

If a municipality adopted an inclusionary racial ordinance, it would be pursuing the wholly ideological objective of integration in housing. Clearly, the goals articulated during the period of the development of New York City's building zone resolution have given way to, or at least have been joined by, a plethora of more ideological objectives. This shift in objectives is particularly apparent in traditional-family ordinances and age-restrictive zoning. Some would argue that the ideological concerns furthered by these two examples of zoning for direct social control involve little more than petty residential preferences not deserving of legislative recognition. But with inclusionary zoning and integration ordinances, zoning for direct social control seeks to further ideological goals that lie at the heart of the American value-system and that are vitally "involved in creating an environment suitable for democratic living."⁴⁴³

This article has not identified all the possible applications of zoning for direct social control. Other instances of this sort of land use regulation have already arisen and new manifestations will continue to appear. An example appears in Robert Nelson's description of how the artists of SoHo, a neighborhood in New York City, preserved the character of their community.⁴⁴⁴ In SoHo, artists have converted old manufacturing lofts to serve their needs. But a large number of relatively

442. Oak Park ultimately developed a wide-ranging community plan for racial integration with a number of alternatives to ceiling quotas. This integration plan is discussed in Note, *supra* note 425, at 182-83. One of the more interesting proposals of the integration plan involved the adoption of an "equity assurance program": the municipality would guarantee homeowners against any devaluation of their property below a certain proportion of appraised value. This assurance would help stabilize the occupancy of a neighborhood insofar as homeowners would no longer move because of a fear that integration would depress property values. *See id.* at 182. The plan also called for a community-wide "orientation program" directed at all persons seeking housing in the community involving seminars, media advertising, and the mandatory distribution of printed material through the housing industry. "This orientation would be intended to make the individual examine his own housing decision so that his selection might further the Village's goals." *Id.* at 183.

443. Williams, *supra* note 177, at 319.

444. *See* R. NELSON, *supra* note 202, at 15.

wealthy New Yorkers who evidently like to live among artists threatened to inundate the area. The resulting increase in rent levels would ultimately have forced out the legitimate artists. Not about to let SoHo go the way of Greenwich Village, the artists in 1971 "persuaded the New York City government to establish an Artists Certification Committee that would certify applicants as professional artists and then to make such certification a zoning requirement for SoHo residency."⁴⁴⁵ This is a fascinating example of the importance the identity of land users may have in shaping the character of a neighborhood.

The City of Long Beach, New York, appeared concerned with the identity of certain land users for less praiseworthy reasons when, in 1973, it adopted an ordinance amending its municipal code with respect to the operation and occupancy of hotels, boarding houses and rooming houses. A federal district court subsequently reviewing the ordinance noted that it dealt with, "[i]n substance, . . . the registration of the mentally ill."⁴⁴⁶ Among other things, the measure provided that "[t]hose patients requiring continuous medical or psychiatric services shall not be registered," and that "certain personal records shall be maintained for any person registered and remaining in excess of fifteen days."⁴⁴⁷ Although the court found the ordinance unconstitutional, the case provides a striking example of how discerning a municipality may become in identifying land users in a local regulation.⁴⁴⁸

V. CONCLUSION

Zoning for direct social control represents a double departure from more traditional zoning efforts. First, such ordinances go beyond the mere governance of the physical aspects of the urban environment and seek to regulate the users of land in residential districts. Second, not only do these ordinances frequently attempt to promote more amorphous goals involving the preservation of community character and aesthetics, but in many instances they pursue ideological concerns. It is, indeed, ironic that one commentator was moved to write as early as 1927, "the conclusion is forced upon us that the police power has been extended until the limits upon the power, as generally conceived, no

445. *Id.*

446. *Stoner v. Miller*, 377 F. Supp. 177, 178 (E.D.N.Y. 1974). Technically speaking, the ordinance was not a zoning measure but, rather, a hotel and boarding house regulation. However, in identifying certain persons and restricting their use of specified dwelling types, the ordinance bore a close resemblance to zoning for direct social control.

447. *Id.*

448. The court held that the ordinance both infringed on the fundamental rights of travel and privacy and was overly vague. *See id.* at 180-81.

longer exist.”⁴⁴⁹ Particularly with respect to zoning for direct social control, this assertion overstates the case today. Clearly the federal and state constitutions continue to impose limitations, even if constitutional guarantees adjust to new public needs.⁴⁵⁰ The statutes that delegate zoning power to the municipalities from the state legislatures are also a restraining influence. Determining how these various limitations should be applied to ensure that zoning for direct social control does not become abusive but remains sensitive to the competing values involved poses a difficult problem.

Whenever land use is regulated, important interests clash: “protection of the individual confronts utilitarian goals of provision for the general welfare.”⁴⁵¹ There is, moreover, the interest of a municipality in determining its own destiny. In the landmark zoning case of *Village of Euclid v. Ambler Realty Co.*,⁴⁵² the Supreme Court noted that a separate municipality has the “authority to govern itself as it sees fit.”⁴⁵³ In *Village of Belle Terre v. Boraas*,⁴⁵⁴ the Court reaffirmed that a community has a “right to define its own character and values.”⁴⁵⁵ There are several reasons why municipalities should retain a good deal of local autonomy. For one thing, the affection for local democracy at a “grass roots” level is deeply embedded in American political ideology.⁴⁵⁶ It is often said that local decisionmaking is more responsive to local needs,⁴⁵⁷ and that government at the local level provides greater public access to government, affording an opportunity for increased citizen participation.⁴⁵⁸ Furthermore, local autonomy permits local gov-

449. N. BAKER, *LEGAL ASPECTS OF ZONING* 26 (1927).

450. See E. FREUND, *supra* note 104, § 21; A. BETTMAN, *Is Housing A Public Use?*, in *CITY AND REGIONAL PLANNING PAPERS*, *supra* note 99, at 87; *Cromwell v. Ferrier*, 19 N.Y.2d 263, 268-69, 225 N.E.2d 749, 752, 279 N.Y.S.2d 22, 26 (1967).

451. J. DiMENTO, *THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* at xv (1980).

452. 272 U.S. 365 (1926).

453. *Id.* at 389.

454. 416 U.S. 1 (1974).

455. See *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1180 (1977); cf. Lupu, *supra* note 192, at 1053 (“[I]t has been a constant tenet of American constitutional tradition that, outside the realms of thought, expression, religion and conscience, the political agencies of the community may define the limits of acceptable human enterprise. *Belle Terre* is consistent with that tradition.”) (footnote omitted).

456. See, e.g., Sandalow, *supra* note 334, at 709-10; Silverman, *Housing for All Under Law: The Limits of Legalist Reform*, 27 U.C.L.A. L. REV. 99, 144 (1979).

457. See, e.g., Sandalow, *supra* note 334, at 710; *Developments in the Law—Section 1983 and Federalism*, *supra* note 455, at 1180; Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134, 1141 (1980) [hereinafter cited as Note, *Land Use Regulation*]; Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896, 900 (1970).

458. See *supra* authorities cited in note 457; cf. I. J. METZENBAUM, *THE LAW OF ZONING* at v (2d ed. 1955):

ernments to act as laboratories for experimentation in social policy.⁴⁵⁹ The ability of localities to develop policies responsive to their own unique needs has the beneficial result of promoting diversity.⁴⁶⁰ Ultimately, individuals have a greater opportunity to choose a community particularly suited to their personal needs and preferences when local governments can formulate independent policy responses to community issues.⁴⁶¹ For example, local age-restrictive land use controls provide a citizen with the choice of living in an age-integrated or an age-homogeneous environment, a choice that might not otherwise be available.⁴⁶²

There are also persuasive counterarguments. Largely because of the smaller unit of government involved, the political process in local decisionmaking may be inferior to the political processes at the state or federal levels.⁴⁶³ This observation echoes the argument of *Federalist X*: a smaller society is more likely to have a homogeneous population with a clearly identifiable majority and, with fewer interests being brought to bear on a given issue, it is more likely that the majority will successfully disregard the interests of the minority.⁴⁶⁴ In addition, local gov-

It [zoning] has helped to restore the original concept of the American form of government—the Town Meeting theory—for, unlike changes in the average law which are voted by those in authority with no specific notice to those affected, zoning changes may not—generally—be made without actual or constructive notice to all those affected within the neighborhood, with an opportunity to be heard.

459. See, e.g., Sandalow, *supra* note 334, at 719; *Developments in the Law—Section 1983 and Federalism*, *supra* note 455, at 1180; Note, *Land Use Regulation*, *supra* note 457, at 1141. In this regard, Professor Tribe has pointed out that traditional-family ordinances might be viewed as courageous social experiments in light of the increasing prevalence of alternative domestic associations. See L. TRIBE, *supra* note 171, at 989.

460. See Note, *The Constitutionality of Local Zoning*, *supra* note 457, at 900 (“A significant benefit derived from local responsiveness and flexibility is diversity.”); *Developments in the Law—Section 1983 and Federalism*, *supra* note 455, at 1180:

This conception of political decentralization as the key to the preservation of diversity and of government attuned to local values and problems has been considered particularly compelling in the United States, given the political and cultural heterogeneity of the American people and the traditional focus on the community as the center of political and social life.

461. See Note, *The Constitutionality of Local Zoning*, *supra* note 457, at 900 (“Many decisions have primarily local significance, yet must be made by all communities. Giving each community power to order its own consumption choices from the common menu not only encourages innovation and experimentation, but also allows individuals a greater opportunity to satisfy their own preferences.”). Specialization among municipalities may enhance economic efficiency as well. See R. ELLICKSON & A.D. TARLOCK, *supra* note 53, at 811-13 (discussion of Tiebout Hypothesis).

462. See Travaglio, *supra* note 123, at 319-20.

463. See Bruff, *supra* note 334, at 671-72; Sandalow, *supra* note 334, at 710-12; Note, *Land Use Regulation*, *supra* note 457, at 1151-52.

464. See THE FEDERALIST No. 10, at 83 (J. Madison) (New Am. Lib. ed. 1961), *quoted in* Bruff, *supra* note 334, at 672.

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing

ernmental structure lacks "complicated checks and balances" and "clear structural separations of power," perhaps creating a greater risk of abusive action.⁴⁶⁵ The possibility that municipal actions will have extraterritorial effects and the inadequacy of procedural safeguards have also been cited as justifications for judicial supervision of local actions.⁴⁶⁶ Finally, local land use decisionmakers may be less informed than those at the state level.⁴⁶⁷

Factors unrelated to local competence also dictate in favor of a more circumspect use of zoning for direct social control. Such zoning could seriously interfere with the interest individuals have in living with domestic associates of their own choosing. For example, in *Belle Terre* the village's zoning ordinance recognized the interest of traditional families in associating with their own kind and thus, conceptually speaking, their personal interest was in harmony with the value of local autonomy. In contrast, the village's ordinance did not recognize and, in fact, interfered with the associational interests of the six unrelated university students who wished to live together in the village.⁴⁶⁸ Moreover, the values embodied in a particular zoning ordinance exercising direct social control may compete with the desirable goal of affording all sectors of the population a reasonable opportunity to obtain housing in the area. An ordinance authorizing a retirement community, for instance, might contribute to the exclusion of low- and moderate-income families with children from the municipality.

This article has discussed these competing values. How should a reviewing court deal with them in a sensitive manner when the validity of a direct social control zoning ordinance is challenged? A rather energetic, but not prohibitive form of judicial review is probably appropriate. Zoning of this type represents a novel use of local power and,

a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

Cf. Makielski, *Zoning: Legal Theory and Political Practice*, 45 J. URB. L. 1, 22 (1967) (The zoning system "has the effect of reinforcing and protecting middle-class economic and social values while providing little or no opportunity for underrepresented groups to find expression or recognition.").

465. See Bruff, *supra* note 334, at 672-73.

466. See *id.* at 671, 673.

467. See Note, *Land Use Regulation*, *supra* note 457, at 1151.

468. These interests, although similar, were competing. See *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 796, 171 Cal. Rptr. 738, 743 (1981) (discussion of competing rights of privacy); cf. L. TRIBE, *supra* note 171, at 977 (1978) ("Two claims of association are at stake [in *Belle Terre*]: that of the students, wishing to live with one another in their preferred way in the village, and that of the great majority of the village's inhabitants, wishing to preserve the integrity of their preferred associational form as a community of traditional families") (footnote omitted); Michelman, *supra* note 144, at 196-97 (discussion of "community-self-determination type of public-interest model of legitimacy"). Belle Terre's mayor claimed that with its opinion the Supreme Court recognized a "community's right to privacy." M. DANIELSON, *supra* note 12, at 183-84.

because it identifies land users, may be particularly subject to prejudicial manipulation.⁴⁶⁹ This article has suggested several means of review that would prevent abuses yet provide municipalities with substantial leeway to experiment. Fact bases tests, comprehensive plan requirements, the availability of alternative housing sites, and the adjustment of the presumption of validity and burdens of proof are all possible tools. By appropriate use of one or more of these tools, the responsibility for planning policy can remain with local governments to a larger degree than would be possible under more rigorous forms of substantive review.

In accordance with these principles, for example, a court would probably not hold on the basis of *Moore*⁴⁷⁰ that age-restrictive zoning is unconstitutional as applied to the elderly excluded from a retirement community because of the youth of one or more of the members of their family.⁴⁷¹ Within the confines of the facts, a court could emphasize the limited geographic scope of the retirement community and point to reasonably comparable housing alternatives in the municipality in rejecting the claim. By way of further illustration, a court could uphold a traditional-family ordinance, although perhaps not so readily as some courts have in the past, if suitable alternative housing existed for so-called "voluntary" families and if the municipality could articulate its goals and perhaps come forward with some empirical basis for passing such an ordinance. In any event, if a reviewing court must overturn a traditional-family ordinance, it should strive to do so on the grounds that the statutory mandate has been exceeded, not on the grounds that a constitutional guarantee has been violated.

Zoning for direct social control is a recent and growing innovation. Courts will no doubt be increasingly called on to draw the line between reasonable and unfair restrictions of this sort. This article has suggested the attitude with which courts might properly approach zoning for direct social control. By and large, no attempt has been made to pass judgment categorically on the appropriateness of any particular instance of this type of zoning. Such a judgment would ignore the flexible attitude advocated, whereby such zoning ordinances receive enough deference that, given reasonably supportive factual circumstances, many of them can be allowed to stand. This approach respects the competing values often presented by zoning for direct social con-

469. Cf. Bruff, *supra* note 334, at 688 ("There is reason for greater caution, however, in upholding local assertion of powers that are novel or that, however exercised, have a special capacity for abuse.") (footnotes omitted); see also *id.* at 701.

470. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality).

471. But see Doyle, *supra* note 184, at 89-97.

trol. The devices and concepts accompanying this approach could aid courts in setting a steady course between judicial activism and judicial self-restraint.