CHALLENGING RESTRICTIVE FAMILY DEFINITIONS IN ZONING ORDINANCES: *CITY OF SANTA BARBARA v. ADAMSON*

Unrelated persons wishing to reside together as a family often confront zoning ordinances[1] which prohibit[2] or restrict[3] nontraditional

1. Municipalities enact zoning regulations pursuant to the police power of the state, often defined as the power to act for the health, safety, and general welfare of the public. 1 R. ANDERSON, AMERICAN LAW OF ZONING, § 2.01 (2d ed. 1976) [hereinafter cited as ANDERSON]. The enactment of zoning restrictions constitutes an exercise of legislative power. Typically, state constitutions vest in the state legislature the legislative power of the state. *Id.* at §§ 2.01-2.02. Consequently, a municipality, as a political subdivision of the state, has no inherent power to zone. Such authority must be delegated to it by the state legislature. *Id.* at § 2.15. All of the states have adopted enabling legislation, often patterned after the Standard State Zoning Enabling Act, a model act prepared by the Department of Commerce in the 1920's. *Id.* at §§ 2.19-2.21; 1 N. WILLIAMS, AMERICAN PLANNING LAW § 18.01 (1974) [hereinafter cited as WILLIAMS]. *See also* ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, UNITED STATES DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT, (Rev. ed. 1926) [hereinafter cited as STANDARD ENABLING ACT], reprinted in 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW: CASES AND MATERIALS 354 (1978).

Since zoning ordinances are legislative acts, courts accord them a presumption of constitutionality. ANDERSON, *supra*, § 3.14. " [A] legislative decision on such matters may not be disturbed unless the legislature has exceeded its powers or acted in an arbitrary or unreasonable manner." *Id.* The litigant challenging the validity of the ordinance bears the burden of proof. *Id.* If the presumption is rebutted, the court will examine the regulation to determine if the legislative body had a rational basis for enacting it. Under the traditional due process analysis (*see* note 4 *infra*), three criteria are considered. First, is the goal sought a legitimate objective through the exercise of the police power? Second, are the means employed reasonably necessary for the accomplishment of the purpose? Third, are the means unduly burdensome upon the affected individuals? A. GODSCHALK, D. BROWER, L. MCBENNETT, B. VESTAL, and D. HERR, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 45-48 (1979) [hereinafter cited as GODSCHALK].

Courts normally require that the means employed to effectuate the legislative purpose bear a rational relation to the stated objective. If the means employed to obtain a legitimate objective are reasonable, courts will require a substantial injury before invalidating the ordinance. GODSCHALK, *supra*. *See also* A. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 83 (1977).

With regard to the scope of objectives permissible under the police power, see Berman v. Parker, 348 U.S. 26 (1954), where the issue before the Court was whether a municipality could use its power of eminent domain in conjunction with its police

living arrangements. The United States Supreme Court made a rare foray into the field of zoning[4] in 1974 and sustained the constitution-

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power to obtain land for slum redevelopment. The Court, per Justice Douglas, spoke expansively of the city's power to act for the public welfare:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . .
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> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police powers to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . .

Id. at 32.

As illustrated by *Berman*, the traditional analysis manifested extreme judicial deference toward local zoning decisions. GODSCHALK, *supra*, at 45. In the 1970's, courts in several jurisdictions moderated their attitude. The trend was foreshadowed by the now classic dissent of Justice Hall of the New Jersey Supreme Court in *Vickers v. Township Comm. of Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963):

> While it has long been conventional for courts to test the validity of local legislation by the criterion of whether a fairly debatable issue is presented, and if so to sustain it, it makes all the difference in the world how a court deals with that criterion. Proper judicial review to me can be nothing less than an objective, realistic consideration of the setting—the evils or conditions sought to be remedies, a full and comparative appraisal of the public interest involved and the private rights affected, both from the local and broader aspects, and a thorough weighing of all factors, with government entitled to win if the scales are at least balanced or even a little less so. Of course, such a process involves judgment and the measurement can never be mathematically exact. But that is what judges are for—to evaluate and protect all interests, including those of individuals and minorities, regardless of personal likes or views of wisdom, and not merely to rubber-stamp governmental action in a kind of judicial laissez-faire. *Id.* at 260, 181 A.2d at 144. This new approach altered the traditional analysis in two important ways. First, courts became willing to shift the burden of proof to the municipality after a preliminary showing, thereby challenging the presumption of validity previously accorded zoning ordinances. Second, the relationship between the regulatory device or classification and the zoning goal was scrutinized, in terms of both the "fit" and their propriety. *See* GODSCHALK, *supra*, at 48-49; WILLIAMS, *supra*, at § 5.05.

2. *E.g.*, City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d (1966) (single-family residence restricted to person related by blood, marriage, or legal adoption and not more than one gratuitous guest).

3. *See, e.g.*, notes 12 and 35 *infra*.

4. American zoning law evolved with minimal guidance from the Supreme Court. In the landmark decision of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926), the Court upheld comprehensive zoning as a permissible exercise of the police power. The Court ruled that zoning was not an unconstitutional deprivation of due process unless the regulations were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. The

ality of residential zoning regulations which restrict the number of unrelated persons permitted to live in a single-family unit while placing no size limitations on related groups.[5] Subsequently, the Supreme Court of New Jersey rejected the Supreme Court's reasoning and invalidated a similar zoning ordinance by relying upon state constitutional grounds.[6] In *City of Santa Barbara v. Adamson*,[7] the California Supreme Court followed New Jersey's departure by holding that a zoning ordinance restricting the occupancy of a single-family dwelling by unrelated persons violates the state constitution.[8]

Defendants[9] shared a ten-bedroom house owned by one of the defendants.[10] The defendant's property was situated in a zoning district permitting only single-family use.[11] The governing ordinance defined "family" as either persons related by blood, marriage or legal adoption, or a group of up to five persons living together as a single housekeeping unit.[12] The twelve members of defendants' household

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zoning plan approved by the Court, involving the division of the community into districts with restrictions upon the use of all property in such districts, became the pattern for subsequent zoning ordinances (hence the term "Euclidian" zoning). *See generally*, ANDERSON, *supra* note 1, at §§ 3.09-.10, 9.01.

In the only other zoning case decided by the Court prior to the past decade, Nectow v. City of Cambridge, 277 U.S. 183 (1928), it sustained an as applied challenge to the constitutionality of a zoning ordinance found to be arbitrary and unreasonable.

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

6. State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

7. 27 Cal.3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

8. *Id.* at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545.

9. The city brought suit against Adamson, the owner of the house, and several other persons residing there. The Court characterized the residents of the home as in their late twenties and thirties with varied occupations, including a businesswoman, a lawyer, a real estate agent, and a graduate student. *Id.* at 127, 610 P.2d at 438, 164 Cal. Rptr. at 541.

10. *Id.* Defendant's house had a total of twenty-four rooms, including six bathrooms. *Id.*

11. *Id.*

12. *Id.* The Santa Barbara Housing Code defines family as:

> 1. An individual, or two (2) or more persons related by blood, marriage, or legal adoption living together as a single housekeeping unit in a dwelling unit . . . 2. A group not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit.

SANTA BARBARA HOUSING CODE § 28.04.230, *cited at* 27 Cal.3d at 127, 610 P.2d at 437-38, 164 Cal. Rptr. at 540-41.

The ordinance enumerated several zoning objectives, including the development and maintenance of "a suitable environment for family life," a ban on commercial activity "injurious to the preservation of a residential environment" and assuring a

were not related by blood, marriage or adoption.[13] After warning the defendants that their living arrangements violated the ordinance, the city of Santa Barbara sued for a restraining order and injunctive relief.[14] The California Supreme Court found that the ordinance infringed upon the right of privacy guaranteed by the state constitution.[15] Adopting a "strict scrutiny" standard of review,[16] the Court concluded that the city failed to demonstrate a compelling public interest to justify the restriction.[17]

Ascribing meaning to the term "family" functions as the critical link in a zoning scheme which classifies residential districts[18] accord-

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low density in residential districts. SANTA BARBARA HOUSING CODE § 28.15.005, *cited at* 27 Cal.3d at 132, 610 P.2d at 440-41, 164 Cal. Rptr. at 543-44.

13. 27 Cal.3d at 127, 610 P.2d at 438, 164 Cal. Rptr. at 541. The Court noted, however, that members of the group shared expenses, rotated chores, and provided emotional support and stability for each other. *Id.*

14. *Id.* The city sought a temporary restraining order, preliminary injunction, and permanent injunction. The trial court issued a restraining order and later a preliminary injunction. *Id.* The decision was affirmed on appeal in an unpublished opinion. City of Santa Barbara v. Adamson, Civ. No. 54312 (Ct. App. Mar. 19, 1979).

15. 27 Cal.3d at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545. The constitutional provision relied on by the court states:

> All persons are by nature free and independent and have unalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

CAL. CONST. art. I, § 1.

The State of California added the privacy provision by referendum in 1972. For a discussion of the court's interpretation of the provision prior to this case, see notes 70-71 *infra. See also, The Supreme Court of California 1974-1975*, 64 CALIF. L. REV. 239, 347-369 (1976); Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481, 502-504 (1974).

16. *See* note 39 *infra*.

17. 23 Cal.3d at 132, 610 P.2d at 441, 164 Cal. Rptr. at 544.

18. Pursuant to its zoning powers (*see* note 1 *supra*), a municipality may establish residential districts and prescribe permissible uses and regulations within that district. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); STANDARD ENABLING ACT, *supra* note 1, § 2; ANDERSON, *supra* note 1, at § 9.24. One type of residential use restriction involves the regulation of residential building types; *i.e.*, regulations designating a district for either single- or multiple-family dwellings. *See generally* WILLIAMS, *supra* note 1, ch. 50. Despite some early criticism (*see* Harmon v. City of Peoria, 27 N.E.2d 525 (Ill. 1940); Merrill v. City of Wheaton, 190 N.E. 918 (Ill. 1934)), the constitutionality of single-family residential districts is generally assumed. *See* Village of Belle Terre v. Boraas, 416 U.S.1 (1974); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Miller v. Bd. of Public Works of Los Angeles, 195 Cal. 477, 234 P. 381 (1925), *appeal*

ing to the number of families permitted per residential structure.[19] Municipalities may use one of several approaches in defining the term within the zoning ordinance.[20] The zoning ordinance may narrowly restrict household occupancy to persons related by blood, marriage, or adoption.[21] Alternatively, the statutory definition of "family" may extend to a specified number of unrelated persons in addition to persons having the requisite legal relationships.[22]

Regardless of the approach, a narrow definition of the term "family" results in the exclusion of diverse group living arrangements from single-family districts.[23] Municipalities justify the classifica-

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dismissed, 273 U.S. 781 (1927); Brett v. Building Comm'r of Brookline, 250 Mass. 73, 145 N.E. 269 (1924). *See also* WILLIAMS, *supra* note 1, at § 50.02.

Courts use several rationales to justify the segregation of residential districts by building types. First, districts with more restrictive building types often have a lower density. This in turn results in reduced traffic, congestion and noise, and limits the burden on public facilities and services. Second, the transiency traditionally associated with the occupants of multiple-family units is deemed incompatible with stable residential neighborhoods. Third, multiple-family dwellings may be aesthetically incompatible with single-family units. Finally, the presence of multiple-family dwellings in residential neighborhoods may lower property values. *See* WILLIAMS, *supra* note 1, at ch. 51.

19. WILLIAMS, *supra* note 1; at § 51.01.

20. A municipality may also elect to leave the term undefined. When faced with such an ordinance, courts attempt to determine if the contested living arrangement constitutes a common housekeeping unit. The biological or legal relationship of the inhabitants is not determinative. *See* Brady v. Superior Court, 200 Cal. App.2d 69, 19 Cal. Rptr. 242 (1962) (ordinance restricting dwelling units to "single-family" construed to mean persons living on the premises as a single housekeeping unit, and not to require consanguinity or affinity of household members). *See also* Rademan v. City and County of Denver, 186 Colo. 250, 526 P.2d 1325 (1974) (ordinance permitting only "single-family units" held to prohibit two married couples and two single persons from residing together where evidence refuted claim of a common housekeeping unit); Planning and Zoning Comm'n v. Synanon Foundation, Inc., 153 Conn. 305, 216 A.2d 442 (1966) ("one-family" district prohibits a large, ever-changing group of unrelated persons). The common housekeeping unit criterion may be purposely adopted by municipalities as a less restrictive alternative to the definitional approaches discussed in the text. *See* State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976). *See also* notes 59 and 75-77 and accompanying text *infra*.

21. Courts tend to interpret ordinances requiring a blood or legal relationship broadly so as to include any related group. WILLIAMS, *supra* note 1, at § 52.02. Such a construction may now be constitutionally compelled in light of the Supreme Court's recent decision in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), discussed at note 45 *infra*.

22. *See, e.g.*, note 12 *supra*.

23. In addition to households typified by the group in *Adamson*, (*see* note 9

tions as an effective means of furthering traditional zoning objectives.[24] These may include preserving the residential character of a neighborhood or promoting an environment conducive to family life.[25] Strict residency requirements serve to restrict behavior and lifestyles deemed incompatible with such uses.[26] Courts also explain the classifications as a device to control overcrowding and congestion.[27] Prohibiting or restricting the size of certain groups, especially those whose size may vary unpredictably, provides a simple means of controlling population in a neighborhood.[28]

Prior to the Supreme Court's decision in *Village of Belle Terre v. Boraas*,[29] courts divided over the validity of restrictive definitions of the term "family."[30] Courts in several jurisdictions found them invalid,[31] reasoning that the power to zone does not permit a municipality

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supra), restrictive definitions of family can exclude group homes for juveniles, discussed at notes 47-49 and accompanying text *infra*. Other affected groups include fraternities and sororities, City of Schenectady v. Delta Chi Fraternity, 5 App. Div.2d 14, 168 N.Y.S.2d 754 (1957) (fraternity not permitted in single-family district); Cassidy v. Triebel, 337 Ill. App. 117, 85 N.E.2d 461 (1948) (sorority does not constitute a family), and religious groups, Carroll v. City of Miami Beach, 198 So.2d 643 (Fla. App. 1967) (Mother Superior and a group of novices held to be a single family); Missionaries of Our Lady of La Sallette v. Village of Whitefish Bay, 267 Wis. 609, 66 N.W.2d 627 (1954) (group of up to eight priests held to be a single family). *See also* WILLIAMS, *supra* note 1, at § 52.01; Note, "Burning the House to Roast the Pig": *Unrelated Individuals and Single-Family Zoning's Blood Relation Criterion*, 58 CORNELL L. REV. 138 (1972); Note, *The Definition of Family in Single-Family Zoning*, 42 MONTANA L. REV. 165 (1981); Comment, *Zoning According to Biological or Legal Relationships is Violative of the New Jersey Constitution*, 11 SETON HALL L. REV. 112 (1980); Note, *Constitutional Implications of Restrictive Definitions of Family in Zoning Ordinances*, 17 SOUTH DAKOTA L. REV. 203 (1972).

24. The zoning objectives cited often resemble those given in support of restrictions on residential building types. *See* note 18 *supra*.

25. *E.g.*, State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

26. 1 P. ROHAN, ZONING AND LAND USE CONTROLS, § 3.04[1] (1978) [hereinafter cited as ROHAN].

27. *E.g.*, Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), *rev'd without opinion*, 510 F.2d 976 (7th Cir. 1975); City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d 116 (1966).

28. *See* 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), *cert. denied*, 417 U.S. 910 (1974) (municipality may rationally decide that the size of "voluntary" families have no upper limit while the average size of the traditional family can be estimated).

29. 416 U.S. 1 (1974).

30. ROHAN, *supra* note 26, at § 3.04[1].

31. *See* notes 32 and 33 *infra*.

to regulate the internal composition of households[32] or to enact ordinances aimed at maintaining established residential patterns.[33]

In *Belle Terre*,[34] the Supreme Court upheld a zoning ordinance which permitted only single-family dwellings within the municipality and which restricted the occupancy of such buildings to groups related by blood or marriage or to no more than two unrelated persons.[35] The Second Circuit found the ordinance an unconstitutional denial of equal protection.[36] The Supreme Court,[37] however, ruled

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32. *See* City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d 116 (1966); 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 (1970); Marino v. Mayor and Council of Norwood, 77 N.J. Super. 587, 187 A.2d 217 (1963).

33. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974). *But see* 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), *cert. denied*, 417 U.S. 910 (1974) where the court upheld an ordinance restricting single-family units to persons biologically or legally related or unrelated groups not exceeding four persons. A communal group challenged the ordinance as an unconstitutional infringement upon the right of family privacy and freedom of association. The court held that the asserted constitutional interests did not extend to unrelated persons living together as a family. 321 F. Supp. at 911. The court drew a sharp distinction between the traditional family and the plaintiffs' "voluntary" family on the basis of biology, history, and law:

> The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary," is often compulsory. Finally, it has been a means for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings.

Id.

34. 416 U.S. 1 (1974).

35. The challenged ordinance defined family to mean:

> [o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit . . . A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage. . . .

BUILDING ZONE ORDINANCE OF THE VILLAGE OF BELLE TERRE, N.Y., Art. I, § D-1.35a (June 8, 1970).

The owners of a house and their six student tenants brought suit. They sought to have the ordinance declared unconstitutional as a violation of their fundamental rights of privacy, association and travel, (*see* note 39 *supra*) and a denial of equal protection. 416 U.S. at 8-9. The District Court upheld the ordinance. 367 F. Supp. 136 (E.D.N.Y. 1972), *rev'd*, 476 F.2d 806 (2d Cir. 1973), *rev'd.*, 416 U.S. 1 (1974).

36. 476 F.2d 806, 816 (2d Cir. 1973), *rev'd.*, 416 U.S. 1 (1974). The Second Circuit's equal protection analysis is noteworthy. The court declined to review the ordinance under the traditional "permissive" standard (*see* note 39 *supra*) because of a perceived alteration in the Supreme Court's test of legislative classifications. The new standard was said to "permit consideration to be given to evidence of the nature of

that zoning regulations purporting to preserve residential neighborhoods fell within a municipality's broad power to zone for the public welfare.[38] Finding that the resulting exclusion of the plaintiffs implicated no fundamental constitutional rights,[39] the Court reviewed the

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the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." *Id.* at 814. The court found a heightened standard to be especially appropriate when the classification involves "individual human rights of groups as opposed to business regulations." *Id.* at 815. The test applied inquired "whether the legislative classification is *in fact* substantially related to the object of the statute." *Id.* at 814. The court found that the most plausible objective of the statute was the maintenance of local social preferences. Such a goal under the guise of zoning laws was found impermissible. *Id.* at 816. Assuming that the ordinance was designed to meet a more traditional zoning objective, such as controlling density, the availability of less restrictive means to achieve that goal would still leave the ordinance "vulnerable." *Id.* at 817. *See generally* Comment, *Equal Protection and Exclusionary Zoning: Boraas v. Village of Belle Terre*, 60 VA. L. REV. 163 (1974). *See also*, Gunther, *The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 10-20 (1972); Note, "Burning the House to Roast the Pig": *Unrelated Individuals and Single-Family Zoning's Blood Relation Criterion*, 58 CORNELL L. REV. 138, 151-155 (1972).

37. Justice Douglas wrote for the Court. Justice Brennan dissented on justiciability grounds. The tenants moved from the house before the case reached the Supreme Court. Since the case involved a question concerning their constitutional rights, Justice Brennan contended that the owners were not qualified to allege denial of another party's rights under the traditional court standards. 416 U.S. 1 at 10. Justice Marshall filed a dissent, affirming the Second Circuit's decision. He found that the students' "fundamental" right of privacy had been violated. *Id.* at 11.

38. *Id.* at 9. In a flourish reminiscent of his opinion in *Berman v. Parker*, 348 U.S. 26 (1954) (*see* note 1 *supra*), Justice Douglas observed:

> 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.

Id.

39. *Id.* at 7. "Fundamental" rights constitute one category of interests in the Warren and Burger Courts' mode of equal protection analysis. Traditionally, the Court has applied one of two standards when reviewing legislative classifications. Under the "permissive" standard, the statutory scheme was not to be set aside "if any state of facts reasonably [might] be conceived to justify it." *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961). A "strict" test of equal protection is invoked if the challenger demonstrates that the legislative scheme in question utilizes either a suspect classification or impinges on a fundamental right. Under the strict test, the government must demonstrate that the classification "promoted a compelling governmental interest." *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7 (1978).

classification under the deferential standard accorded to social and economic legislation.[40]

Three years later the Court indicated in *Moore v. City of East Cleveland*[41] that the exclusionary effect of some residential use restrictions may violate the Constitution.[42] In *East Cleveland*, the ordinance restricted single-family dwelling units to members of a single family, defined to include only certain categories of related persons.[43] A fragmented court[44] held the ordinance invalid, ruling that a zoning ordinance which intruded upon extended family relationships in the absence of an important governmental interest violated the four-

40. 416 U.S. at 8. The Court required that the classification drawn be "reasonable, not arbitrary," *id. citing* Royster Giano Co. v. Virginia, 253 U.S. 412, 415 (1917), and bear "a rational relationship to a [permissible] state objective," 416 U.S. at 8, *citing* Reed v. Reed, 404 U.S. 71, 76 (1971). Some commentators have concluded that the Court's failure to use a heightened standard of review in *Belle Terre* at a time when it was using it in other contexts (see e.g., United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)) (held invalid a regulation which denied food stamps to households containing unrelated persons)) indicates a predilection by the Court to use greater judicial restraint when reviewing local zoning decisions. GODSCHALK, *supra* note 1, at 87-88. *See also The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 127-128 (1974). Nevertheless, the *Belle Terre* decision has received unfavorable reaction from commentators because of its truncated consideration of the exclusionary aspects of the zoning regulation. Williams & Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre, and Berman*, 29 RUTGERS L. REV. 73 (1975); Recent Development, *Supreme Court Upholds Restrictive Definition of Family in Zoning Ordinance*, 60 CORNELL L. REV. 299 (1975); Note, *No Dogs, Cats, or Voluntary Families Allowed—Village of Belle Terre v. Boraas*, 24 DE PAUL L. REV. 784 (1975); Comment, *Village of Belle Terre v. Boraas: Belle Terre is a Nice Place to Visit—But Only "Families" May Live There*, 8 URBAN L. ANN. 193 (1974).

41. 431 U.S. 494 (1977).

42. *See generally* Note, *Constitutionally Protected Notions of Family*, 19 B.C.L. REV. 959 (1978); Comment, *A Zoning Ordinance which Places Limits on which Members of an Extended Family May Live Together in a Single-Family Dwelling Infringes on Protected Family Interest, has only a Marginal Relationship to Permissible Zoning Objectives and thereby Violates Due Process Requirements: Moore v. City of East Cleveland*, 27 DRAKE L. REV. 565 (1977-78); Comment, *Moore v. City of East Cleveland: Freedom of Personal Choice for the Extended Family*, 10 SW. U. L. REV. 651 (1978).

43. *Id.* at 496. The city's definition of family was unusually complicated. One commentator interpreted it to include "a nuclear family (i.e., husband, wife, and kids), but only a limited number of extended families. The latter could include one dependent child and his/her children, but (if so) not another dependent child or any children of another child." WILLIAMS, *supra* note 1, § 52.02 at 51. The defendant lived with her son and two grandsons, who were first cousins.

44. Six justices wrote opinions. A plurality of the justices joined the Court's opinion. 431 U.S. at 495.

teenth amendment's due process clause.[45]

Unrelated groups facing exclusion have successfully challenged "single-family" ordinances in several jurisdictions[46] notwithstanding *Belle Terre*. Courts in a number of states[47] have sustained challenges to ordinances which exclude group homes from single-family districts.[48] To overcome the sanction seemingly granted to restrictive ordinances by *Belle Terre*, such courts frequently cite two factors supporting invalidation. First, the state has an important interest in facilitating efforts to raise handicapped and foster children in a home environment, an interest which should not be frustrated by a local zoning restriction. Second, invalidation of such ordinances does not countermand *Belle Terre* since group homes often closely resemble traditional families.[49]

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45. *Id.* at 499. The Court reasoned that substantive due process protected extended family relationships because of the deeply rooted notion of "sanctity of the family" in the nation's history and traditions. *Id.* at 503-04. The Court noted that "when a city undertakes such intensive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference is inappropriate." *Id.* at 499. The ordinance was then examined vis-a-vis "the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499.

46. *See* notes 47-50 *infra*.

47. *See* Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977); Berger v. State, 71 N.J. 206, 364 A.2d 998 (1976); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S. 449 (1974); Children's Home of Easton v. City of Easton, 53 Pa. Commw. Ct. 216, 417 A.2d 830 (Commw. Ct. 1980). *But see* Lakeside Youth Service v. Zoning Hearing Bd., 51 Pa. Commw. Ct. 485, 414 A.2d 1115 (Commw. Ct. 1980); Carroll v. Washington Township Zoning Comm'n, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980).

Several states have enacted legislation to control this type of exclusionary zoning. *See* Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URBAN L. ANN. 47 (1980).

48. *E.g.*, Berger v. State, 71 N.J. 206, 364 A.2d 998 (1976); Abbott House v. Village of Tarrytown, 34 A.D.2d 821, 312 N.Y.S. 2d 841 (1970). *See generally Developments in the Law*—Zoning, 91 HARV. L. REV. 1427, 1574-77 (1978).

49. *E.g.*, Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977) (married couple and six unrelated children constituted a family since the children were indistinguishable from adopted children and group maintained a single housekeeping unit); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E. 2d 756, 357 N.Y.S.2d 449 (1974). In *Ferraioli*, the ordinance limited families to related persons. *Id.* at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 451. Nevertheless, the Court ruled that the members of the group home constituted a family within the meaning of the ordinance, stating:

> Thus the city has a proper purpose in largely limiting the use in a zone to single family units. But if it goes beyond to require that the relationship in the family unit be those of blood or adoption, then its definition of family might be too

The New Jersey Supreme Court expanded the scope of the trend in *State v. Baker*[50] by invalidating an ordinance prohibiting more than four unrelated persons from living together.[51] In doing so, the *Baker* court explicitly rejected *Belle Terre*.[52] The court grounded its decision in the state substantive due process doctrine developed in earlier exclusionary zoning cases.[53] *Baker* extends that doctrine to include a prohibition against the exclusion of groups constituting bona fide households from single-family districts.[54]

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restrictive . . . So long as the group home bears the generic characteristic of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance.

Id. at 305-06, 313 N.E.2d at 758, 357 N.Y.S.2d at 452-53.

50. 81 N.J. 99, 405 A.2d 368 (1979).

51. *Id.* at 104, 405 A.2d at 370. The defendant, an ordained minister, and his four-member family shared a home with a woman and her three children. The defendant contended that the living arrangement arose from religious convictions. *Id.*

52. 81 N.J. at 112, 405 A.2d at 374. The court declared: "We find the reasoning of *Belle Terre* to be both unpersuasive and inconsistent with the results reached by this Court in Kirsch Holding Co. v. Borough of Manasquan, [59 N.J. 241, 281 A.2d 513 (1971)] and Berger v. State, [71 N.J. 206, 364 A.2d 998 (1976)]. Hence we do not choose to follow it." *Id.*

53. *See* S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (zoning ordinance that does not meet the fundamental needs for adequate housing possessed by people of all income levels who reside within a region does not serve the public welfare and is invalid). In *Mount Laurel*, the New Jersey Supreme Court generally held that the state constitution required that zoning regulations promote the welfare of the public as a whole. *See* N.J. CONST. art. I, par. 1. The broader view of the zoning function expressed in the opinion stands in sharp contrast to that of the Supreme Court in *Belle Terre*. Williams and Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre, and Berman*, 29 RUTGERS L. REV. 73 (1975). In Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977) the court held invalid a zoning ordinance which precluded any substantial amounts of new housing for low- and moderate-income households in the city and region. *See also* Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979) (zoning ordinance prescribing minimum floor areas for residents held invalid as unrelated to legitimate zoning purpose). At the present time, however, the New Jersey Supreme Court appears to be reconsidering the *Mount Laurel* and *Oakwood* decisions. *See* MANDELKER & CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 93 (1981 Supp.).

54. 81 N.J. at 113, 405 A.2d at 375. *Baker* contributes to the New Jersey zoning philosophy a requirement that "zoning restrictions be accomplished in the manner which least impacts upon the rights of individuals to order their lives as they see fit." 81 N.J. at 114, n.10, 405 A.2d at 375, n.10. *See generally* Note, *The Definition of Family in Single-Family Zoning*, 42 MONTANA L. REV. 165 (1981); Comment, *Zoning According to Biological or Legal Relationships is Violative of the New Jersey Constitution*, 11 SETON HALL L. REV. 112 (1980).

Baker does not prohibit single-family districts nor regulations designed to preserve neighborhoods suitable for family life.[55] Under the New Jersey due process requirements, however, a zoning classification must bear a substantial relation to the city's objective.[56] Restrictive family definitions lacked the required relationship.[57] The court also concluded that the city could obtain neighborhoods of the desired character by means more direct and less restrictive.[58] As an alternative to the restrictive classification, the court suggested that municipalities limit single-family districts to bona fide housekeeping units,[59] and that local officials define such a unit in a reasonable manner.[60] In conjunction with this flexible zoning unit, the court encouraged the use of space-related occupancy regulations—limiting occupants in relation to floor area or sleeping or bathroom facilities—to control overcrowding.[61]

The California Supreme Court invalidated the zoning restriction in *City of Santa Barbara v. Adamson*[62] using an alternative legal theory. Interpreting the privacy provision in the California Constitution to include the right to privacy in the choice of household companions,[63] the Court found that the ordinance impinged upon a fundamental interest under California law.[64] The ordinance failed under the re-

55. 81 N.J. at 109, 405 A.2d at 372.

56. *Id.* at 105, 405 A.2d at 371.

57. *Id.* at 107, 405 A.2d at 372-73.

58. *Id.* at 108, 405 A.2d at 372. The court qualified its condemnation of the ordinance. "[D]espite the inexactitude and overinclusiveness of such regulations, we would be reluctant to condemn them in the absence of less restrictive alternatives. Such options do, however, exist." *Id.*

59. *Id.* at 109, 405 A.2d at 372. The court commented that "[t]he courts of this and other states have often noted that the core concept underlying single-family living is not biological or legal relationships but, rather, its character as a single housekeeping unit." *Id.* at 108, 405 A.2d at 372.

60. *Id.* at 109 n.3, 405 A.2d at 372-73 n.3. The court established the parameters within which the term could be defined. Groups bearing the "generic character of a family unit as a relatively permanent household" must be permitted. *Id.* at 108-09, 405 A.2d at 372 *citing* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). On the other hand, uses incompatible with residential areas could be excluded. These included commerical residences, non-familial institutional uses, and boarding homes. 81 N.J. at 109, 405 A.2d at 372.

61. *Id.* at 110, 405 A.2d at 373.

62. 27 Cal.3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

63. *Id.* at 130, 610 P.2d at 439, 164 Cal. Rptr. at 542.

64. *Id.* at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.

sulting strict scrutiny test.[65]

The *Adamson* court's reliance upon the privacy provision instead of other broader guarantees enumerated in the California Constitution[66] suggests a desire to limit the scope of the decision. Indeed, the rationale does appear narrower than the substantive due process values which underlies the holding in *Baker*.[67] The privacy rationale suggests that residential zoning restrictions which do not interfere with the composition of households may be valid even though they retain other exclusionary features.[68] In contrast, the holding in *Baker* may represent one plank in a broad-based scheme to counter the exclusionary effect of zoning decisions.[69]

The scope of the *Adamson* decision remains elusive, however, because of the uncertain content of the constitutional privacy provision.[70] Since its addition to the California Constitution in 1972, the California Supreme Court consistently interpreted the privacy provision as a restraint on the surreptitious collection of information by police agents.[71] The provision's newly-found meaning in the field of

65. *Id.*

66. For the text of the "inalienable rights" section of the California Constitution, of which the privacy guarantee is one element, see note 15 *supra*. Ironically, the source of New Jersey's substantive due process doctrine is an identical provision in its constitution absent the right of privacy. N.J. CONST. art. I, par. 1. The *Baker* court, however, implied such a right. 81 N.J. 99 at 114 n.10, 405 A.2d 368 at 375 n.10.

67. *See* note 53 *supra*.

68. Thus, for example, the *Adamson* rationale may not prohibit zoning ordinances that have the effect of excluding certain groups from neighborhoods or even a city because of strict housing regulations. New Jersey courts using the substantive due process doctrine have held this type of ordinance invalid. *See* Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977).

69. *See* note 53 *supra*.

70. Interpretation of the provision is complicated by the lack of a legislative history. Since the right of privacy was added to the state constitution by referendum (*see* note 15 *supra*), brochures used in the referendum campaign have been used as a substitute. White v. Davis, 13 Cal.3d 757, 774, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975). The literature indicates a concern for "government snooping and data collecting." *Id.*

71. In its first explication of the provision's substantive content, the Court observed that:

> [T]he moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The provision's primary purpose is to afford some measure of protection against this most modern threat to personal privacy.

zoning suggests that the court's interpretation may be in a state of flux.

Regardless of its ultimate scope, the privacy rationale articulated by the *Adamson* court prohibits zoning regulations which interfere with one's choice as to household companions absent a compelling governmental interest.[72] Nevertheless, communities may continue to enact zoning regulations that preserve family neighborhoods on the basis of the *Belle Terre* mandate.[73] To comply with the dual requirements, the *Adamson* court encouraged adoption of the zoning scheme suggested by the New Jersey Supreme Court in *Baker*.[74]

California municipalities adopting the *Baker* plan will have to address at least two threshold problems. First, although the "bona fide housekeeping unit" is central to the plan,[75] neither the *Adamson* nor *Baker* court developed the substantive content of the concept.[76] In

White v. Davis, 13 Cal.3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105 (1975). Subsequent decisions affirmed this view. *See* People v. Privitera, 23 Cal.3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (1979) (the right to obtain drugs of unproven efficacy is not encompassed by the right of privacy); Loder v. Municipal Court, 17 Cal.3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976) (a city's retention and dissemination of an individual's arrest record in connection with criminal charges that were subsequently dismissed for lack of prosecution did not violate the right of privacy). *See generally* Note, *City of Santa Barbara v. Adamson: An Associational Right of Privacy and the End of Family Values*, 69 CAL. L. REV. 1052 (1981).

72. 27 Cal.3d at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.

73. *See* GODSCHALK, *supra* note 1, at 81.

74. 27 Cal.3d at 133-34, 610 P.2d at 442, 164 Cal. Rptr. at 545. *See* notes 59-61 and accompanying text *supra*.

75. 81 N.J. at 109 n.3, 405 A.2d at 372-73 n.3. The "bona fide housekeeping unit" is central in the sense that the term will identify those households permitted in single-family districts. *See* notes 18-19 and accompanying text *supra*. The *Baker-Adamson* alternative to restrictive family definitions presumes a zoning scheme which classified zoning districts by building type (i.e. single family, multiple family). *See* note 18 *supra*. Some commentators question the efficacy of such distinctions in light of changes in the assumptions which underlie the district classifications. *See* WILLIAMS, *supra* note 1, at § 51.02.

76. The *Adamson* opinion discussed the term only briefly. *See* 27 Cal.3d at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545. In *Baker* the discussion was similarly truncated, *see* 81 N.J. at 108-09, 405 A.2d at 372, but the court cited a number of decisions relevant to the concept. *See e.g.* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S. 449 (1974) (*see* note 49 *supra*); Oliver v. Zoning Comm'n of Chester, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974) (to determine whether group home constitutes family, reference must be made to standards established by deputy commissioner for such homes and by the building, fire, safety and public health codes); Carroll v. City of Miami Beach, 198 So.2d 643 (Fla. Dist. Ct. App. 1967) (religious novices under supervision of Mother Superior is a "family" since they

order to effectively implement the decisions, courts following *Adamson* and *Baker* must explicate criteria which identify permissible households.[77]

A second problem arises with respect to *East Cleveland's* proscription of ordinances which interfere with extended family relationships.[78] To control overcrowding, the *Baker* scheme suggests that occupants per household be limited in relation to, for example, bathroom facilities.[79] As applied to the *Baker* plan, *East Cleveland* can be read to require that the regulation exempt households consisting of related persons.[80] *Adamson* would appear to prohibit such a distinction between households,[81] divesting municipalities of the power to control density in this manner.[82]

Interestingly, the latter threshold problem may be unique to the *Adamson* rationale. Under the *Baker* approach, municipalities may carve out an exception in order to comply with *East Cleveland*. Since less restrictive means are not available to further the city's interest due to the conflicting constitutional constraints, an ordinance excusing extended family groups to the extent necessary to comport with *East Cleveland* may still comply with the substantial relation stan-

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would live like any other family); Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962) (ordinance restricting dwelling units to "single family" construed to mean persons living in the premises as a single housekeeping unit, and not to require cosanguinity or affinity of household members).

77. The *Baker* court, of course, placed responsibility for defining the term upon local officials. To avoid a case-by-case evolution of the appropriate definition, however, courts must articulate more specific guidelines than those provided by the *Adamson* or *Baker* courts.

78. *See* note 45 and accompanying text *supra*.

79. *See* note 61 and accompanying text *supra*.

80. The regulations will, by design, operate on both related and unrelated groups. The constitutional protection afforded related family groups by *East Cleveland* appears to require that municipalities using area and facility regulations carve out an exception for households of related persons.

81. 27 Cal.3d at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545.

82. *See* City of Chula Vista v. Pagard, 115 Cal. App.3d 785, 171 Cal. Rptr. 738 (1981) where an exasperated court, attempting to apply *Adamson* in light of *East Cleveland*, said that cities desiring to promote neighborhoods addressed to family values and needs found themselves between the "federal Scylla" in *East Cleveland* and the "State of California's Charybdis" in *Adamson*. *Id.* at 798, 171 Cal. Rptr. at 746. The court reluctantly invalidated an ordinance similar to Santa Barbara's, observing that in order to comply with the *Adamson* and *East Cleveland* decisions, cities could do little more than attempt to draft restrictions in a narrowly drawn, evenhanded ordinance. *Id.* at 800, 171 Cal. Rptr. at 747.

dard required by New Jersey law.[83] The *Adamson* holding, however, permits exceptions only when justified by a compelling state interest.[84] This higher standard precludes an easy compromise between the two decisions.[85]

The *Adamson* decision warrants criticism for its failure to consider thoroughly its implications and rationale. While it shares with *Baker* a rejection of *Belle Terre*,[86] *Adamson* and *Baker* otherwise differ considerably. One may view *Baker* as a logical extension of New Jersey case law previously developed in exclusionary zoning cases.[87] *Adamson*, however, lacks this foundation in California law. The California Supreme Court abruptly and without satisfactory explanation altered its interpretation of the state constitution's privacy guarantee to provide a basis for the decision.[88] Recognizing that a municipality may legitimately regulate density in a residential neighborhood, the *Adamson* court failed to reconcile the constraints placed upon such regulations by the privacy theory[89] with the apparently conflicting constraints demanded by the federal constitution.[90] Shortly after deciding *Adamson*, the California Supreme Court had an opportunity to address this tension. Unfortunately, the court chose not to.[91]

Nevertheless, *Adamson* stands as an important decision in zoning law. *Belle Terre* inadequately considered the exclusionary effect resulting from restrictive family definitions. *Adamson*, like *Baker*,

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83. *See* note 58 *supra*.

84. 27 Cal.3d at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.

85. The impasse, however, may not be insurmountable. *East Cleveland* may be distinguished as a case concerned with an unusual ordinance directly interfering with an extended family. Indirect interference from a regulation reasonably calculated to control overcrowding may pass constitutional muster.

86. The *Adamson* court questioned whether *Belle Terre* remained good law in light of *East Cleveland*. *See* 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.

87. *See* note 53 *supra*.

88. *See* notes 70-71 and accompanying text *supra*.

89. *See* note 81 and accompanying text *supra*.

90. *See* notes 45 and 80 and accompanying text *supra*.

91. *See* City of Chula Vista v. Pagard, 115 Cal. App.3d 785, 171 Cal. Rptr. 738 (1981), where the California Supreme Court, after granting a hearing on the appeal, ordered the cause transferred to the lower court for reconsideration in light of *Adamson*.

serves to mitigate unnecessarily arbitrary zoning classifications by circumscribing the reach of a municipality's zoning powers.

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