

March 2016

## Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions

Rigel C. Oliveri

Follow this and additional works at: <http://scholarship.law.ufl.edu/flr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 Fla. L. Rev. 1401 (2016).  
Available at: <http://scholarship.law.ufl.edu/flr/vol67/iss4/8>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [outler@law.ufl.edu](mailto:outler@law.ufl.edu).

## SINGLE-FAMILY ZONING, INTIMATE ASSOCIATION, AND THE RIGHT TO CHOOSE HOUSEHOLD COMPANIONS

*Rigel C. Oliveri\**

“[P]eople consider their right to pass judgment upon their future neighbors as sacred.”<sup>1</sup>

### Abstract

Many local governments use single-family zoning ordinances to restrict occupancy in residential areas to households whose members are all related to one another by blood, marriage, or adoption. The Supreme Court upheld such ordinances in the 1974 case of *Belle Terre v. Boraas*, and they have been used to prevent all sorts of groups from living together—from unmarried couples who are raising children to college students. This Article contends that *Belle Terre* is wholly incompatible with the Court’s modern jurisprudence on privacy and the right of intimate association. The case appears to have survived this long because of a reflexive deference paid to the “police power,” which gives local governments wide latitude to pass laws to promote the general welfare of the community. This Article disputes that the police power can stretch so far, and asserts that Constitutional protection should attach to the choice of household companions. If such protection is accorded, the reasons traditionally given for such ordinances—reduction of overcrowding, protection of children—fail to stand up to heightened scrutiny. This Article also takes issue with so-called “functional family” reforms, which allow groups who resemble or operate like families to live in single-family zoned areas. While these reforms do expand the class of people who can choose their household companions, they leave untouched the assumption that governments can regulate this decision absent a compelling reason. Moreover, they allow government actors to decide, based on largely subjective criteria and after an often-invasive inquiry, whether groups of people are sufficiently “family-like” to live together. If the right of intimate association within the home is to have any force, it must be available to everyone, regardless of their identities, motivations, or characteristics.

---

\* Associate Professor of Law, University of Missouri. I am grateful for comments and suggestions from Tim Iglesias, Robert Schwemm, and, as always, Michael Byrne. Early versions of this Article were workshopped before the University of Missouri faculty, at the Central States Legal Scholarship Conference, and at the Southeastern Association of Law Schools Annual Conference. All three audiences provided a good deal of useful feedback. I would also like to thank my library liaison, Cindy Shearer, for her excellent assistance.

1. RICHARD F. BABCOCK & FRED P. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S, at 90 (1973).

INTRODUCTION .....	1402
I. SINGLE-FAMILY ZONING .....	1406
A. <i>History</i> .....	1406
B. <i>Definitions and Examples</i> .....	1408
C. <i>Judicial Treatment of Single-Family Zoning</i> .....	1411
1. Federal Courts .....	1411
2. State Courts .....	1414
D. <i>The Fair Housing Act</i> .....	1416
II. THE RIGHT OF INTIMATE ASSOCIATION .....	1418
A. <i>Purposes and Constitutional Origins</i> .....	1418
1. Early Cases .....	1418
2. The Modern Framework .....	1422
B. <i>Housing and Privacy</i> .....	1425
C. <i>Recent Legal Developments</i> .....	1427
III. TOWARD A RIGHT OF CORESIDENCE .....	1429
A. <i>Coresidence as a Protected Association</i> .....	1429
B. <i>Functional Family Reforms</i> .....	1431
C. <i>The Role of Liberty</i> .....	1434
D. <i>Household Composition and the Limits</i> <i>of the Police Power</i> .....	1436
1. Problems with Stereotyping .....	1438
2. Protection of Children and Families .....	1442
3. Theories of Local Government Legitimacy .....	1444
IV. A LOOK BACKWARD, THE WAY FORWARD, AND CRITICISMS .....	1447
CONCLUSION .....	1453

## INTRODUCTION

Imagine the following scenario: A man and a woman have been together for thirteen years. They buy a house big enough for the two of them, their two children, and the woman’s daughter from a previous marriage. But before they move in, zoning authorities inform them that their occupancy of the home is illegal and they will be subject to prohibitive fines should they live there—or anywhere in the neighborhood. The reason? Because the man and woman are not married to one another. You might guess that these events occurred long ago, when laws and social mores were more conservative with respect to marriage. In fact, this happened in 2006, in Black Jack, Missouri, when

Fondray Loving, his fiancée Olivia Shelltrack, and their three children were told they could not occupy the five-bedroom house they had purchased.<sup>2</sup> And this was not an isolated case.<sup>3</sup>

The early part of the twenty-first century has seen profound changes in how Americans live: increased numbers of people are living together outside of wedlock; nonmarital births and child-rearing are on the rise; and the Supreme Court has recently recognized a constitutional right to same-sex marriage. Direct governmental regulation of private intimate conduct, such as fornication and adultery, has diminished almost entirely.

Yet there is still one mechanism by which local governments can—and do—interfere with people’s ability to live together outside of a traditional marital relationship: single-family zoning ordinances. Such ordinances may place whole neighborhoods, or even entire towns, off-limits to people who wish to live together but who do not fit into a traditional definition of “family,” which requires that members be related to one another through blood, marriage, or adoption.

---

2. See Eun Kyung Kim, *Law Means Unwed Couple, 3 Kids May Be . . . Booted from Black Jack*, ST. LOUIS POST-DISPATCH A1 (Feb. 22, 2006).

3. The litigation of the Shelltrack case uncovered evidence that at least four other couples had been denied occupancy permits to live in Black Jack because they were unmarried and living with children, including a couple who were the parents of triplets. P.J. Huffstutter, *Housing Code Defines What Makes a Family*, L.A. TIMES (May 21, 2006), <http://articles.latimes.com/2006/may/21/nation/na-family21>. Accounts of examples from other cities and states include: Michael Tackett, *An Imperfect Family Circle Squares Off With Zoning Law*, CHI. TRIB. (Nov. 9, 1986), [http://articles.chicagotribune.com/1986-11-09/news/8603240201\\_1\\_ordinance-single-family-zoning-appeals-court](http://articles.chicagotribune.com/1986-11-09/news/8603240201_1_ordinance-single-family-zoning-appeals-court) (noting that a Ladue, Missouri zoning law prevents unmarried couples from living together); Nancy Larson, *Gay Families, Keep Out!*, ADVOCATE, July 18, 2006, at 34, 34 (discussing a lesbian couple and their daughter who were warned by real estate agents that a Ladue, Missouri zoning ordinance would prevent them from living together) *Denver Zoning Fight Turns on Defining a Family*, N.Y. TIMES (Mar. 26, 1989), <http://www.nytimes.com/1989/03/26/us/denver-zoning-fight-turns-on-defining-a-family.html> (noting that a Denver, Colorado zoning law prevents unmarried couples from living together); Ann Scales Cobbs, *Couple Rebuffed by Jennings, Ferguson on Occupancy Permits*, ST. LOUIS POST-DISPATCH 8D (May 26, 1991) (noting that a Ferguson, Missouri zoning law prevents an unmarried couple from living with two of the woman’s relatives); Jack W. Greer, *‘Family’ Crackdown Planned, Unmarried Couples Face Citation from Attorney*, ST. LOUIS POST-DISPATCH A1 (July 21, 1994) (noting that a village attorney charged several unmarried couples with violating a Wilbur Park, Missouri zoning law); Ray Quintanilla, *Town Finds New Family Ties Knotty*, CHI. TRIB. (Sept. 22, 1995), [http://articles.chicagotribune.com/1995-09-22/news/9509220323\\_1\\_ordinance-unrelated-people-living](http://articles.chicagotribune.com/1995-09-22/news/9509220323_1_ordinance-unrelated-people-living) (noting that a Crystal Lake, Illinois zoning law prevented an unmarried couple from living with their four children from previous relationships); Stephanie McCrummen, *Manassas Changes Definition of Family*, WASH. POST (Dec. 28, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/27/AR2005122701216.html> (noting that a Manassas, Virginia zoning law prevented a couple from living with the woman’s nephew). See generally Geneva Collins, *Zoning and Public Housing Rules Dictate Who May Live with Whom*, L.A. TIMES (Mar. 19, 1989), [http://articles.latimes.com/1989-03-19/news/mn-274\\_1\\_public-housing](http://articles.latimes.com/1989-03-19/news/mn-274_1_public-housing) (discussing cities around the United States with restrictive zoning laws).

It is not just unmarried couples raising children together who are affected by single-family ordinances. These zoning rules may prevent anyone who, for whatever reason, wishes to live in an arrangement outside that of a biologically or legally related family—five elderly widows, six college students, a minister and his family who take in a needy family, four childhood best friends, or six members of a professional sports team—from residing in single-family zoned neighborhoods. Indeed, many people (including this author) have had the experience of being a college student unable to legally rent a house with schoolmates because of zoning restrictions on the number of unrelated people who can live together.<sup>4</sup>

On one hand, the law in this regard appears to be settled, at least at the federal level. In the 1974 case of *Village of Belle Terre v. Boraas*,<sup>5</sup> the Supreme Court held that unrelated people have no right to live together and upheld a restrictive single-family ordinance under minimal scrutiny.<sup>6</sup> During this same time period, however, the Court was recognizing an increasingly robust right of association in the context of intimate relationships and strong “spatial privacy” rights within the home.<sup>7</sup> A number of recent non-zoning cases make clear that intimate activities and relationships deserve special protection, particularly when they are situated within the home.<sup>8</sup> All of this is difficult, if not impossible, to reconcile with *Belle Terre*,<sup>9</sup> which appears to have survived this long because of a reflexive deference paid to the “police power” that gives local governments wide latitude to enact zoning ordinances in order to promote the general welfare of the community.<sup>10</sup>

Mitigation of the harsh results of *Belle Terre* has come from two sources. First, the Supreme Court’s opinion in *Moore v. City of East*

4. A particularly entertaining example of this occurred in Washington D.C. in 2006 when Brian O’Neill Jr. sought to live with a group of his classmates in a Georgetown house owned by his father. Michelle Boorstein, *For Georgetown “Apostles,” A Rowhouse Rebellion*, WASH. POST (Nov. 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/10/AR2006111001978.html>. Zoning laws restricted the number of unrelated people who could live together unless they were members of a “religious community,” so Brian’s friends filed paperwork to incorporate themselves as a non-profit religious organization called “The Apostles of O’Neill.” *Id.* Their attempt to evade the zoning laws ultimately failed. See Michelle Boorstein, *“Apostles” Ordered to Abide by Zoning Laws*, WASH. POST (Nov. 23, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/22/AR2006112201924.html>.

5. 416 U.S. 1 (1974).

6. See *id.* at 7–9.

7. See *infra* Sections II.B–C (examining both the rationale and case law).

8. See *infra* Section II.C (same).

9. This is especially so in light of the fact that one of the most forceful early opinions endorsing associational rights within the home was written by Justice William Douglas, see *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538–45 (1973) (Douglas, J., concurring), who went on to write the majority opinion in *Belle Terre*. 416 U.S. at 2.

10. See *Belle Terre*, 416 U.S. at 9.

*Cleveland*<sup>11</sup> invalidated a single-family zoning law that would have prevented extended family members from living together.<sup>12</sup> Second, more recently some municipalities have liberalized their ordinances to permit so-called “functional families” (unrelated people who live together as a family) or unmarried couples with children to live in single-family zoned areas. A number of commentators similarly argue that the right of intimate association must also protect nontraditional yet clearly intimate family-like relationships, and a handful of state courts have relied on their state constitutions to invalidate single-family ordinances as they applied to functional families.

This Article makes two central arguments: First is the fairly obvious conclusion that *Belle Terre* is wholly incompatible with the Court’s modern associational rights jurisprudence. The right to choose household companions is clearly the sort of intimate association that the law should protect from unwarranted governmental intrusion. As such, heightened scrutiny is appropriate for governmental actions that interfere with it. When the reasons historically offered for single-family zoning laws receive heightened scrutiny, they fail.

Second, this Article contends that *Moore*’s protection of extended families and the recent “functional family” reforms, while superficially a step in the right direction, do not go far enough and ultimately miss the point. Simply broadening the definition of family fails to question how local governments can use zoning to prevent people from living together based on their relationship to one another in the first place. These reforms require courts and zoning boards to make value judgments about whether particular households are acceptable family substitutes and to condition their ability to live together on how they measure up. While this approach allows more groups to live together than a restrictive regime, it still does violence to the concept of associational rights. If it means anything, the right to choose household companions must protect *all* people who wish to live together—or coreside<sup>13</sup>—regardless of their identities, relationship, or reason for doing so.

Part I of this Article discusses the history of single-family zoning and its treatment by federal and state courts. Part II traces the origins and development of the Supreme Court’s associational rights jurisprudence, noting the Court’s inconsistency with respect to the sources and

---

11. 431 U.S. 494 (1977).

12. *Id.* at 495–96, 499–500, 505–06.

13. This Article uses the term coreside, meaning the act of sharing a dwelling unit with another person, rather than the more familiar but narrower term, “cohabitare.” Black’s Law Dictionary defines cohabitation as “[t]he fact or state of living together, [especially] as partners in life, [usually] with the suggestion of sexual relations.” BLACK’S LAW DICTIONARY 296 (9th ed. 2009). “Coresidence,” in contrast, does not carry any sexual connotation, time commitment, or other relationship requirements. For reasons discussed later in this Article, this is a significant distinction. *See infra* Part III.

justifications of the right to associate. Part III connects the right to associate with the right to choose one's living companions, arguing that the trajectory of the Supreme Court's jurisprudence in this area leads inexorably toward recognizing such a right. This Part also discusses functional family reforms, concluding that while they are a good start, they do not go far enough to protect people's liberty interests in choosing living companions. It questions whether the police power can really stretch far enough to authorize the regulation of household composition, particularly when advocates of such ordinances rely on unsupported stereotypes about unrelated households and when the ordinances fail on their own terms to meet the needs they purport to address. This Part then analyzes whether single-family zoning is justifiable under either of the prevailing models of local government legitimacy.

Part IV addresses how both single-family zoning laws and the *Belle Terre* decision are heavily grounded in historical context, with assumptions about residential living patterns and perceived threats thereto that no longer apply today. In light of all of this, it is appropriate for the Supreme Court to revisit single-family zoning laws and to overturn *Belle Terre*, a move that will not deprive local governments of the ability to accomplish legitimate zoning objectives. Finally, this Part also addresses likely criticisms of this analysis from supporters of single-family ordinances as well as fair housing advocates, who often find themselves at odds with municipal zoning authorities.

## I. SINGLE-FAMILY ZONING

This Part discusses the history of single-family zoning, including explanations of some key terms. It continues with an examination of the impact federal and state courts and the Fair Housing Act have had on these zoning laws.

### A. History

Zoning laws emerged at the beginning of the twentieth century.<sup>14</sup> Initially concerned with alleviating overcrowded, unsafe, and unsanitary conditions in urban centers, most early zoning codes contained regulations on the height, use, and density of structures on land.<sup>15</sup> Over time, zoning ordinances evolved from simple prohibitions of offensive conditions to more comprehensive plans for land use throughout an entire community.<sup>16</sup>

---

14. 1 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:2 (4th ed. 2014).

15. *See id.*

16. *Id.*

The U.S. Supreme Court validated comprehensive zoning as a legitimate use of the police power in *Village of Euclid v. Ambler Realty Co.*<sup>17</sup> At issue in that case was the validity of a plan that divided up the entire area of the Village into six classes of use districts including single-family, dual-family, and multifamily dwellings, as well as commercial, light industrial, and heavy industrial.<sup>18</sup> In upholding the plan, the Court emphasized that comprehensive zoning laws of this sort could appropriately serve a variety of interests such as promoting health and safety, preventing disorder, and more efficiently delivering community services.<sup>19</sup> Recognizing that every community has different circumstances and conditions, the Court was reluctant to prescribe precise limits to the exercise of this power.<sup>20</sup> Rather, it said that “[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”<sup>21</sup> The Court went on to make clear that an ordinance should not be found unconstitutional unless it was “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>22</sup> Two years later in *Nectow v. City of Cambridge*,<sup>23</sup> the Court recognized such an unreasonable application when it struck down an arbitrary-seeming zoning ordinance that a Special Master had determined did “not promote the health, safety, convenience, and general welfare of the inhabitants of that part of the defendant city.”<sup>24</sup>

In the wake of *Euclid*, virtually every municipality in the country developed zoning ordinances and implemented some form of land use planning that designated residential areas.<sup>25</sup> Ordinances typically specified that some residential areas were to be zoned for “single families” (as opposed to multi-family apartment buildings) and defined “family” in terms of a “single, non-profit housekeeping unit.”<sup>26</sup> They did not attempt to define family further in terms of the identities of household members.<sup>27</sup>

---

17. 272 U.S. 365, 379–80, 386, 397 (1926).

18. *Id.* at 379–81.

19. *See id.* at 391.

20. *Id.* at 387–88.

21. *Id.* at 388.

22. *Id.* at 395.

23. 277 U.S. 183 (1928).

24. *Id.* at 187–89 (internal quotation marks omitted).

25. *See* 1 RATHKOPF & RATHKOPF, *supra* note 14, § 1:2.

26. *See* Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1258–59, 1259 n.148 (2005). “Housekeeping unit” was not often further defined, but courts usually construed it to mean a living situation in which residents have access to the whole dwelling and share common housekeeping facilities. 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:14.

27. Alexander, *supra* note 26, at 1258.



Toward the middle of the twentieth century, the focus of single-family zoning laws shifted from the use of the land to the identity of the users.<sup>28</sup> In particular, as the baby boom went into full swing and the notion of the “nuclear family” began to take hold in the popular imagination, the suburbs were developed as the ideal place for young (white) families to live.<sup>29</sup> Zoning authorities moved away from the more neutral term “single housekeeping unit” and started defining “family” in terms of the relationships between the household members, requiring that they be related by “blood, marriage, or adoption.”<sup>30</sup> Some went further to describe the degree of relatedness or consanguinity that would be required: for example, some allowed nuclear family members and a grandparent to constitute a family, but not adult siblings or cousins.<sup>31</sup> Most ordinances permitted families to include one or two unrelated individuals, which allowed for live-in servants, borders, or guests.<sup>32</sup> Many ordinances also contained an exception allowing a small number of unrelated people to live together as a family.<sup>33</sup>

Not every jurisdiction moved to this type of single-family ordinance, with a relationship-based definition of family and limits placed on unrelated household members. Some areas retained the original “single housekeeping unit” definition.<sup>34</sup> Because both types of ordinances tend to be referred to as “single-family ordinances,” this Article will refer to the former type as “restrictive single-family ordinances” and the latter type as “single-household ordinances.”

### B. Definitions and Examples

Today, restrictive single-family zoning ordinances exist in various forms throughout the United States.<sup>35</sup> While they may differ in their particulars, all have the same basic framework. They define “family” to mean “related by blood, marriage, or adoption” (sometimes with the specific relationships defined further) and permit families of any size to

---

28. *Id.* at 1259–60.

29. *See id.* (noting that the coining of the term “nuclear family” coincided with the shift away from a functional definition of a household unit to one which defined “family”); 3 RATHKOPF & RATHKOPF, *supra* note 14, § 36.9 & n.1 (discussing the exclusionary effects of local zoning).

30. Alexander, *supra* note 26, at 1259–60.

31. *Id.* at 1262.

32. *Id.* at 1260.

33. 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:8.

34. *See id.* § 23:17.

35. *See* Alexander, *supra* note 26, at 1257, 1264–65. An exact count is likely impossible. There were over 36,000 municipalities, cities, towns, townships, and other political subdivisions counted in the most recent census, and even the best municipal code databases are not complete. *Population of Interest-Municipalities and Townships*, U.S. CENSUS BUREAU, [http://www.census.gov/govs/go/municipal\\_township\\_govs.html](http://www.census.gov/govs/go/municipal_township_govs.html) (last visited July 1, 2015).

live together.<sup>36</sup> Some ordinances permit a limited number of unrelated people (usually one or two) to live in a household of related individuals.<sup>37</sup> Finally, most ordinances also allow a family to consist of a small number of unrelated people (usually two or three, and rarely more than four) who live together.<sup>38</sup> The justifications typically given for such ordinances include: the need to preserve the “family character” of the neighborhood, often to ensure that it remains a suitable place for children; the need to prevent overcrowding, noise, and traffic; and the need to protect property values.<sup>39</sup>

Columbia, Missouri (home of the author), offers a representative example, and provides the following information to citizens on its website:<sup>40</sup>

#### What is a Family?

What the code says: According to Chapter 29—Zoning of City Ordinance, the definition of *Family* is:

(1) An individual or married couple and the children thereof and no more than two (2) other persons related directly to the individual or married couple by blood or marriage, occupying a single housekeeping unit on a nonprofit basis. A family may include not more than one additional person, not related to the family by blood or marriage; or

(2) a.1. In zoning districts R-1 . . . a group of not more than three (3) persons not related by blood or marriage, living together by joint agreement and occupying a single housekeeping unit on a nonprofit cost-sharing basis.

. . . .

b. In all other applicable zoning districts, a group of not more than four (4) persons not related by blood or marriage, living together by joint agreement and occupying a single housekeeping unit on a nonprofit cost-sharing basis.<sup>41</sup>

---

36. See 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:8.

37. Alexander, *supra* note 26, at 1260.

38. 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:18. For ease of reference, this Article will refer to households that violate restrictive single-family ordinances as “unrelated households.” This is not a perfectly accurate term, however, because such households—like the Shelltrack–Loving household—may well contain members who are related to one another. See *supra* note 2–3 and accompanying text.

39. *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391–92, 394 (1926); 1 RATHKOPF & RATHKOPF, *supra* note 14, § 1:2.

40. The page can be found at [https://www.gocolumbiamo.com/community\\_development/neighborhoods/renting/documents/WhatisaFamily.pdf](https://www.gocolumbiamo.com/community_development/neighborhoods/renting/documents/WhatisaFamily.pdf).

41. See also COLUMBIA, MO., CODE OF ORDINANCES § 29-2 (1964), available at

The reasons Columbia gives to support these limitations are the need to reduce traffic, trash, and noise.<sup>42</sup> Columbia also provides the following examples and explanations of acceptable and unacceptable household compositions:<sup>43</sup>

Acceptable examples:		
Mr. & Mrs. Jones and their children Bobby and Katie +	Mrs. Jones' parents +	Jennifer Doe, a friend
Mrs. Thomas and her three children +	Her aunt and uncle +	Her cousin (although related, could be counted as one other unrelated person)
Mr. and Mrs. Rogers and their son +	Mr. Rogers' brother and his son	
Examples in violation of this code:		
Mr. & Mrs. Jones and their children Bobby and Katie +	Mrs. Jones' sister and brother-in-law and their three children	
<i>Why is this a violation?</i> The addition of Mrs. Jones sister and her family exceeds the two related people and one additional unrelated person.		
Bob Campbell +	Bob's two brothers +	Two unrelated roommates
<i>Why is this a violation?</i> The total number of occupants in this example is five. One unrelated roommate would need to move out to be in compliance in any zoning district.		
John Doe +	Three unrelated roommates	
<i>Why is this a violation?</i> It exceeds the three unrelated people allowed in R-1 zoning; it would be allowable in all other zoning districts.		
Jane Roberts +	Four unrelated roommates	
<i>Why is this a violation?</i> Four or more unrelated people are not allowed in any zoning district. If one roommate left it would be acceptable in all zoning districts except R-1; Jane and two roommates are acceptable in R-1.		

Although they are phrased in terms of occupancy and number of people, it is important to distinguish restrictive single-family ordinances such as this one from numerical occupancy limits, which are part of

[https://www.municode.com/library/#!/mo/columbia/codes/code\\_of\\_ordinances?nodeId=COORCOMI\\_CH29ZO](https://www.municode.com/library/#!/mo/columbia/codes/code_of_ordinances?nodeId=COORCOMI_CH29ZO).

42. *What is a Family?*, CITY COLUMBIA, MO., [https://www.gocolumbiamo.com/community\\_development/neighborhoods/renting/documents/WhatisaFamily.pdf](https://www.gocolumbiamo.com/community_development/neighborhoods/renting/documents/WhatisaFamily.pdf) (last visited July 1, 2015).

43. *Id.*

virtually every municipality's property maintenance code.<sup>44</sup> Numerical occupancy limits refer to the number of people who can occupy a dwelling.<sup>45</sup> These limits are based on the square footage, number, and configuration of the various rooms in the dwelling unit.<sup>46</sup> Their purpose is to ensure safety, privacy, and sanitation, and to prevent overcrowding.<sup>47</sup>

Put simply, numerical occupancy limits focus on the absolute *number* of people who can reside in a dwelling, regardless of their relationship to one another. Restrictive single-family ordinances focus on the *relationship* of the occupants, limiting only the number of unrelated household members. Thus, a restrictive single-family ordinance may allow larger groups while barring smaller ones.<sup>48</sup> Nevertheless, the two issues—limiting numerical occupancy and regulating household composition—are frequently conflated by proponents of single-family zoning ordinances.<sup>49</sup>

### C. Judicial Treatment of Single-Family Zoning

This Section discusses the approaches taken by the courts in analyzing these ordinances. It addresses the potential differences between outcomes in federal and state courts when state courts look to their respective state constitutions.

#### 1. Federal Courts

After *Euclid* and *Nectow*, the Supreme Court did not significantly address zoning again until 1974, with the case of *Village of Belle Terre*

---

44. Many jurisdictions, including the City of Columbia, use the numerical occupancy limits set forth in the International Property Maintenance Code. See 2012 INTERNATIONAL PROPERTY MAINTENANCE CODE § 404 (2011), available at <ftp://law.resource.org/pub/us/code/ibr/icc.ipmc.2012.html>; *International Codes-Adoption by State*, ICC (Feb. 2015), <http://www.iccsafe.org/gr/Documents/stateadoptions.pdf>; *The Facts About the Property Maintenance Code*, CITY OF COLUMBIA, MO., [https://www.gocolumbiamo.com/community\\_development/neighborhoods/documents/PropertyMaintenance.pdf](https://www.gocolumbiamo.com/community_development/neighborhoods/documents/PropertyMaintenance.pdf) (last visited July 1, 2015).

45. *E.g.*, *Fair Hous. Council of Orange Cnty., Inc. v. Ayres*, 855 F. Supp. 315, 316 (C.D. Cal. 1994) (discussing a numerical occupancy limit of two persons per apartment unit).

46. *E.g.*, 2012 INTERNATIONAL PROPERTY MAINTENANCE CODE § 404.2–4, 404.6.

47. See, *e.g.*, 2012 INTERNATIONAL PROPERTY MAINTENANCE CODE § 404.1 (discussing privacy); *id.* § 404.45 (noting requirements for smoke detectors and emergency escape requirements); *id.* § 404.5 (discussing prohibition on overcrowding); *id.* § 404.7 (discussing requirements for sanitary food preparation spaces).

48. The examples provided by the City of Columbia are instructive: the first household, which contains seven individuals, is permitted, while the sixth household, which consists of four unrelated roommates, would violate the ordinance. See *supra* chart accompanying note 43.

49. None of the cases discussed in this Article involve households that violated numerical occupancy limits.

*v. Boraas*.<sup>50</sup> At issue was the validity of a restrictive single-family zoning ordinance that defined “family” to mean “[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit,” with a narrow exception for no more than two unrelated people living and cooking together as a single housekeeping unit.<sup>51</sup> The ordinance applied to the Village’s entire residential area, which meant that three or more unrelated people were prohibited from living together anywhere in Belle Terre.<sup>52</sup>

A group of six unrelated college students who wished to rent a house together and the landlord who wished to rent it to them challenged the ordinance on a variety of grounds.<sup>53</sup> Writing for the majority, Justice William Douglas summarily concluded that the ordinance “involve[d] no ‘fundamental’ right guaranteed by the Constitution, such as . . . the right of association . . . or any rights of privacy.”<sup>54</sup> Because he considered no fundamental rights to be at stake, Justice Douglas used only a rational basis standard of review.<sup>55</sup> In a now-famous passage, he described the government’s purpose in dramatic terms:

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. . . . 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.<sup>56</sup>

Justice Douglas concluded that the Village’s ordinance was rationally related to the goal of preserving a low-density, family-oriented, small-town lifestyle because limiting the housing to families would tend to reduce crowding, traffic, and noise.<sup>57</sup>

In dissent, Justice Thurgood Marshall took issue with the majority’s refusal to recognize that fundamental rights were implicated, arguing that the ordinance burdened the students’ First Amendment freedom of association and their constitutionally guaranteed right to privacy.<sup>58</sup> He

50. 416 U.S. 1, 3 (1974).

51. *Id.* at 2 (alteration in original). The statute placed no limit on the number of people related by blood, marriage, or adoption who could live together. *See id.*

52. As Justice Thurgood Marshall noted in dissent, “[t]he village ha[d], in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.” *Id.* at 16–17 (Marshall, J., dissenting).

53. *Id.* at 2–3, 7 (majority opinion).

54. *Id.* at 7.

55. *Id.* at 7–8.

56. *Id.* at 9.

57. *See id.*

58. *Id.* at 13 (Marshall, J., dissenting).

described the two rights (privacy and association) as operating together to create a space in which people should be free to make decisions about how they live and to conduct their personal relationships without governmental interference.<sup>59</sup> As a result, he believed that the ordinance could only withstand constitutional scrutiny “upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest.”<sup>60</sup>

Applying the heightened level of scrutiny, Justice Marshall argued that the Village’s stated interests, while legitimate and substantial, were not served by an ordinance that limited the number of unrelated people who could live together but permitted an unlimited number of related people to live together.<sup>61</sup> He noted that numerical occupancy restrictions would be a far more effective way to deal with population density and its related problems.<sup>62</sup>

Just three years later, the Court again took up the issue of restrictive single-family zoning in *Moore v. City of East Cleveland*.<sup>63</sup> The ordinance at issue in that case sought to limit the types of extended family members who could live together.<sup>64</sup> It contained a complicated definition of “family” that prevented a woman from living with her son and two grandchildren because the boys were first cousins and not brothers.<sup>65</sup> In contrast with *Belle Terre*, a plurality of the *Moore* Court assumed that the group constituted a family regardless of the ordinance’s restrictive definition, and struck down the ordinance because it involved people who had a blood relationship to one another.<sup>66</sup> The plurality identified the constitutional right at stake as the Fourteenth Amendment’s substantive due process right to personal choice in matters of marriage and family life, including family living arrangements.<sup>67</sup> The plurality determined

---

59. *Id.* at 15–16 (“The choice of household companions—of whether a person’s ‘intellectual and emotional needs’ are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home.”).

60. *Id.* at 18.

61. *Id.* at 18–19.

62. *Id.* at 19–20.

63. 431 U.S. 494, 495–96 (1977).

64. *See id.* at 496 & n.2 (noting that the ordinance recognized only a few categories of related individuals as a “family”).

65. *See id.* at 496–97.

66. *Id.* at 498–99 (“East Cleveland . . . has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . . When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual deference to the legislature is inappropriate.”).

67. *Id.* at 499. Justice John Paul Stevens wrote a separate concurrence in which he found the ordinance unconstitutional as a matter of property law. *Id.* at 513, 521 (Stevens, J., concurring). Specifically, he believed that prohibiting the owner’s use of her property in this manner “cuts so

that the ordinance could not survive the higher level of scrutiny, making many of the same arguments that Justice Marshall made in his *Belle Terre* dissent: that numerical occupancy limits and restrictions on vehicles are the best ways to discourage overcrowding and traffic, and that attempts to regulate the relationships of household occupants serve these goals “marginally, at best.”<sup>68</sup>

Thus, the Supreme Court’s only two pronouncements on the subject of single-family zoning stake out two very different points on the constitutional continuum: On one side, unrelated people have no right to live together and no real redress against zoning laws that prohibit them from doing so. On the other side, people who are legally or biologically related, whether in a nuclear family or not, have a substantive due process right to live together and zoning laws that would interfere with this right are subject to strict scrutiny.

## 2. State Courts

While the issue is settled as a matter of federal law (for now), a number of state courts have heard challenges to restrictive single-family ordinances brought under their state constitutions.<sup>69</sup> Most have upheld such zoning ordinances based on the reasoning that they were rationally related to a legitimate government interest—usually the need to control population density.<sup>70</sup> Their use of the rational basis test signaled the courts’ belief that no fundamental rights were at stake. Some went so far as to expressly state that there was no “governmental interest in keeping together a group of unrelated persons.”<sup>71</sup> If associational rights were

---

deeply into a fundamental right normally associated with the ownership of residential property” that it constituted a taking. *Id.* at 520–21.

68. *Id.* at 499–500, 500 n.7. This holding did not prevent municipalities from enacting ordinances that restricted extended families from living together. In the 1990s and 2000s, a number of municipalities introduced such ordinances in an apparent attempt to prevent Latino immigrants, who are more likely to live in extended families, from settling in their neighborhoods. See Daniel Eduardo Guzmán, Note, “*There Be No Shelter Here*”: *Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL’Y 399, 416–21 (2010) (describing ordinances in Georgia and Virginia that sought to redefine family by limiting extended family members); see also McCrummen, *supra* note 3.

69. For an excellent and thorough summary of every state’s treatment of family-definition ordinances, see Adam Lubow, “. . . *Not Related by Blood, Marriage, or Adoption*”: *A History of the Definition of “Family” in Zoning Law*, Student Writing Competition Paper, 16 J. AFFORDABLE HOUSING 144 (2007).

70. See, e.g., *Town of Durham v. White Enters., Inc.*, 348 A.2d 706, 710 (N.H. 1975); *State v. Champoux*, 566 N.W.2d 763, 768 (Neb. 1997); *City of Brookings v. Winker*, 554 N.W.2d 827, 831–32 (S.D. 1996). As discussed *supra*, this rationale confuses single-family zoning with the numerical occupancy limits commonly found in property maintenance codes.

71. *City of Ladue v. Horn*, 720 S.W.2d 745, 752 (Mo. Ct. App. 1986); see also *White Enters.*, 348 A.2d at 709 (“The State has no particular interest in keeping together a certain group

invoked, these courts usually summarily dismissed such arguments with a reference to *Belle Terre*<sup>72</sup> or took an approach similar to that in *Moore*, which recognized the right to associate within the home but limited it to related individuals.<sup>73</sup>

A handful of state courts came out the other way. Most of these did not take the step of striking down restrictive single-family ordinances entirely but instead simply refused to apply them to the group at issue. These courts invariably did so after determining that there was no significant difference between the group of unrelated people seeking to live together and a group of related people. For example, *State v. Baker*<sup>74</sup> involved an ordained minister and his family who took a single mother and her children into their home.<sup>75</sup> *City of Santa Barbara v. Adamson*<sup>76</sup> involved a group of unrelated people who cooked together, shared household chores and home maintenance expenses, vacationed together, and had a fair degree of stability in their living arrangement.<sup>77</sup> Both households at issue operated in all material respects like families.

Once reaching this conclusion, these courts could find no rational reason for a zoning law to distinguish between the two basically equivalent groups.<sup>78</sup> Thus, most of these courts relied on equal protection reasoning without ever recognizing a fundamental right of intimate

---

of unrelated persons. The State has a clear interest, however, in preserving the integrity of the biological or legal family.”).

72. See, e.g., *City of Baton Rouge/Parish of E. Baton Rouge v. Myers*, 145 So.3d 320, 332, 335–36 (La. 2014). A notable exception is *McMaster v. Columbia Bd. of Zoning Appeals*, 719 S.E.2d 660 (S.C. 2011), in which the Supreme Court of South Carolina dismissed a challenge to a restrictive single-family ordinance that had been brought on the grounds that it violated the due process clause of South Carolina’s state constitution. *Id.* at 661. The Court specifically noted that “the freedom to select one’s cohabitants could, under some circumstances, implicate the freedom of association guaranteed by the First Amendment of the United States Constitution,” but refused to decide the issue because that argument was not before it. *Id.* at 661 n.1.

73. For example, in *Rosenberg v. City of Boston*, the court held that the right of intimate association only covers affiliations that center on family. No. 08 MISC 377101(CWT), 2010 WL 2090956, at \*9 (Mass. Land Ct. May 25, 2010). Thus, the court concluded, a person’s right to cohabit with relatives is protected, but she has no right to choose living companions who are not related to her. See *id.*; see also *Doe v. City of Butler, Pa.*, 892 F.2d 315, 316, 321 (3d Cir. 1989) (holding that a single-family zoning ordinance preventing more than six victims of domestic violence from living together in a shelter did not interfere with their right to associate with one another because associational rights do not extend to living with nonrelatives).

74. 405 A.2d 368 (N.J. 1979).

75. *Id.* at 370.

76. 610 P.2d 436 (Cal. 1980).

77. *Id.* at 438.

78. See, e.g., *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 840–41 (Mich. 1984) (involving related and unrelated coresiding members of a religious nonprofit organization); *Baer v. Town of Brookhaven*, 537 N.E.2d 619, 619 (N.Y. 1989) (involving five unrelated elderly women).



association within the home.<sup>79</sup> A few of these courts did articulate (at least in dicta) a high degree of skepticism about zoning ordinances that regulate the nature of the relationship between household members.<sup>80</sup>

There are a few examples of courts striking down ordinances entirely on due process grounds. For example, in *Holy Name Hospital v. Montroy*,<sup>81</sup> the court invalidated a single-family ordinance that would have prevented small groups of nuns from living together in Teaneck, New Jersey.<sup>82</sup> Similarly, *DiStefano v. Haxton*<sup>83</sup> struck down a restrictive single-family ordinance on both due process and equal protection grounds.<sup>84</sup> Regarding due process, the court made clear that the plaintiffs had a liberty interest to choose their own apartment-mates and housemates, and there was no compelling reason for the government to interfere with this right.<sup>85</sup>

#### D. *The Fair Housing Act*

In 1988, Congress amended the federal Fair Housing Act to protect two new characteristics: familial status and disability.<sup>86</sup> This created additional avenues for challenging restrictive single-family ordinances. To the extent that these types of cases are now dealt with statutorily, they are beyond the scope of this Article. Nevertheless, a brief description might be useful to help the reader distinguish between restrictive single-family zoning challenges, which are based on the Fair Housing Act, and those that rely on the Constitution and the right to associate.

“Familial status,” as defined by the Act, refers to a child under the age of eighteen living within the home of a parent or custodial guardian.<sup>87</sup> The custodian category includes foster parents, temporary guardians, and

79. See, e.g., *Dinolfo*, 351 N.W.2d at 838 (agreeing with the *Belle Terre* Court’s refusal to recognize such a fundamental right and finding *Belle Terre* “to be clear authority for the proposition that to limit residentially zoned property to a traditional family and a number of non-related persons is permissible under the United States Constitution”).

80. *Santa Barbara*, 610 P.2d 436, at 441–42 (stating that “zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users” (emphasis omitted)); *Baker*, 405 A.2d at 371 (opining that zoning should never “be used as a tool to regulate the internal composition of housekeeping units”).

81. 379 A.2d 299 (N.J. Super. Ct. Law Div. 1977).

82. *Id.* at 187–89. The court noted that with 90% of the Township zoned for single families, Teaneck was effectively operating as a “private club” to which “application for admission must be accompanied by a validated marriage certificate.” *Id.* at 187.

83. C.A. No. WC 92-0589, 1994 WL 931006 (R.I. Super. Ct. Dec. 12, 1994).

84. *Id.* at \*7–8, \*14.

85. *Id.* at \*7.

86. Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 6(b)(1)–(2) 102 Stat. 1619, 1622 (codified as amended at 42 U.S.C. §§ 3604, 3606 (1988)). The previously existing protected characteristics were race, color, religion, national origin, and sex. *E.g.*, 42 U.S.C. §§ 3604, 3606 (1982).

87. 42 U.S.C. § 3602(k) (2012).

those in the process of obtaining legal recognition of their relationship.<sup>88</sup> This coverage is broader than the definition of relatedness used in restrictive single-family ordinances, which require an existing biological or adoptive relationship. As a result, restrictive single-family ordinances, which would prevent families from taking in foster children or otherwise serving as guardians for children to whom they are not biologically related, now violate the Fair Housing Act.<sup>89</sup>

The addition of disability as a protected characteristic was intended to address direct discrimination against disabled home-seekers as well as land-use restrictions on group homes for the disabled.<sup>90</sup> “Group homes” is an umbrella term commonly used to describe communal facilities that allow disabled people to live together within a residential, as opposed to an institutional setting.<sup>91</sup> The statute expressly prohibits the refusal to make reasonable accommodations in rules, policies, practices, or services, when such an accommodation is necessary for a disabled person to live in a dwelling.<sup>92</sup> Ordinances that require household members to be related are just the sort of “rules” from which group home residents might require an accommodation in order to live together. As a result, restrictive single-family ordinances, which interfere with the ability of such homes to operate, may be subject to challenge under the Fair Housing Act.<sup>93</sup>

Finally, the Fair Housing Act has been the basis for challenges to municipalities that have used overly narrow family definitions or overly restrictive occupancy codes in a deliberate attempt to keep out particular ethnic groups who are more likely to live in large, extended families. For example, in the 1990s and 2000s, a number of municipalities introduced narrow family definition ordinances in an apparent attempt to prevent Hispanic households, which are more likely to contain extended family members, from settling in their neighborhoods.<sup>94</sup> Also, in 1997, the Department of Justice filed suit against the Town of Cicero, Illinois,

---

88. *See id.*

89. With the addition of protection for familial status, the Fair Housing Act included a specific provision allowing housing providers to impose reasonable numerical occupancy limitations. *See* 42 U.S.C. § 3607(b)(1). Thus, even though familial status is a protected category, a biological, adoptive, or foster family still may be prevented from living in a dwelling that is too small for the number of people in the household.

90. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3246 (Jan. 23, 1989); *see also* H.R. REP. NO. 100-711 (1988), *reprinted in* U.S.C.C.A.N. 2173, 1988 WL 169871, at \*13, 17–18.

91. 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:24 (describing group homes as “small residential facilities, often organized like families, which provide valuable social services”).

92. 42 U.S.C. § 3604(f)(3)(B).

93. *See, e.g.,* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 728 (1995); Keys Youth Servs., Inc. v. City of Olathe, Kan., 248 F.3d 1267, 1269 (10th Cir. 2001); Groome Res., Ltd. v. Parish of Jefferson, 234 F.3d 192, 195–97 (5th Cir. 2000); Smith & Lee Assocs. v. City of Taylor, Mich., 102 F.3d 781, 784–86 (6th Cir. 1996).

94. *See* Guzmán, *supra* note 68.

alleging that it had adopted an extremely strict numerical occupancy standard in an attempt to prevent Hispanic families, which tend to be larger, from moving there.<sup>95</sup> Arguably, the municipal policies in both situations—an overly narrow family definition and an overly restrictive occupancy code—while facially neutral, create a disparate adverse impact on a particular national origin group.<sup>96</sup>

## II. THE RIGHT OF INTIMATE ASSOCIATION

This Part traces the origins and development of the Supreme Court’s associational-rights jurisprudence, noting the Court’s inconsistency with respect to the sources and justifications of the right to associate.

### A. Purposes and Constitutional Origins

There is no “right to association”—intimate or otherwise—specifically set forth within the Constitution. Nevertheless, the Supreme Court has identified this right in a number of cases and a variety of contexts. As with the development of its privacy jurisprudence, which overlaps significantly with associational rights, the Court has relied upon multiple constitutional sources and justifications to ground its protection of the right to associate. Often, the purpose and parameters of the right vary according to context and the type of association at issue. As a result, while some sort of a right clearly exists, it remains poorly understood and inconsistently recognized.<sup>97</sup> In particular, as discussed below, a tension has arisen between the desire to protect particular types of intimate associations based on a value judgment of the relationship at issue (a “relationship” rationale), a desire not to discriminate between certain types of similar relationships (an “equal protection” rationale), and a desire to protect individual autonomy when it comes to decision-making about intimate associations, regardless of the nature of the relationship involved (a “liberty” rationale).<sup>98</sup>

#### 1. Early Cases

The first case to specifically recognize a right to associate was *NAACP v. Alabama ex rel. Patterson*,<sup>99</sup> which involved the State of Alabama’s

---

95. *United States v. Town of Cicero, Ill.*, No. 93 C 1805, 1997 WL 337379, at \*1 (N.D. Ill. June 16, 1997).

96. *See id.* at \*2–4; Guzmán, *supra* note 68.

97. Collin O’Connor Udell, Student Article, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 239–40 (1998). *See generally* John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010).

98. These categories are similar to the foundations of privacy law articulated by Professor Kendall Thomas, who also identifies a “Zonal Paradigm” (similar to the spatial privacy analysis discussed *infra* Section II.B), a “Relational Paradigm,” and a “Decisional Paradigm.” Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443–48 (1992).

99. 357 U.S. 449 (1958).

attempts to require the NAACP to divulge the names and home addresses of its members.<sup>100</sup> The Court noted that group association was often an important mechanism for political advocacy and other expressions of belief.<sup>101</sup> Thus, it recognized a “freedom to engage in association for the advancement of beliefs and ideas” rooted in the First Amendment.<sup>102</sup>

Seven years later, the Court addressed state encroachment on a different sort of association, one that did not exist for expressive or political purposes. In *Griswold v. Connecticut*<sup>103</sup> the Court reviewed a state law that prohibited the use or provision of contraceptives applied against a physician who prescribed contraceptives to a married woman.<sup>104</sup> After famously noting that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,”<sup>105</sup> Justice Douglas observed that the case at hand “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”<sup>106</sup> While the marital relationship was different from the other sorts of associations that the Court had found worthy of protection,<sup>107</sup> it was no less important:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>108</sup>

Thus, *Griswold* grounded associational rights in the need to protect the privacy of a particular sort of intimate relationship—marriage—that is deeply rooted in our history and traditions as a society.

The Court moved away from this emphasis on privacy and traditional relationships in its next contraception case, *Eisenstadt v. Baird*,<sup>109</sup> which struck down a ban on contraception use by unmarried women.<sup>110</sup> Justice

---

100. *Id.* at 451. For a thorough discussion of this case and its role in the early development of the doctrine of associational rights, see generally John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010).

101. NAACP, 357 U.S. at 460.

102. *See id.*

103. 381 U.S. 479 (1965).

104. *Id.* at 480.

105. *Id.* at 484.

106. *Id.* at 485.

107. *See, e.g., id.* at 483.

108. *Id.* at 486.

109. 405 U.S. 438 (1972).

110. *Id.* at 454–55.

William Brennan initially approached the issue as one of equal protection, arguing that the state had failed to articulate a rational basis for distinguishing between married people and unmarried people when it came to prohibiting access to contraception.<sup>111</sup> He then squarely addressed the right of intimate association, transforming it from a right meant to protect a particular type of relationship into one that shields individuals in their decision-making about intimate matters:<sup>112</sup>

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>113</sup>

Hence, with *Eisenstadt* the emphasis in associational privacy shifted toward individual autonomy and away from the specific nature of the intimate relationship at issue.

Another case of note from the early 1970s is *United States Department of Agriculture v. Moreno*.<sup>114</sup> The *Moreno* Court was asked to consider a provision in the Food Stamp Act that excluded households from participation in the program if they contained any unrelated people.<sup>115</sup> Justice Brennan's majority opinion treated the issue as one of equal protection between households with related members and unrelated members.<sup>116</sup> Justice Brennan did not treat the households with unrelated people as a suspect class or the act of living together as a fundamental right. Instead, applying rational basis review, he found that the statute's classification failed to further any legitimate government interest.<sup>117</sup>

More significant for purposes of this discussion is Justice Douglas's concurring opinion, in which he argued that the real issue was the plaintiffs' right to associate within their homes:

This case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance. The choice of one's associates for

---

111. *Id.* at 443, 446–47.

112. Inazu, *supra* note 97, at 161.

113. *Eisenstadt*, 405 U.S. at 453 (emphasis omitted).

114. 413 U.S. 528 (1973).

115. *Id.* at 529.

116. *Id.* at 532–34.

117. *See id.* at 538.

social, political, race, or religious purposes is basic in our constitutional scheme. . . .

. . . As the facts of this case show, the poor are congregating in households where they can better meet the adversities of poverty. This banding together is an expression of the right of freedom of association that is very deep in our traditions.<sup>118</sup>

Having identified the right to choose one's living companions as a fundamental one, Justice Douglas, who would write the majority opinion in *Belle Terre* just one year later,<sup>119</sup> argued that any government classification between related and unrelated people curtailing that right had to satisfy strict scrutiny.<sup>120</sup> Thus, his reasoning relies on both recognition of the liberty aspect of the right to associate within the home and an equal protection argument about related versus unrelated groups.

There is another important line of cases here that bears mentioning: the early public accommodations cases.<sup>121</sup> Although the courts did not frame their analysis as addressing associational rights, these cases invariably turned on whether the establishment was considered public or private, with private groups being given considerably more latitude to discriminate.<sup>122</sup> By focusing on the private/public divide in the right to exclude, the courts were implicitly acknowledging a right of private group members to freely associate with one another. Justice Arthur Goldberg's concurrence in *Bell v. Maryland*,<sup>123</sup> a lunch-counter sit-in case that raised the issue of whether enforcement of private acts of segregation can constitute state action,<sup>124</sup> set forth the issues cogently:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.<sup>125</sup>

---

118. *Id.* at 541 (Douglas, J., concurring).

119. *See* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974).

120. *See* *Moreno*, 413 U.S. at 543–45.

121. *See, e.g.,* *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 432, 434–35 (1973) (considering whether a community pool was a private club); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234–36 (1969) (considering whether a community park was a private social club); *Daniel v. Paul*, 395 U.S. 298, 300–01 (1969) (considering whether a recreational facility was private).

122. *E.g.,* *Tillman*, 410 U.S. at 438–39 (holding that a community pool was not a private club and thus was not exempt from the provisions of 42 U.S.C. § 2000(a) (2012)). Under 42 U.S.C. § 2000a(e), private clubs are exempt from the general prohibition against discrimination or segregation in places of public accommodation. 42 U.S.C. § 2000(a), (e).

123. 378 U.S. 226 (1964).

124. *Id.* at 227–28 (majority opinion); *id.* at 310–11 (Goldberg, J., concurring).

125. *Id.* at 313 (Goldberg, J., concurring).

## 2. The Modern Framework

The concept of a specific right to intimate association gained significant traction in 1980, when Professor Kenneth Karst published his influential article, *The Freedom of Intimate Association*.<sup>126</sup> Professor Karst noted from the outset that many of the Court's recent decisions on matters ranging from marriage, divorce, childrearing, and reproduction, which were grounded variously on equal protection as well as substantive and procedural due process rights, were in fact all "variations on a single theme: the freedom of intimate association."<sup>127</sup>

Professor Karst defined intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."<sup>128</sup> He identified four values of intimate association that justify its constitutional protection: (1) society (as in, companionship), which includes access of one person to another particular person's physical presence; (2) caring and commitment; (3) intimacy (defined as a type of close and enduring association between people); and (4) self-identification (a variant on self-expression).<sup>129</sup> He also advocated the use of a sliding scale standard of review for intimate association cases, with the level of scrutiny increasing with the presence of particular values.<sup>130</sup>

In 1984, the Supreme Court handed down *Roberts v. United States Jaycees*,<sup>131</sup> an opinion that seems written with Professor Karst's article in mind. The issue was whether state antidiscrimination law could force the Jaycees, a private organization, to admit women.<sup>132</sup> Writing for the Court, Justice Brennan began by noting, as Professor Karst had, that the Court had actually developed two overlapping strands of associational rights: the right of expressive association ("the right to associate for the purpose of engaging in those activities protected by the First Amendment") and the right of intimate association ("choices to enter into and maintain certain intimate human relationships").<sup>133</sup>

As to the source and object of the right of intimate association, Justice Brennan's opinion is hardly a model of clarity. On one hand, he described the right as a fundamental element of personal liberty, arguing that protecting intimate relationships from unwarranted state interference "safeguards the ability independently to define one's identity that is

---

126. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

127. *Id.* at 625.

128. *Id.* at 629.

129. *Id.* at 630–37.

130. *Id.* at 676.

131. 468 U.S. 609 (1984).

132. *Id.* at 612.

133. *Id.* at 617–18.

central to any concept of liberty.”<sup>134</sup> On the other hand, he articulated a somewhat contradictory dual purpose for the right, as protecting both traditional institutions and diversity: “[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.”<sup>135</sup>

Justice Brennan went on to discuss the types of associations that should be accorded constitutional protection, which unsurprisingly included family, marriage, childbirth, and childrearing.<sup>136</sup> “Family relationships,” he reasoned, involve the sharing not only of “thoughts, experiences, and beliefs but also distinctly personal aspects of one’s life.”<sup>137</sup> He recognized, however, that it was not the legal or biological relationship per se that led to this level of intimacy, but the fact that such relationships involve relatively few people, are highly selective, and are secluded in critical respects from others.<sup>138</sup> As a result, other relationships with similar qualities could also be considered sufficiently intimate to warrant constitutional protection. Justice Brennan therefore advocated using the objective factors that tend to distinguish families—size, purpose, selectivity, and seclusion among others—as a yardstick for assessing whether other types of associations should be protected. Applying these factors, the Court found that the Jaycees were not an intimate enough group to invoke their associational rights in order to exclude women.<sup>139</sup>

Despite Justice Brennan’s rhetorical nod to the relationships that have been critical to the “culture and traditions of the Nation,”<sup>140</sup> *Roberts*’s main doctrinal contribution was to identify the level of intimacy in a relationship as the operative factor for constitutional protection, and to measure that level of intimacy using the fairly objective criteria of size, purpose, selectivity, and seclusion.<sup>141</sup> Subsequent cases applied these criteria to various types of associations, usually finding them not intimate enough to be protected against government intrusion.<sup>142</sup>

---

134. *Id.* at 618–19.

135. *Id.*

136. *Id.* at 619.

137. *Id.* at 619–20.

138. *See id.* at 620.

139. *Id.* at 621.

140. *Id.* at 618–19.

141. *See id.* at 619–20. Professor John Inazu criticizes the approach set forth by Justice Brennan and Professor Karst, arguing that they fail to articulate a defensible rationale for how they distinguish between protected and unprotected associations. Inazu, *supra* note 97, at 161–62. Many of the qualities that they assume make intimate associations worthy of protection may be present in nonintimate associations, and not all intimate associations actually have the characteristics that make them worthy of protection. *Id.* at 162–64.

142. *See, e.g.,* *City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989) (concluding that a public dance hall with up to 1000 patrons on a given night was not a site of intimate associations); *Bd.*



Similarly, although Justice Brennan included “purpose” as one of the criteria, value judgments about the quality of, nature of, or reason for the particular intimate association at issue do not typically factor into the analysis. Instead, the “purpose” criterion seems to stand only as a measure to evaluate whether the reason for a group’s existence is incompatible with government interference. For example, in *Board of Directors of Rotary International v. Rotary Club of Duarte*<sup>143</sup> (*Duarte*), the Court noted the following:

The purpose of Rotary “is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community.” The membership undertakes a variety of service projects designed to aid the community, to raise the standards of the members’ businesses and professions, and to improve international relations. Such an inclusive “fellowship for service based on diversity of interest,” however beneficial to the members and to those they serve, does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment.<sup>144</sup>

Thus the “purpose” question is not whether the group should be free of governmental interference because the Court approves of the group’s purpose—indeed in *Duarte* the Court appears to hold the Rotary’s purpose in high regard while at the same time denying the group’s associational arguments. Rather, what matters is whether this purpose is incompatible with government interference.

*FW/PBS, Inc. v. City of Dallas*<sup>145</sup> is a significant exception to the Court’s “non-judgmental” approach to the purpose prong. In that case the Court considered multiple challenges to a set of zoning and licensing restrictions that the City of Dallas had applied to adult-oriented businesses.<sup>146</sup> A group of people who owned hotels that rented out rooms by the hour challenged a regulation setting a ten-hour minimum for hotel stays.<sup>147</sup> The hotel owners cited *Roberts* in arguing that the regulations

---

of *Dir. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546–47 (1987) (concluding that local Rotary Clubs, with an upper range of 900 members, that carry on a variety of public activities and admit all qualified applicants are not sufficiently intimate to warrant protection as an intimate association).

143. 481 U.S. 537 (1987).

144. *Id.* at 546–47 (internal citation omitted) (quoting 1 ROTARY BASIC LIBRARY, FOCUS ON ROTARY 60–61 (1981)).

145. 493 U.S. 215 (1990).

146. *Id.* at 220–21.

147. *Id.* at 236–37.

burdened their patrons' right to engage in intimate associations—presumably the sexual activity that would occur in the hotel rooms.<sup>148</sup> Rather than looking to the (unquestionable) intimacy of the associations at issue, Justice Sandra Day O'Connor's majority opinion focused on the purpose and nature of the associations, and the fact that they were not the sort of traditional relationships that justified protection:

[W]e do not believe that [the regulations] will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts*. Any “personal bonds” that are formed from the use of a motel room for fewer than 10 hours are not those that have “played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.”<sup>149</sup>

With the exception of *FW/PBS*, the modern approach to intimate association, with its focus on objective measures of group intimacy, appears in many ways to harken back to the early public accommodations cases, which focused on the divide between public and private conduct.<sup>150</sup> Even though technically “private” in the sense that they are not government actors or public accommodations, large groups that carry on activities in public spaces, that have “public seeming” purposes involving civic, social, and economic participation, and that are open to significant segments of the public will likely not be found intimate enough to invoke associational rights.

### B. *Housing and Privacy*

Throughout the last century, a separate but related strand of privacy case law has taken shape in the area of the Fourth Amendment and residential searches and seizures. Although a complete discussion of Fourth Amendment jurisprudence is outside the scope of this Article, the Court's specific treatment of the home as a focus of “spatial privacy” is relevant here. As many courts and commentators have noted, the home occupies an almost sacred space in the American psyche and American history. This, in turn, has led the courts to be extremely protective of residential spaces against governmental interference, as compared to other spaces such as automobiles, schools, or the workplace—solicitude that has been described as “housing exceptionalism.”<sup>151</sup>

---

148. *Id.*

149. *Id.* at 237.

150. See *supra* notes 128–32 and accompanying text; see also Patrick Lofton, Comment, *Any Club That Would Have Me as a Member: The Historical Basis for a Non-Expressive and Non-Intimate Freedom of Association*, 81 MISS. L.J. 327, 356–58 (2011) (tying the early public accommodations cases to modern associational rights).

151. Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 907–08 (2010).

Despite the Supreme Court's admonition that the Fourth Amendment protects people, not property,<sup>152</sup> when determining the scope of Fourth Amendment protection, courts tend to focus more on the privacy interests created by the physical home itself and less on the nature of who is inside or what they are doing. Put another way, "core" domestic spaces receive the highest level of protection regardless of whether the specific activities or associations at issue in a particular case are the sort that have been historically accorded value.<sup>153</sup>

The arguments as to why this is so break down very much like the arguments discussed above for why intimate associations need protection; in other words, there is a relationship rationale and an autonomy rationale. Some commentators contend that domestic spaces are safeguarded because they are where interpersonal relationships, particularly aspects of family life like marriage and parenting, are likely to flourish. As Professor Stephanie Stern argues, "The physical home has doctrinal value in selective contexts as a proxy for substantive privacy and privacy of intimate association. Homes are important to privacy and personhood not because homes symbolize intimate ties but because they so frequently shelter them."<sup>154</sup> Thus, even if a particular residence does not actually provide a haven for an intimate relationship (for example, it is used primarily as a drug house), it is still accorded protection because the home is the sort of place that usually does.

Others contend that the home holds such a significant position because it is a central aspect of personhood to control one's residential space. In her influential work, *Property and Personhood*, Professor Margaret Radin argues that "to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment."<sup>155</sup> The home is particularly important because of "the feeling that it would be an insult for the state to invade one's home because it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there."<sup>156</sup> Professor Radin recognized that when the property interests of a group are involved, personhood intersects with the freedom of association because "group cohesion may be important or even necessary to personhood."<sup>157</sup> Nevertheless, it is clear that the personhood aspect of the analysis remains

---

152. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

153. Indeed, this must be so, as the most common mechanism for a Fourth Amendment challenge is a motion to suppress, which will only be sustained when there is evidence of illegal activity.

154. Stern, *supra* note 151, at 950.

155. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (emphasis omitted).

156. *Id.* at 992.

157. See *id.* at 1011–12.

the cornerstone; the relationship or group membership is merely one way for the individual to realize his or her personhood.

Regardless of which rationale grounds the concept of spatial privacy within the home, the law recognizes this as a powerful interest that should not be intruded upon lightly. Arguments about spatial privacy have not often arisen in the context of zoning, for the simple reason that most zoning regulations do not seek to regulate what goes on, or who lives, inside the home, but the concept is clearly relevant to restrictive single-family ordinances.

### C. Recent Legal Developments

A handful of recent cases provide support for a right of intimate association within the home, and they ground this support in a liberty or decisional autonomy rationale. The most significant of these is *Lawrence v. Texas*,<sup>158</sup> which struck down a state law that criminalized homosexual sodomy.<sup>159</sup> The plaintiffs in the case were two men accused of engaging in sexual acts while inside one of the men's apartment.<sup>160</sup> Although it did not explicitly frame the case as one of associational rights, Justice Anthony Kennedy's majority opinion recognized a right to intimate conduct grounded in the exercise of liberty under the Due Process Clause. "Liberty," he argued, "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>161</sup> This right is particularly strong, he reasoned, when the government is seeking to regulate activity that takes place within the home.<sup>162</sup> People are, for the most part, at liberty to choose their sexual partners and the choice is highly personal.<sup>163</sup> Therefore, Justice Kennedy cautioned against "attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."<sup>164</sup> "[A]dults," Justice Kennedy continued, "may choose to enter upon this relationship in the confines of their homes and their own private lives."<sup>165</sup>

The U.S. Court of Appeals for the Ninth Circuit more directly affirmed the right to freedom of choice in roommates in *Fair Housing Council of San Fernando Valley v. Roommate.com*.<sup>166</sup> In that case, an

---

158. 539 U.S. 558 (2003).

159. *Id.* at 578.

160. *Id.* at 562–63.

161. *Id.* at 562.

162. *See id.* ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.")

163. *Id.* at 567.

164. *Id.*

165. *Id.*

166. 666 F.3d 1216, 1220–21 (9th Cir. 2012).

online roommate locator service required users to disclose their sex, sexual orientation, familial status, and those characteristics they preferred in a roommate.<sup>167</sup> A fair housing advocacy group alleged that the defendant violated state and federal fair housing laws by collecting this information and then sorting, steering, and matching users based on those characteristics.<sup>168</sup>

The court concluded that the fair housing laws did not apply to the choice of a roommate because the right of intimate association protects that choice, and the roommate relationship, generally.<sup>169</sup> The court applied the factors identified in *Duarte*—“size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship”—to the roommate relationship and found that they were easily met.<sup>170</sup> The court went on to emphasize that the protection of privacy and associational rights was particularly important in the context of the home, and it concluded that to hold that the Fair Housing Act applied inside of a home or apartment “would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.”<sup>171</sup>

Finally, in *Seniors Civil Liberties Ass’n v. Kemp*,<sup>172</sup> the U.S. Court of Appeals for the Eleventh Circuit recognized, in dicta, that the right of intimate association should include the right to choose who lives in your home. In that case, senior citizens challenged the Fair Housing Act’s familial status provisions, which required their condominium complex to allow families with children to reside there.<sup>173</sup> The plaintiffs argued that requiring their complex to accept families with children violated their own associational and privacy rights, which included their rights *not* to live near children.<sup>174</sup> The court soundly rejected this argument, stating, in essence, that the plaintiffs had no right to control the composition of the families who lived near them.<sup>175</sup> The court went on to note that the plaintiffs may be entitled to resist government encroachment on their right to choose who lived in their own homes: “If the [Fair Housing] Act were trying to force plaintiffs to take children into their home, this

167. *Id.* at 1218.

168. *Id.*

169. *See id.* at 1220–23.

170. *Id.* at 1220–21 (quoting *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987) (internal quotation marks omitted)).

171. *Id.* at 1221. The court then vacated the lower court’s ruling and remanded for an entry of judgment in favor of the defendant. *Id.* at 1223–24.

172. 965 F.2d 1030 (11th Cir. 1992).

173. *Id.* 1032–33.

174. *Id.* at 1036.

175. *Id.* (“Whatever the penumbral right to privacy found in the Constitution might include, it excludes without question the right to dictate or challenge whether families with children may move in next door to you.”).

argument might have some merit. But the Act violates no privacy rights because it stops at [their] front door.”<sup>176</sup>

Although none of these cases deals directly with zoning, each provides further support for the right of people to be free to structure their living arrangements, to conduct their intimate relationships within the walls of their dwelling place, and generally to order their “home lives” however they wish.

### III. TOWARD A RIGHT OF CORESIDENCE

This Part connects the right to associate with the right to choose one’s living companions, arguing that the trajectory of the Supreme Court’s jurisprudence in this area leads inexorably toward recognizing such a right. The Part also discusses functional family reforms, concluding that while they are a good start, they do not go far enough to protect people’s liberty interests in choosing living companions. It questions whether the police power can really stretch far enough to authorize the regulation of household composition. Part III concludes with an analysis of whether single-family zoning can be justified under either of the prevailing models of local government legitimacy.

#### A. *Coresidence as a Protected Association*

The decision in *Belle Terre* has come in for a great deal of criticism.<sup>177</sup> It is poorly reasoned, inconsistent with Supreme Court precedent at the time, and wholly incompatible with the Court’s modern view of liberty-based associational rights. It is time for the issue to be revisited and for the case to be overturned.

The Supreme Court’s jurisprudence on associational rights makes clear that coresidence should be viewed as a protected association. Applying the analytical framework set forth in *Roberts* leads inevitably to this conclusion. The *Roberts* criteria include “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”<sup>178</sup> With respect to size, virtually all roommate or housemate arrangements involve

---

176. *Id.*

177. *E.g.*, J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 586 (1977); Norman Williams, Jr. & Tatyana Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre and Berman*, 29 RUTGERS L. REV. 73, 76–82 (1975); Katia Brenner, Note, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, (1999); Rebecca M. Ginzburg, Note, *Altering “Family”: Another Look at the Supreme Court’s Narrow Protection of Families in Belle Terre*, 83 B.U. L. REV. 875 (2003); Robert J. Hartman, Comment, *Village of Belle Terre v. Boraas: Belle Terre Is a Nice Place to Visit—But Only “Families” May Live There*, 8 URB. L. ANN. 193 (1974).

178. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

relatively few people. It is the rare house or apartment that could comfortably (or legally, within numerical occupancy limits) accommodate more than twelve people<sup>179</sup> and most will be in the four- to eight-person range. This is significantly smaller than the two Jaycees chapters at issue in *Roberts*, which had 430 and 400 members each.<sup>180</sup> Selectivity and exclusivity are also a given, in that most people who share dwelling space choose their coresidents, and residency is not open to all comers.

Measured on the scale of intimacy, it is clear that sharing a house or apartment with another person is a very intimate act indeed.<sup>181</sup> As the court in *Roommate.com* observed:

Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms. . . .

. . . The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. Roommates also have access to our physical belongings and to our person. . . .

Equally important, we are fully exposed to a roommate's belongings, activities, habits, proclivities and way of life. This could include matter we find offensive (pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers).<sup>182</sup>

Professor Karst himself recognized that “living in the same quarters” was an inherently intimate act and he argued that “any governmental intrusion on personal choice of living arrangements demands substantial justification.”<sup>183</sup>

---

179. See 2012 INTERNATIONAL PROPERTY MAINTENANCE CODE § 404.5 & tbl.404.5 (2011), available at <https://law.resource.org/pub/us/code/ibr/icc.ipmc.2012.html> (specifying minimum area requirements for occupants within a household under an overcrowding prohibition).

180. *Roberts*, 468 U.S. at 621. The Rotary Clubs at issue in *Duarte* had as many as 900 members. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987).

181. See Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1151 (2010).

182. Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1221 (9th Cir. 2012).

183. Karst, *supra* note 126, at 629, 687.

*Lawrence* puts the proverbial final nail in the coffin. Just as it expressly repudiated the reasoning in *Bowers v. Hardwick*,<sup>184</sup> it also deeply undermines *Belle Terre*.<sup>185</sup> *Lawrence*'s focus on liberty bolsters the associational rights that coresidents enjoy: If the state cannot intrude on a person's choice of who to have sex with inside his home, why should it be able to interfere, without a compelling reason, with that person's decision about who lives there with him?<sup>186</sup>

### B. Functional Family Reforms

It might be tempting to argue that the right of coresidence should really be a right to cohabit, or live together as a functional family. That is, we should extend associational rights to groups of people that look like traditional families—groups with some relational ties or a family-like structure such as unmarried couples who are raising children together or biological families who live with unrelated people. Indeed, the most significant recent reforms fall precisely along this line.<sup>187</sup> A number of ordinances now specifically define family as including unmarried couples and their offspring.<sup>188</sup> Others define a “functional family” as a group that operates in the same manner as a family and then include it in the definition of family.<sup>189</sup> Ames, Iowa has such an ordinance, which grants a special use permit for functional families, defined as people who share “a strong bond or a commitment to a single purpose; . . . Share a single household budget; Prepare food and eat together regularly; [and]

---

184. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today.”).

185. See generally Sara L. Dunski, Note, *Make Way for the New Kid on the Block: The Possible Zoning Implications of Lawrence v. Texas*, 2005 U. ILL. L. REV. 847 (arguing that *Lawrence* undermines decisions like *Belle Terre*, which justify zoning ordinances that essentially regulate nontraditional activity within the home).

186. Critics might argue that sexual intercourse in one's home is a more intimate act than simply sharing a dwelling with another person. This is true (at least with respect to physical intimacy), but the two are similar enough in relevant respects for this Article's conclusion to hold. Specifically, both take place within the home and both involve highly personal decisions about how to structure one's life. If anything, choosing to live with someone may be more significant, with respect to the ramifications for finances, security, and day-to-day affairs than a brief sexual encounter with another person—allegedly the situation at issue in *Lawrence*. See *Lawrence*, 539 U.S. at 563.

187. See Dwight H. Merriam, *Ozzie and Harriet Don't Live Here Anymore: Time to Redefine Family*, ZONING PRACTICE, Feb. 2007, at 2, 5–7 (advocating giving functional families a special use permit to reside in single-family neighborhoods and providing an example of this type of city ordinance).

188. After the controversy with the Shelltrack–Loving household, the City of Black Jack amended its family definition ordinance to include unmarried couples raising children together. See Norm Parish, *Black Jack Revises Housing Regulation*, ST. LOUIS POST-DISPATCH A1 (Aug. 16, 2006).

189. See, e.g., 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:17.



Share in the work to maintain the premises.”<sup>190</sup> Ann Arbor, Michigan has a similar ordinance, which defines functional family as “a group of people plus their offspring, having a relationship [that] is functionally equivalent to a family. The relationship must be of a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit.”<sup>191</sup>

Commentators have also called for a restructuring of the associational rights doctrine so that it clearly applies to particular sorts of “family-like” and “marriage-like” relationships. In part, this is because of the way the doctrine has been framed from the beginning, in which the rights of the nuclear family are paramount, and the value of other intimate relationships is defined by how closely they resemble familial ones.<sup>192</sup>

Professor Nancy Marcus advocates a sliding scale model in which the court’s standard of review will vary according to the closeness of the relationship.<sup>193</sup> Thus, unmarried couples may be entitled to the highest level of protection if their relationship bears the hallmarks of marriage, displaying “a significant commitment through shared finances, children, [or] *cohabitation*.”<sup>194</sup> Unmarried couples who are sexually or romantically intimate but not in a marriage-like relationship would be entitled to some lesser level of heightened scrutiny.<sup>195</sup> Finally, other relationships, including friendships, would be entitled to rational basis review.<sup>196</sup>

Practitioner Collin Udell similarly argues for the protection of “nontraditional relationships that resemble traditional relationships in the quality of their intimacy.”<sup>197</sup> She calls for a three-tiered framework based on the relative level of intimacy, which is determined by three qualities: cohabitation, sexual intimacy, and commitment.<sup>198</sup> If all three qualities are present—two people cohabit, are sexually intimate, and are in a long-

190. AMES, IOWA, MUNICIPAL CODE § 29.1503(4)(d) (2015), available at <http://www.cityofames.org/modules/showdocument.aspx?documentid=655>.

191. ANN ARBOR, MICH., CODE OF ORDINANCES 5:7(4) (1996), available at [https://www.municode.com/library/#!/mi/ann\\_arbor/codes/code\\_of\\_ordinances?nodeId=TITVZOPL\\_CH55ZO\\_ARTIUSRE\\_5\\_7REOC](https://www.municode.com/library/#!/mi/ann_arbor/codes/code_of_ordinances?nodeId=TITVZOPL_CH55ZO_ARTIUSRE_5_7REOC); see also BOROUGH OF INDIANA, PA., CODE § 348-1 (2014), available at [http://ecode360.com/11884789#/13675901?&\\_suid=142894827658107449802580610552](http://ecode360.com/11884789#/13675901?&_suid=142894827658107449802580610552) (containing an identical definition).

192. Professor Karst himself defines “intimate association” to mean “a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship.” Karst, *supra* note 126, at 629.

193. Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 311–15 (2006).

194. *Id.* at 312–13 (emphasis added).

195. *Id.*

196. *Id.* at 315.

197. Udell, *supra* note 97, at 269–70.

198. *Id.* at 278–79.

term committed relationship—strict scrutiny applies.<sup>199</sup> If only two are present—people cohabit and are sexually intimate, but have no long-term commitment—then intermediate scrutiny is appropriate.<sup>200</sup> And if only one is present—people live together but are not sexually intimate and do not have a long-term commitment to one another—rational basis review is appropriate.<sup>201</sup>

At base, the “functional family” concept was also the driver of the logic state courts employed in cases like *Baker*, *Santa Barbara*, and *Charter Township of Delta v. Dinolfo*.<sup>202</sup> Because each of these courts found that the groups at issue behaved like a family, they could find no justification for treating the two differently.<sup>203</sup> Similarly, in *Baer v. Town of Brookhaven*,<sup>204</sup> the court overturned a restrictive family ordinance as it applied to five elderly widows precisely because the ordinance’s definition of family did not include “functionally equivalent” families.<sup>205</sup>

All of this seems like a good first step, because it eliminates the most obvious injustice of restrictive single-family zoning ordinances: the fact that groups like the Shelltrack–Loving household, who are for all intents and purposes a family, may be prevented from living together by an unnecessarily narrow definition of what family means. This approach also addresses the cultural argument that restrictive single-family ordinances privilege a particular model of family living that relatively well-off, heteronormative, nonminorities of a certain age are more likely to engage in.<sup>206</sup> Yet, for reasons set forth more fully in the next Section, these reforms do not go far enough and ultimately divert attention away from the more important question of why any government should be able to condition people’s ability to live together on the particular qualities of their relationship to one another.

---

199. *Id.* at 279.

200. *Id.*

201. *Id.*

202. 351 NW.2d 831 (Mich. 1984); *see infra* text accompanying notes 229–31.

203. *Supra* notes 74–79 and accompanying text.

204. 537 N.E.2d 619 (N.Y. 1989).

205. *Id.* at 619.

206. Justice Brennan’s concurrence in *Moore* refers to the “cultural myopia” of East Cleveland’s ordinance, arguing that:

The line drawn by this ordinance displays a depressing insensitivity toward the economic and social needs of a very large part of our society.

. . . The “extended family” that provided generations of early Americans with social services and economic and emotional support in times of hardship . . . remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society.

*Moore v. East Cleveland*, 431 U.S. 494, 507–08 (1977).

### C. *The Role of Liberty*

Thus far, the major relief from strict single-family zoning has come in two forms: (1) *Moore*'s extension of associational rights to all biologically related people and extended families, not just nuclear family members; and (2) the functional family reforms, which protect unrelated people who resemble families. Both of these are predicated on different doctrinal sources for the right of intimate association. As discussed previously, one might look at intimate association as a three-legged stool, supported by the substantive due process rights and privacy accorded to traditionally valued relationships such as marriage and childrearing (the "traditional relationship" leg), equal protection for similar groups (the "nondiscrimination" leg), and individual autonomy (the "liberty" leg).<sup>207</sup>

*Moore* clearly gains its force from the substantive due process rights accorded to traditionally protected relationships such as marriage and child rearing, in the vein of *Griswold*. It relies on the assumption that the extended family is also a valued and foundational institution in our society, worthy of protection from governmental interference. The functional family reforms are, in essence, arguments based on equal protection. They are premised on the notion that some groups of unrelated people so closely resemble legally and biologically related people that ordinances, which discriminate against them on that basis, are arbitrary—very much like Justice Brennan's view in *Moreno*.

What is missing here is the third leg of the stool. Loosening the definition of family and broadening the concept of associational rights to cover extended and functional families does not go far enough. While it solves one problem—discrimination against nontraditional families and family-like groups—it fails to address the bigger issue of whether household composition is an appropriate subject for zoning regulation at all.

In short, both *Moore* and the functional family reforms are inadequate because they ignore a much more powerful argument against single-family zoning ordinances: the fact that such ordinances intrude into extremely personal decisions people make about how to structure their lives. This omission ties directly to a failure to recognize the liberty and decisional autonomy basis for the right of intimate association first articulated in *Eisenstadt*, alluded to by Justice Douglas himself in *Moreno*, and reaffirmed so robustly in *Lawrence*.<sup>208</sup>

Sharing a dwelling with another person is by definition an intimate association worthy of protection, not because of the nature of one's

---

207. See *supra* Section II.A.

208. Professor Inazu speculates that the privacy/liberty side of the associational rights doctrine was perceived as its weakest link, and therefore Professor Karst downplayed this aspect in favor of the relational component of the argument. See Inazu, *supra* note 97, at 164–65.

relationship with that person (although that may certainly be part of it), but because the choice of whom to share living space with is such a personal and significant part of one's everyday life.<sup>209</sup> And if an association is intimate, then it should not be limited because of a court or legislature's subjective judgment about its value, need, or importance.

The "purpose" prong of the intimacy analysis set forth in *Roberts* and *Duarte* is relevant here. As discussed previously, with one exception the Court has not used the "purpose" criteria as a mechanism for passing judgment on the reasons for the association.<sup>210</sup> Put another way, associations are not deemed intimate and therefore worthy of protection simply because the Court approves of their reason for existing. Rather, "purpose" seems to refer more generally to whether the reason for the group's existence makes it more or less appropriate for the group to remain free of government interference. In the housing context this should lead to a simple inquiry: is this group forming for the purpose of residential living (as opposed to a commercial or criminal undertaking)?<sup>211</sup> If the answer is "yes" and the other intimacy factors are met, then the group should be able to invoke associational rights against unwarranted government interference. The court should not investigate further to ask why the group is living together—whether it is because of love, friendship, compatibility, economic necessity, convenience, or any combination of the above.<sup>212</sup>

At its core, what might seem to be a benefit of the functional family approach—the fact that it rejects labels for a more nuanced view of how people actually live—may be a detriment because it creates the potential for a tremendous invasion of privacy.<sup>213</sup> In essence, it requires courts and

---

209. See *supra* Section III.A. On this point this Article disagrees with Professor Tim Iglesias, who argues that it is only the quality of the relationship between roommates that determines whether they are intimate and deserving of protection. Tim Iglesias, *Does Fair Housing Law Apply to "Shared Living Situations"? Or, the Trouble with Roommates*, 22 J. AFFORDABLE HOUSING 111, 126–33 (2014).

210. *Supra* Subsection II.A.2.

211. In a sense, this inquiry closely mirrors the "use" concept that underlies all of zoning law. See 1 RATHKOPF & RATHKOPF, *supra* note 14, § 1:2 (discussing the geographical division of localities into specific use districts—residential, business, and industrial—in early zoning codes).

212. Some courts are particularly dismissive of the economic reasons that people may have for choosing to live together. See, e.g., *Stegeman v. City of Ann Arbor*, 540 N.W.2d 724, 726 (Mich. Ct. App. 1995) ("These are individuals who are sharing a house not to function as a family, but for convenience and economics."). Besides failing to address the real issue of why the government should care how people feel about their household companions, such an attitude is classist in the extreme, and fails to appreciate the very real financial pressures that cause people to live with roommates or compel families to double up.

213. As one commentator has noted, "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

zoning boards to review the intimate particulars of people's lives in order to determine whether they can live together.<sup>214</sup> For example, in *McMinn v. Town of Oyster Bay*,<sup>215</sup> four childhood friends sought to live together after they graduated from college.<sup>216</sup> One of the issues at trial was whether the young men actually ate dinner together, and the fact that they did not apparently contributed to their losing.<sup>217</sup> In *Santa Barbara*, the Supreme Court of California, sitting en banc, took note of the fact that the household group provided "[e]motional support" to one another and had taken a trip to Mexico together.<sup>218</sup> *Dimenstein v. Zoning Board of Appeals of City of Milford*<sup>219</sup> perhaps takes the cake. In determining that six professional hockey players who lived together did not qualify as a functional family, the court reasoned, "While the six hockey players are on the same team there is no evidence that any of them are linemates or defense pairs. Moreover, the Nighthawks finished with the worst record in the American Hockey League in the 1990/1991 season, which is not conducive to cohesion between team members."<sup>220</sup>

#### D. Household Composition and the Limits of the Police Power

Questioning whether municipalities can reach household composition in their zoning ordinances inevitably leads to an examination of the nature of the police power itself. *Euclid* outlined goals—public health, safety, morals, or general welfare—that could be met by zoning laws, and gave municipalities wide latitude in deciding how best to serve these purposes. Despite this mandate, in the 1920s, local governments exercised police power in a much narrower manner than they do today; they were

---

such system avoid outrageous intrusiveness in gathering its information." Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1053 (1979).

214. Professor Karst argues that the government cannot be in the business of evaluating whether any particular relationship reaches a specific threshold quality of intimacy, and therefore wide berth must be given around certain types of relationships likely to contain that level of intimacy. See Karst, *supra* note 126, at 688–89. This Article argues, in contrast, that the choice of whom to share a dwelling with is such a personal one that it should be protected from unwarranted government interference regardless of the quality of the relationship.

215. 482 N.Y.S.2d 773 (N.Y. App. Div. 1984), *aff'd*, 488 N.E.2d 1240 (N.Y. 1985).

216. See *id.* at 775–76.

217. As a dissenting judge in the Appellate Division of the Supreme Court, which modified the trial court's order, noted, "Although the trial court found that the four males shared occasional social activities, it noted that their different hours of employment precluded their sharing dinner—an activity which, surely, is a fundamental attribute of the family unit." *Id.* at 787.

218. *City of Santa Barbara v. Adamson*, 610 P.2d 436, 438 (Cal. 1980). But see *Carroll v. Washington Twp. Zoning Comm'n*, 408 N.E.2d 191, 193–94 (Ohio 1980) (finding that foster children were not sufficiently "integrated" with their foster family to constitute a functional family).

219. No. CV91 03 56 97S, 1991 WL 172850 (Conn. Super. Ct. Aug. 30, 1991), *clarified on reconsideration*, No. CV 91 035697 S, 1991 WL 208922 (Conn. Super. Ct. Sept. 16, 1991).

220. *Id.* at \*3 n.5. One hopes that these reasons were tongue-in-cheek, although this would provide little comfort to the players.

primarily concerned with alleviating overcrowded and unventilated tenement apartments, ensuring basic sanitation, and keeping industrial pollution out of residential areas.<sup>221</sup> In 1954, *Berman v. Parker*<sup>222</sup> (with Justice Douglas writing for a unanimous Court) significantly broadened the appropriate use of the police power, from eliminating unhealthy and unsafe conditions to creating beautiful well-ordered spaces.<sup>223</sup>

Municipal zoning authorities and state courts pushed this grant of authority to its limits when they started enacting restrictive single-family zoning ordinances.<sup>224</sup> Yet courts—including the Supreme Court in *Belle Terre*—and legislatures reflexively invoke the police power to justify an intrusion on privacy and liberty that would be intolerable if enacted through any other means. As one commentator trenchantly argues:

[Restrictive single-family] regulations provide a fascinating perspective into the unique powers that America gives to laws governing “land use.” Government cannot, of course, tell you what kind of car to drive, what to cook for dinner, whether to watch reality TV, whether to fill the living room with ceramic gnomes or tchotchkes, or whether to pay for your kid’s college education. All these things are considered, and rightly so, within the realm of human privacy and basic human freedom. But under the label of land use law, governments are able to tell you who to consider your family and who can live in your house. . . . Why can government be so intrusive? Because the neighbors might not like how you live and because they have pushed the local government, through civic local democracy, into passing a law regulating your household. It’s an accepted exercise of the police power.<sup>225</sup>

---

221. Developments in the Law—Zoning, *The Legitimate Objectives of Zoning*, 91 HARV. L. REV. 1443, 1443, 1445–46 (1978) (noting that in the 1920s zoning for health, safety, and welfare typically meant making sure that buildings were not overcrowded, industrial noise and odors did not intrude into residential spaces, and adequate light and air could enter urban dwellings).

222. 348 U.S. 26 (1954).

223. *Id.* at 32–33 (“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 power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . The concept of the public welfare is broad and inclusive. 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.” (internal citation omitted)).

224. As Professor Gregory Richards notes, “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.” J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 781.

225. PAUL BOUDREAUX, *THE HOUSING BIAS: RETHINKING LAND USE LAWS FOR A DIVERSE NEW AMERICA* 50 (2011).

However broad it may be, the police power is neither limitless nor extra-constitutional. As discussed above, if a municipal action burdens a constitutional right then it must meet heightened scrutiny, and many of the most commonly cited reasons for restrictive single-family ordinances fail under this level of scrutiny. Even actions that receive minimal scrutiny and judicial deference cannot be arbitrary or unreasonable and must be motivated by something more than animus and stereotypes. In particular, without some check, the vague “general welfare” and “community character” objectives often invoked to justify restrictive single-family ordinances can serve as a guise for discrimination, create oppressive homogeneity, and serve as a vehicle for invidious stereotypes that bear no tangible relationship to land use.<sup>226</sup> The rest of this Section will focus on three arguments that undermine the core assumptions behind the use of the police power to regulate household composition.

### 1. Problems with Stereotyping

*Moreno* itself cautioned that “a bare [legislative] desire to harm a politically unpopular group” could not justify a statute.<sup>227</sup> A number of state courts have held that zoning measures must be based on specific, demonstrable consequences from a particular type of use, not on generalizations about certain types of people.<sup>228</sup> And yet the arguments for restrictive single-family ordinances frequently indicate that this is exactly what is happening.

For example, in *Dinolfo*, an amicus brief filed by the Michigan Townships Association in support of a restrictive single-family ordinance argued that “[t]he purpose of such regulations is to prohibit the influx of informal residential groups of people whose primary inclination is toward the enjoyment of a licentious style of living.”<sup>229</sup> It went on to warn, without any evidence, that failure to regulate household composition will allow “college fraternities, ‘hippie’ communes, motorcycle clubs, and assorted loosely structured groups of people associating for the purpose of enjoying a purely licentious style of living to locate at will in

---

226. See *The Legitimate Objectives of Zoning*, *supra* note 221, at 1451–52.

227. U.S. Dep’t of Agric. v. *Moreno* 413 U.S. 528, 534 (1973).

228. See, e.g., *State v. Baker*, 405 A.2d 368, 375 (N.J. 1979) (holding that “municipalities may not condition residence upon the number of unrelated persons present within the household” because “[g]iven the availability of less restrictive alternatives, such regulations are insufficiently related to the perceived social ills which they were intended to ameliorate”). As the court in *State v. Baker* went on to note, “Regulations based upon biological traits or legal relationships necessarily reflect generalized assumptions about the stability and social desirability of households comprised of unrelated individuals—assumptions which in many cases do not reflect the real world.” *Id.* at 372.

229. *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 841 (Mich. 1984) (quoting amicus curiae).

settled . . . residential neighborhoods.”<sup>230</sup> This characterization of unrelated households was especially bizarre in light of the fact that the ordinance was being enforced against two nuclear families who were members of a church called the Work of Christ Community and who sought to take fellow church members into their homes as a way of living out their commitment to Christianity.<sup>231</sup>

College students are frequent targets for negative characterization. In *Borough of Glassboro v. Vallorosi*,<sup>232</sup> the court heard a challenge to a restrictive single-family ordinance that was clearly aimed at preventing college students from living together.<sup>233</sup> In defending the ordinance, the Borough’s Mayor compared student residency to a harmful use that would need to be regulated just like “toxic waste.”<sup>234</sup> The anti-student sentiments were so extreme that they prompted a thoughtful passage from the court:

The Court cannot but be disheartened at a mental climate that classifies college students, presumably the brightest and best of our society, as less worthy than toxic waste. True, they may have peculiar lifestyles; true, they frequently exhibit a less respectful attitude toward their elders than those in present authority would prefer and they sometimes behave in such a manner as to drive their elders to distraction. Yet it cannot be forgotten not only that they are entitled to their lifestyle as a matter of constitutional right, but in a few fleeting years they will stand in the shoes of those they now offend—those whose present occupancy of power is but fleeting.<sup>235</sup>

Similarly, in *Stegeman v. City of Ann Arbor*,<sup>236</sup> the court upheld a functional family ordinance against a group of students that it dismissively referred to as “a ragtag collection of college roommates.”<sup>237</sup>

Just as restrictive single-family ordinances may rest on unsupported negative assumptions about unrelated people who live together, they may also gain support from an overly idealized view of related-member households. In *Dinan v. Board of Zoning Appeals of the Town of*

230. *Id.*

231. *Id.* at 834. The Plaintiff Township insisted that the common bond of the next group that might seek to reside there might “not [be] the Work of Christ, but the Work of Satan.” *Id.* at 841.

232. 535 A.2d 544 (N.J. Super. Ct. Ch. Div. 1987), *aff’d*, 539 A.2d 1223 (N.J. Super. Ct. App. Div. 1988) (per curiam), *aff’d*, 568 A.2d 888 (N.J. 1990).

233. *Id.* at 544–45, 549.

234. *Id.* at 548–49.

235. *Id.* at 549.

236. 540 N.W.2d 724 (Mich. Ct. App. 1995).

237. *Id.* at 727.



*Stratford*,<sup>238</sup> the court upheld a restrictive single-family ordinance on the following rationale:

[Households with unrelated people] are less likely to develop the kind of friendly relationships with neighbors that abound in residential districts occupied by traditional families. . . . [T]hey are not likely to have children who would become playmates of other children living in the area. Neighbors are not so likely to call upon them to borrow a cup of sugar, provide a ride to the store, mind the family pets, water the plants or perform any of the countless services that families, both traditional and nontraditional, provide to each other as a result of longtime acquaintance and mutual self-interest.<sup>239</sup>

*Distefano v. Haxton*<sup>240</sup> presents a rare example of a court confronting stereotyped views about unrelated groups. The city in that case had passed a restrictive single-family ordinance, citing the need to cut down on noise and unruly behavior.<sup>241</sup> Yet it provided no evidence that unrelated groups were more likely to be disruptive than those in related households, leading the court to conclude:

There is nothing on this record to suggest that teenagers living with their parents will play their Metallica or their Beethoven at lower decibel levels in the wee hours of the morning than would four unrelated monks (or nuns)—or unrelated widows (or widowers) or four unrelated Navy lieutenants. It is a strange—and unconstitutional—ordinance indeed that would permit the Hatfields and the McCoys to live in a residential zone while barring four scholars from the University of Rhode Island from sharing an apartment on the same street.

. . . The legislation operates on the assumption that if some unrelated individuals sharing an apartment or house—be they students or otherwise are rowdy and disorderly, then all unrelated persons necessarily act in that fashion and must be barred from residential zones. Elementary logic teaches us that while a specie may have the qualities of the larger genus it inhabits, the genus does not have all the characteristics of each and every specie that it contains.<sup>242</sup>

---

238. 595 A.2d 864 (Conn. 1991).

239. *Id.* at 870.

240. C.A. No. WC 92-0589, 1994 WL 931006 (R.I. Super. Ct. Dec. 12, 1994).

241. *Id.* at \*1, \*3.

242. *Id.* at \*11–12.

Indeed, the law on this issue is fraught with stereotyped pronouncements, often with moral and class overtones, which courts and legislators unfortunately employ in an undisciplined and unreasoned manner. The cases all too frequently seem to come down to whether the court feels sympathy with the particular group at issue—the group of elderly widows in *Baer v. Town of Brookhaven*<sup>243</sup> or the nuns in *Holy Name Hospital v. Montroy*<sup>244</sup> as opposed to the hockey players in *Dimenstein v. Zoning Board of Appeals of City of Milford*.<sup>245</sup>

Nowhere is this clearer than in the disparity between Justice Douglas's opinions in *Moreno* and *Belle Terre*. *Moreno* involved extremely sympathetic households—low income women and children, some with disabilities providing each other with mutual care and assistance.<sup>246</sup> Speaking about these groups, Justice Douglas could not have been more solicitous, describing them as “[p]eople who are desperately poor but unrelated [who] come together and join hands with the aim better to combat the crises of poverty,”<sup>247</sup> and concluding that the act of “[t]aking a person into one's home because he is poor or needs help or brings happiness to the household” is deserving of the highest level of constitutional protection.<sup>248</sup> Against the objection that relaxing the regulations against unrelated household members could allow “unrelated individuals who voluntarily chose to cohabit” and “‘hippies’ or ‘hippy communes’” to benefit, Justice Douglas responded flatly that “the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod.”<sup>249</sup>

In *Belle Terre*, by contrast, Justice Douglas barely mentioned the people at issue except to identify them as students at the nearby State University at Stony Brook.<sup>250</sup> He dismissed all of their arguments about free association without analysis, except to argue that the associational rights of the village residents were not impaired by the restrictive single-family ordinance because they could always have unrelated people over to visit.<sup>251</sup> He then spent the rest of the opinion waxing on about open spaces and youth values, making clear his belief that unrelated groups pose a threat to them, and he concluded that this vague threat easily justified barring the group from the Village.<sup>252</sup>

---

243. 537 N.E.2d 619 (N.Y. 1989).

244. 379 A.2d 299 (N.J. Super Ct. Law Div. 1977).

245. No. CV91 03 56 97S, 1991 WL 172850 (Conn. Super. Ct. Aug. 30, 1991), *clarified on reconsideration*, No. CV 91 035697 S, 1991 WL 208922 (Conn. Super. Ct. Sept. 16, 1991).

246. U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528, 531–32 (1973).

247. *Id.* at 543.

248. *Id.* at 542, 544–45.

249. *Id.* at 543.

250. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974).

251. *Id.* at 9.

252. *Id.*

The difference in language between the two opinions could not be more striking. It seems likely that at least some of this disparity stems from how worthy he viewed the different groups of people at issue. A more cynical explanation could also be that in *Moreno* the groups at issue were the urban poor, situated far from the sort of leafy suburbs that Justice Douglas and other middle class people would reside in. Their presence in an unrelated household was not disruptive to an idyllic neighborhood, whereas *Belle Terre* involved potential intrusions of unrelated groups into just such a place. One might wonder how Justice Douglas would have responded if the groups in *Moreno* were trying to move into the Village of Belle Terre.

## 2. Protection of Children and Families

As *Belle Terre*'s invocation of "youth values" makes clear, the needs of children are often used to justify restrictive single-family ordinances. The above passage from *Dinan*, with its fear that unrelated households are "not likely to have children who would become playmates of other children living in the area" is another example.<sup>253</sup> Similarly, in *Ames Rental Property Ass'n v. City of Ames*,<sup>254</sup> the Supreme Court of Iowa upheld a single-family ordinance because it concluded that unrelated people "tend not to establish roots in the community nor do they provide playmates for their neighbors' children."<sup>255</sup>

However far the police power might stretch, zoning in order to socially engineer neighborhoods to optimize the likelihood of playgroups for children seems a bridge too far. But there is a bigger problem with invoking the needs of children to exclude unrelated households: it assumes that unrelated households will not contain children, an assumption which is neither borne out by statistical evidence<sup>256</sup> nor supported by the facts of the cases. For example, in *City of Ladue v. Horn*<sup>257</sup> the court found that an unmarried couple with three children from previous relationships were not a family and had to move out of the seven-bedroom home they had purchased.<sup>258</sup> In so deciding, the court

---

253. *Dinan v. Bd. of Zoning Appeals of the Town of Stratford*, 595 A.2d 864, 870 (Conn. 1991).

254. 736 N.W.2d 255 (Iowa 2007).

255. *Id.* at 261.

256. In 2012, more than 7.8 million households were comprised of cohabiting couples and 3.2 million of these contained children. JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 20 tbl.7 (2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf> [hereinafter HOUSEHOLD CENSUS 2012]. In 2010, over 1.3 million minors lived with people to whom they were not related at all. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 2 tbl.1 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> [hereinafter HOUSEHOLD CENSUS 2010].

257. 720 S.W.2d 745 (Mo. Ct. App. 1987).

258. *Id.* at 747, 752.

cited *Belle Terre*'s passage about the need to create zones of "family values [and] youth values."<sup>259</sup> In *Carroll v. Washington Township Zoning Commission*,<sup>260</sup> the Ohio Supreme Court also cited *Belle Terre* in support of its ruling that the Township's restrictive single-family zoning law prevented a couple from taking in foster children.<sup>261</sup> And in *State v. Baker* zoning authorities sought to prevent two unrelated families with a total of six children from living together in a single-family neighborhood.<sup>262</sup>

Indeed, most restrictive ordinances can easily be applied to exclude unrelated households with children.<sup>263</sup> One need look no further than the plight of the Shelltrack–Loving household with its three children. The Columbia, Missouri ordinance provided at the beginning of this Article offers another example. The guidance to Columbia's ordinance states that a married couple and their two children would not constitute a family if they lived with the wife's sister and brother-in-law and their three children.<sup>264</sup> Thus, this ordinance would exclude a household containing five children from a single-family zoned neighborhood. In light of this, any restrictive single-family ordinance that purports to protect the needs of children but excludes households with children should fail for want of rational relation to its purpose.

It is certainly true that acting in the interest of families has long been an accepted goal of law in general and land-use regulation in particular.<sup>265</sup> Indeed, a good deal of the Supreme Court's substantive due process jurisprudence centers on the need to protect families from state encroachment.<sup>266</sup> Defenders of restrictive single-family zoning

259. *Id.* at 750 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)).

260. 408 N.E.2d 191 (Ohio 1980) (per curiam).

261. *Id.* at 193–94.

262. 405 A.2d 368, 370, 375 (N.J. 1979). *But see* *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 834, 842–44 (Mich. 1984) (declining to enforce an ordinance against two households which each contained "several" children and six unrelated single adults).

263. In the oral argument for *City of Baton Rouge/Parish of Baton Rouge v. Myers*, 145 So. 3d 320 (La. 2014), counsel for the City/Parish admitted that the definition of family used by its ordinance would prevent foster parents and children from residing together. *See id.* at 341. The court recognized that the ordinance might prevent people from living with their foster and non-adopted stepchildren, but refused to rule on the issue because it found that the defendant landlord did not have standing to raise the argument. *Id.* at 331 (majority opinion).

264. *What is a Family?*, *supra* note 42.

265. *See* 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:2; *see also*, *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970). In response to the plaintiffs' associational-rights argument, the court noted the special place the family occupies in the American legal system, and concluded that unrelated groups were undeserving of similar protection. *Id.* at 911–12. "To define 'association' so broadly [as to give the group the right to live together], would be to dilute the effectiveness of that special branch of jurisprudence which our tradition has developed to protect the truly vital interests of the citizenry." *Id.* at 912.

266. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 481–82, 484–86 (1965); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 514 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

ordinances, however, take the notion a step farther, framing it as a zero-sum game and concluding that the need to protect a particular version of the family unit authorizes them to exclude everyone else.<sup>267</sup> Unless unrelated groups in and of themselves are demonstrably harmful to traditional families (and not merely assumed harmful based on stereotypes) or they are competing with families for scarce housing in residential neighborhoods, this conclusion simply does not follow.<sup>268</sup>

If anything, the opposite is true—the protection of the domestic sphere that the Court has carved out in its privacy and intimate association cases should caution against governmental interference with *any* domestic arrangement. As Professor Frank Michelman argues, “when we consider that a main pillar [in our Constitutional structure] is the first amendment, an inference that governments are not only constitutionally bound to respect traditional household forms, but are also constitutionally authorized to censor nontraditional ones, becomes problematic to say the least.”<sup>269</sup>

### 3. Theories of Local Government Legitimacy

The police power derives much of its force from the notion that local governments are uniquely capable of addressing certain local issues like what speed limit to set in town or where to locate a shopping center. On questions like these, local governments are much better than larger, more remote units of government at identifying problems and responding to the

---

*See generally* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008) (examining the judicial trend of broadening constitutional protection of rights for families).

267. This was made explicit in the brief filed before the Louisiana Supreme Court by the City/Parish in support of Baton Rouge’s restrictive ordinance: “It might be said that the purpose of a single family zone is to get away from [non-traditional] families.” Brief for Plaintiff-Appellant, City of Baton Rouge/Parish of E. Baton Rouge, 145 So. 3d 320 (La. 2014) (No. 2013 CA 2011), 2014 WL 1673329, at \*10, \*12.

268. A parallel can be drawn here to the recent controversy over same-sex marriage. Opponents of marriage equality often argue that recognition of gay marriage will harm traditional marriage, yet they are hard pressed to provide concrete evidence of any tangible harm that will actually occur. Professor Courtney Joslin recounts, in a hearing in the case of *Perry v. Schwarzenegger*, that “Judge Vaughn Walker asked Charles Cooper, counsel for the parties defending the constitutionality of California’s marriage ban (Proposition 8), how permitting same-sex couples to marry would ‘harm opposite-sex marriage.’ Cooper responded: ‘Your honor, my answer is: I don’t know, I don’t know.’” Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 82–83 (2011) (quoting Transcript of Proceedings at 23, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW)) (internal citations marks omitted); *see also* Wilkinson III & White, *supra* note 177, at 624 (“Where vindication of lifestyle diversity can be shown to damage so basic an institution as the family, courts should not order it. The difficulty comes in the showing. The withdrawal of law from certain areas of moral choice does not inevitably portend a collapse of the social order.”).

269. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 193 (1977–1978).

preferences of their citizenry. Thus, it may be useful to analyze restrictive single-family ordinances through the lens of the two most commonly-accepted theoretical models of local government authority, the public choice model and the community self-definition/participation model.

Professor Charles Tiebout set forth the public choice model in his seminal article, *A Pure Theory of Local Expenditures*.<sup>270</sup> This theory views local government as the optimal means for communities to maximize majoritarian preferences for taxation levels, service delivery, and regulation.<sup>271</sup> This leads to community homogeneity as people sort themselves according to the community that best suits their preferences, with a corresponding level of efficiency as externalities are minimized.<sup>272</sup> Central to this model is the assumption that a multiplicity of municipal governments allows for a great deal of choice and that people—referred to by Tiebout as “consumer-voters”—are free to move around to find the best fit.<sup>273</sup>

The public choice model does a poor job of justifying restrictive single-family ordinances. First, the theory is grounded in mobility—it only works if people easily move out of communities that no longer meet their needs. One reason supporters frequently offer for restrictive single-family ordinances, however, is the desire to reduce transience and promote neighborhood stability. People generally transition through different phases of life—single adulthood, married life with children, divorce, empty nesting, retirement, and aging. A person may wish to stay in her community throughout all of these life stages, but may need to live with others in order to make this economically feasible. The notion that a person who is happy where she resides would have to exit her community because it disapproves of her household composition actually forces a transience that might not otherwise exist.

This leads to a related and more significant objection: Restrictive single-family zoning restrictions do not easily map onto the sort of “public goods”—schools, roads, parks, police protection, and parking facilities—that Professor Tiebout’s economic model addresses.<sup>274</sup> The needs and preferences of an unrelated household with respect to these goods can be identical to those of a related household. The “distinction” between the two types of households created by the single-family ordinance may be one without a difference. Some examples might be instructive: A five-member household consisting of a couple and their child plus their divorced friend and her child probably has needs and

---

270. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956).

271. *See id.* at 417.

272. *Id.* at 420–21.

273. *Id.* at 418–19.

274. *See id.* at 418.

preferences similar to those of a household consisting of a married couple and their three children. At the same time, a household consisting of five unrelated college students will have very different needs and preferences from a household consisting of five unrelated elderly widows. The relevant variables here are income, stage of life, and presence of children, not whether the groups are related. Thus, single-family zoning actually *decreases* efficiency by adding an irrelevant variable.

Perhaps, however, the public good in Tiebout's model is actually neighborhoods in which only related people occupy households. In other words, related-household neighborhoods are themselves the good that consumer-voters can decide they prefer.<sup>275</sup> The problem here, of course, is that the people who live in unrelated households are themselves also consumer-voters. Banning them from certain neighborhoods (or whole towns) prevents them from exercising their choices, and therefore acts as a market distortion.

Single-family ordinances fare even worse under the community self-definition/participation rationale for local government legitimacy. This theory is best articulated in the works of Professor Gerald Frug<sup>276</sup> and Professor Frank Michelman.<sup>277</sup> Professor Frug points to local government as the entity best able to maximize citizen involvement and participation in the political process and assist individuals to feel most empowered to participate actively in the basic societal decisions that structure their lives.<sup>278</sup> Professor Michelman describes a "public interest model" in which majority groups come together to express their shared values.<sup>279</sup> Thus, local government, as the smallest unit of government closest to the people, is the most appropriate forum for decisions about community identity and values. In other words, small communities should get to have a say in matters such as the household composition of their members, because this is an important part of their self-definition.

This rationale echoes in some of the defenses of *Belle Terre*. Justice Douglas took particular note of the small size of the community of Belle Terre in his opinion.<sup>280</sup> Professor Radin made the argument explicit, noting that "the case could easily involve property for personhood on both sides. . . . [T]he students argue that their leasehold is personal, and the townspeople argue that their [single-family preference] is personal. It is difficult to choose between these two arguments."<sup>281</sup> And Professor

---

275. Tiebout does recognize that certain noneconomic variables, such as the desire to live near "nice people," may affect people's decisions about where to live. *Id.* at 418 n.12.

276. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

277. Michelman, *supra* note 269, at 149.

278. Frug, *supra* note 276, at 1069.

279. Michelman, *supra* note 269, at 149.

280. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974).

281. Radin, *supra* note 155, at 1012.

Richard Briffault notes that “[*Belle Terre*’s] exclusion of people who practiced an alternative lifestyle was unobjectionable because it was seen as an action similar to that of a family choosing not [to] welcome an unwanted guest into its home.”<sup>282</sup>

Yet while this model may be a satisfactory way of justifying certain local government actions, it fails on its own terms to validate municipal power to enact restrictive single-family ordinances. This is because if it is important for a local government, as the unit of government that is closest to the people, to express its values about household composition, it is just as important (if not far more so) for an even smaller and more personal entity—the individual households of that community—to make those decisions for themselves.

Professor Michelman recognizes this when he points out that “[t]he arguments in favor of endowing community-sized groups with such capacity look, indeed, very like those for creating and protecting a free-choice capacity for household groups.”<sup>283</sup> As Professor Briffault also observed:

The focus of local public policy on home and family and the use of local public powers to advance these private interests lead to an association of the locality with individual autonomy. [Local power is] treated as a right much like the personal right to privacy in one’s home and to make family decisions immune from state interference.<sup>284</sup>

Government actions that invade private aspects of domestic life are no less intrusive when carried out by small municipal entities. And while local governments may be well equipped to address local concerns generally, this does not justify allowing them to dictate issues such as household composition.

#### IV. A LOOK BACKWARD, THE WAY FORWARD, AND CRITICISMS

Restrictive single-family ordinances and the judicial decisions that uphold them, from *Belle Terre* on down, are marked in their lack of analytical rigor. In addition to their reflexive invocation of the police power and their heavy reliance on stereotypes, they are filled with value judgments masquerading as facts about what families look like and why people should live together. As with any statement that contains value judgments, it is important to look at the statement’s context and the biases of the person making it.

---

282. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 383 (1990).

283. Michelman, *supra* note 269, at 196.

284. Briffault, *supra* note 282, at 444–45.



Restrictive single-family ordinances are clearly a product of their time. In the 1950s and 60s, when they proliferated, the nuclear family model represented a majority of American households.<sup>285</sup> This was already breaking down by the time *Belle Terre*, also a product of its time, was decided. The late 1960s and early 1970s were a time of significant social upheaval. Urban unrest, hippy communes, and socialist, antigovernment movements were more prevalent and viewed by many as threats to peaceful, middle class family life.<sup>286</sup> In historical hindsight, this worldview is obvious in *Belle Terre* and many of the decisions that have followed it.

Forty years later, many cities are gentrifying, hippy communes have mostly gone the way of the lava lamp, and socialist movements no longer epitomize an existential threat to American democracy. Today's suburban household is far more likely to worry about subprime mortgage loans and ever-lengthening commutes than having a clothing-optional commune or a militant Chapter of Students for a Democratic Society moving in next door.

At the same time, traditional families no longer comprise the majority of households.<sup>287</sup> Between 1970 and 2012, the percentage of households composed of married couples with children dropped from 40% to 20%.<sup>288</sup> Nontraditional living arrangements are steadily increasing both in absolute numbers and as a percentage of households. According to the most recent Census, in 2010, 18.3 million people lived in a household with someone they were not related to, and one in eight homes contained one or more people not related to the householder.<sup>289</sup>

All of these data confirm what anyone living in the early part of the twenty-first century can see firsthand: American culture has changed in ways that make coresidence increasingly likely for all types of people at all stages of life. The age of first marriage is steadily creeping upwards.<sup>290</sup> This means that people are more likely to live with roommates during young adulthood. A majority of marriages are preceded by a period of cohabitation, and for an increasing number of people cohabitation has replaced marriage. Unmarried childbearing, with or without cohabitation,

285. See Alexander, *supra* note 26, at 1259–60.

286. See *id.* at 1261.

287. HOUSEHOLD CENSUS 2010, *supra* note 256, at 5 tbl.2. (showing that husband–wife family households now make up only 48.4% of households).

288. HOUSEHOLD CENSUS 2012, *supra* note 256, at 1.

289. HOUSEHOLD CENSUS 2010, *supra* note 256, at 2–3. The data indicate that 7.7 million lived with unmarried partners, 5.2 million with housemates or roommates, 3.8 million with “other nonrelatives,” and 1.5 million with a roomer or boarder. *Id.* at 2 tbl.1, 3. By 2012, 7,845,000 households were comprised of cohabiters. HOUSEHOLD CENSUS 2012, *supra* note 256.

290. *Figure MS-2 Median Age at First Marriage: 1890 to Present*, U.S. CENSUS BUREAU, available at <http://www.census.gov/hhes/families/files/graphics/MS-2.pdf> (last visited July 1, 2015).

is at an all-time high and divorce is commonplace.<sup>291</sup> Single or divorced parents may well need or prefer to live with unrelated household members. People are living longer, and older people who wish to “age in place” might require non-related household companions. Recent economic turmoil has created situations in which unrelated people of all ages are forced to live together to make ends meet.<sup>292</sup>

Meanwhile, houses themselves have only been increasing in size. The average floor area and number of bedrooms for newly constructed homes has steadily increased since 1973.<sup>293</sup> As nuclear families shrink while houses continue to grow, overcrowding—the prevention of which proponents so often give as a reason for restrictive single-family zoning—is at an all-time low.<sup>294</sup> The problem, in fact, may soon be a mismatch between people and the housing stock: too many large houses, and too few large traditional families to fill them.

Thus, the trend in American household arrangements is moving steadily away from the nuclear family ideal that gave rise to restrictive single-family ordinances in the first place. At the same time, many of the social conditions, stereotypes, fears, and assumptions that provided the backdrop to *Belle Terre* and its progeny no longer exist. Meanwhile, the Supreme Court has recognized increasingly robust privacy rights in a number of areas, with choice of household companions being one glaring absence.<sup>295</sup>

In sum, *Belle Terre* was a poorly conceived decision from the start, and the intervening four decades have only made it look more legally and factually obsolete. Yet local governments across the country still continue

291. See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 347 (2011) (discussing the increase in births of nonmarital children).

292. See, e.g., Peter Bennett, *Housemate Trend Growing*, L.A. TIMES (Mar. 6, 1994), [http://articles.latimes.com/1994-03-06/realestate/re-30902\\_1\\_potential-housemate/2](http://articles.latimes.com/1994-03-06/realestate/re-30902_1_potential-housemate/2); Mara Lee, *Recession Roommates*, WASH. POST (Nov. 7, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/05/AR2009110505645.html>; Carolyn Said, *Window into Airbnb's Hidden Impact on S.F.*, S.F. CHRON. (Aug. 17, 2009), <http://www.sfchronicle.com/business/item/Window-into-Airbnb-s-hidden-impact-on-S-F-30110.php>; Tripp Whetsell, *Boarder Patrol: Recession Forcing Older New Yorkers to Take in Roommates*, N.Y. DAILY NEWS (Feb. 18, 2010); <http://www.nydailynews.com/life-style/real-estate/boarder-patrol-recession-forcing-older-new-yorkers-roommates-article-1.174731>.

293. FREDERICK J. EGGERS & ALEXANDER J. THACKERAY, *ECONOMETRICA, 32 YEARS OF HOUSING DATA 12–13* (2007) (compiling data for the U.S. Department of Housing and Urban Development Office of Policy Development and Research).

294. *Id.* at 14–15.

295. *Belle Terre's* regressive approach to associational rights was so dramatic that it led one commentator to predict after the case was decided that other attempts to expand privacy rights were sure to fail. See Patricia Fitts Jacobson, Note, *The Collision of Zoning Ordinances and the Constitutional Rights of Privacy and Association: Critique and Prognosis*, 30 CASE W. RES. L. REV. 155, 181 (1979). In fact, the opposite was true, and *Belle Terre* simply remains as an outlier.

to regulate household composition, using *Belle Terre* as their touchstone. In light of this, it is clearly time for the Supreme Court to revisit the issue and to overturn *Belle Terre*. The Court should make a clear statement that the right of intimate association includes the right to choose household companions, and therefore all efforts to regulate internal household composition are suspect and deserving of a high level of scrutiny.

Overturning *Belle Terre* will not leave local governments powerless to zone in ways designed to preserve peaceful, low-density residential neighborhoods.<sup>296</sup> It would simply return the regulatory focus to the use of the building and its structural characteristics.<sup>297</sup> The main purpose of designating a residential structure as a “single-family” home is to distinguish between buildings that contain a single dwelling unit and those that contain more than one. A single dwelling unit simply means a residential unit that is not divided into individual apartments with their own entrances and kitchens.<sup>298</sup> All that matters is that the people share a single dwelling and live in it in a manner that is compatible with residential use (for example, they do not rent out rooms nightly or conduct business out of the home). Numerical occupancy limitations can and should still apply to prevent overcrowding, and other ordinances can be used to regulate parking, noise, property maintenance, and other aspects of the dwelling that might affect the surrounding neighborhood.

This approach gets zoning boards and property inspectors out of the business of inquiring into personal relationships and requires them to use more tailored approaches to addressing neighborhood problems. More importantly, it recognizes that government should play no role in regulating household composition and allows people to structure their living arrangements as they see fit. Nevertheless, there are two central criticisms of this Article’s analysis and conclusions that require response; they come from opposite sides of the discourse—from supporters of single-family zoning laws and from fair housing advocates, who typically find themselves in opposition to such laws.

The first criticism, from supporters of single-family zoning, can be summarized as follows: “Does this mean we have to tolerate the student ghetto?” They argue that a stable, middle-class family-oriented neighborhood can be destroyed by the introduction of even a few rental houses filled with rowdy college students. The houses and yards may not

---

296. This approach would not even prevent governments from taking actions that affect household composition. Instead, it would simply mean that such actions would be subject to a high level of scrutiny.

297. Indeed, there are many jurisdictions that never changed this focus, and have always kept their zoning laws focused on single households rather than trying to define families. 2 RATHKOPF & RATHKOPF, *supra* note 14, § 23:14.

298. *See id.* (noting that “single-housekeeping unit” is often defined as any living arrangement in which there are shared cooking and housekeeping facilities and in which all household members have access to the whole dwelling).

be maintained well; noise, trash, and parking problems are likely to ensue. Existing neighborhood residents may find their property values harmed. They may move out, allowing for more student housing to take their place, and the student ghetto is born. This is not an unrealistic concern. Most college towns probably have at least one of these neighborhoods and most non-student households probably do not want to live anywhere near there.<sup>299</sup>

Yet there is no reason that the elimination of restrictive single-family zoning should mean that communities are helpless in the face of such problems. As discussed above, municipalities can and should continue to enforce numerical occupancy standards to guard against overcrowding. Parking pass systems or reasonable limitations on the number of cars registered to a single address can resolve parking issues. Criminal codes can address noise, litter, and raucous behavior. Often, the real problem is absentee landlords, who fail to maintain their property because they know students are unlikely to complain. In that case, municipalities should rigorously enforce property maintenance codes. If an overabundance of rentals is the problem, then owner-occupancy requirements that limit the percentage of houses in a particular neighborhood that can be rented can control the problem (although such requirements themselves are not without controversy).<sup>300</sup> All of these measures control density and preserve the ambience of the neighborhood without privileging or excluding any particular type of person or relationship.

A second criticism comes from fair housing advocates, who ask “Does the right to choose household companions mean that housemates and roommates are allowed to discriminate?” The short answer is, regretfully, “yes.” The right to freely associate has always existed in tension with civil rights statutes that seek to force associations on unwilling people. To protect a person’s choice of roommates is to give him license to discriminate, because the converse of the right to associate is the right to exclude.<sup>301</sup> Indeed, two recent cases that support the right of association within the home, *Roommate.com* and *Seniors*, presented scenarios in which the goals of the Fair Housing Act were in direct conflict with the right to freely associate.<sup>302</sup>

---

299. This complaint fails to recognize that not all students are the same. Four quiet medical students do not pose the same threat to neighborhood peace as a raucous fraternity house, yet all are affected equally by restrictive single-family zoning. Moreover, some college towns may actually help to create such student ghettos by imposing and enforcing restrictive single-family zoning laws everywhere else, thus confining and concentrating student living in one discrete area.

300. Many jurisdictions may not permit owner-occupancy restrictions, viewing them as impermissible limitations on the users, as opposed to the uses, of property. 2 RATHKOPF & RATHKOPF, *supra* note 14, § 81:4. Of course, this same argument can be, and has been, used to attack restrictive single-family zoning laws as well. See *supra* Section III.C.

301. Inazu, *supra* note 97, at 168.

302. See *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d

As a result, civil rights advocates may view cases in which the right of association trumps the statutory civil right as a loss.<sup>303</sup> This is understandable. Invidious discrimination is hurtful and corrosive, no matter if carried out at a governmental, commercial, or a personal level.<sup>304</sup> Yet the more personal a discriminatory decision is, the stronger the liberty interest that attaches and the less justifiable any government interference will be.<sup>305</sup> Thus, the law may appropriately regulate a person's decisions about who to hire, or rent to, or admit into a school, but it is far less able to reach a person's decision about who to marry, live with, or be friends with.<sup>306</sup> At some point, these decisions start to look like "a private domain with no connection to law."<sup>307</sup>

It is also worth pointing out that the very individuals most likely to benefit from an elimination of single-family zoning laws are those who also benefit from fair housing laws: unmarried couples—gay or straight—who are raising children together; minority racial or ethnic groups; and people with unconventional religious practices. Indeed, fair housing laws have already been used to help some groups—foster families, disabled people, and Latino immigrants—combat the effects of restrictive single-family zoning ordinances.<sup>308</sup>

These two concepts—freedom of association and antidiscrimination—may exist in tension, but there is no reason both cannot be accommodated by appropriately situating the dividing line between the two. *Seniors* and *Roommate.com* correctly locate this limit at the front door. If we view this through the *Roberts* doctrinal lens of intimate association, the size, type, and intimacy of the living arrangement will control whether the state (here, through Fair Housing laws) can interfere with people's choices regarding who they live with. Under this analysis, people living together in a dwelling unit will enjoy an associational right to choose (and thus discriminate in their choice of)

---

1216, 1218 (9th Cir. 2012); *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1032–33 (11th Cir. 1992).

303. See, e.g., Iglesias, *supra* note 209 (critiquing the *Roommate.com* decision as overly broad and an unjustifiable expansion of the right of association that may have negative repercussions on the effectiveness of fair housing laws).

304. See Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1374–79 (2009) (discussing the effects of personal and state-sanctioned discrimination, as well as discrimination in the employment/networking sphere); Matt Zwolinski, *Why Not Regulate Private Discrimination?*, 43 SAN DIEGO L. REV. 1043, 1048–54 (2006) (discussing the harmful effects on victims of commercial and private discrimination).

305. See Emens, *supra* note 304, at 1309–10; see also, e.g., Iglesias, *supra* note 209, at 113–14, 149, 151 (discussing the protected liberty interest in the personal decisions that may attend the selection of a roommate, even where they are discriminatory).

306. See, e.g., Emens, *supra* note 304, at 1309–10; Kenneth L. Shropshire, *Private Race Consciousness*, 1996 DETROIT C.L. MICH. ST. U. L. REV. 629, 629–30.

307. Emens, *supra* note 304, at 1310.

308. *Supra* Section I.D.

living companions. However, apartment buildings or neighborhoods would be too big, nonintimate, and nonexclusive for such a right to apply to the entire building, complex, or neighborhood.

It is important to note that recognizing a right to associate within the home does not mean that the Fair Housing Act or other civil rights laws do not protect roommates and housemates. These laws should still apply to claims that roommates or housemates might have against their landlord or housing provider. Laws that prohibit harassment or intimidation that interferes with a person's right to housing should still apply to roommates and housemates,<sup>309</sup> just as we criminalize domestic violence. The point is that, if the law recognizes a robust right of free association with respect to a person's choices about household composition, fair housing laws that govern the availability of housing would not ordinarily apply to roommates and housemates *vis a vis* one another.

#### CONCLUSION

Ultimately, the message of this Article is a simple one: There is a right of intimate association within the home, and this right cannot be conditioned on any governmental actor's subjective opinion about the value, motivation, or characteristics of the people who seek to invoke this right. For it is the very people who are least likely to win favor in the eyes of a judge or zoning board who are the most in need of protection. Just as those with unpopular messages may most powerfully invoke the right to free speech, people with nonmainstream living arrangements and lifestyles must be able to invoke their right of intimate association.<sup>310</sup> Thus, neither restrictive single-family zoning ordinances nor functional family reforms are constitutional exercises of the state's authority.

---

309. 42 U.S.C. § 3617 (2012) (prohibiting interference with, or coercion or intimidation of, a person exercising his rights under the Fair Housing Act). For a related argument, see generally Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case out of It?*, 61 CASE W. RES. L. REV. 865 (2011).

310. See Wilkinson III & White, *supra* note 177, at 612–13 (“[T]he subjects of lifestyle protection are likely to be persons unable to gain redress through the political process. . . . Obloquy is reserved for those whose tastes are unconventional, whose tongues are thought sharp or vile, and whose dress or behavior seems irregular or shocking. Yet it is just such persons who give a constitution its mettle, and without whom human freedom would be limited to choices of which prevailing majorities approve.”).

