

Burning the House to Roast the Pig Unrelated Individuals and Single Family Zoning's Blood Relation Criterion

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NOTE

"BURNING THE HOUSE TO ROAST THE PIG": UNRELATED INDIVIDUALS AND SINGLE FAMILY ZONING'S BLOOD RELATION CRITERION

Suburbia has become a national ideal.¹ Yet virtually all residential land in many suburban areas has been zoned for the sole use of the traditional "single family."² This has the effect of excluding a significant portion of eligible residents, those who are unrelated but desire to live together. Zoning ordinances which define the family unit in terms of the blood relationship among its members³ and correspondingly limit the use of prime residential land to single families⁴ have

¹ See Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 20-23 (1971) for an evaluation of single family zoning in suburbia chronicling the development of what has become the status quo.

A central feature in this [new] affluence was the single family house situated in suburbia. The substantive content of television . . . demonstrated a suburban bias, while the commercial messages deliberately instilled it. . . . While the media conditioned the appropriate responses, the federal government contributed its share by subsidizing expressways leading out into the suburbs, tilting the income tax in favor of the homeowner, and expediting the availability of mortgage credit. *Id.* at 20 (footnotes omitted).

² See, e.g., Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971). In a survey taken of the entire state of New Jersey it has been shown that in Morris, Middlesex, and Monmouth Counties, 99.5% of all residential land is limited to single family use through zoning, thus effectively creating a suburban exclusionary barrier to urban expansion from New York City. *Id.* at 486-87.

Even after limiting the scope of analysis solely to the area of the "family," a broad range of possible definitions may be found within property case law. See, e.g., *G.M.G. Realty Co. v. Spring*, 191 Misc. 334, 336, 77 N.Y.S.2d 732, 734 (N.Y. City Mun. Ct. 1948) (the "family" consists only of a blood related father, mother, and children); *Stafford v. Village of Sands Point*, 200 Misc. 57, 59, 102 N.Y.S.2d 910, 913 (Sup. Ct. 1951) (the "family" consists of those living together in one house, under the same management, with a common goal); *Boston-Edison Protective Ass'n v. Paulist Fathers, Inc.*, 306 Mich. 253, 256-57, 10 N.W.2d 847, 848 (1943) (a religious association is a "family"); *Oystead v. Shed*, 13 Mass. 520, 523 (1816) (boarders and lodgers are a "family"); *Marino v. Mayor & Council*, 77 N.J. Super. 587, 592-94, 187 A.2d 217, 220-21 (Law Div. 1963) (an unrelated man and woman living together may be a "family").

³ The basic type of zoning ordinance discussed in this Note is one which defines "family" as "one person living alone, or two or more persons related by blood, marriage, or legal adoption" or similarly relies on a nexus with blood relation in defining its "R-1" residential area. *Palo Alto, Cal., Munic. Code § 18.04.210, quoted in Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 909 (N.D. Cal. 1970).

⁴ Even before the widespread implementation of "public" zoning, the "single family" was used as a limiting technique in private restrictive covenants. See, e.g., *Kalb v. Mayer*, 164 App. Div. 577, 150 N.Y.S. 94 (2d Dep't 1914). By the time the Supreme Court first

solidified the exclusionary makeup of suburban America⁵ and have largely precluded the establishment of more pluralistic communities.⁶ Faced today with a nationwide housing crisis⁷ and concerned with the summary and often absolute nature of the exclusion,⁸ courts have begun to challenge tradition and to consider the rights and the needs of the

considered the constitutionality of zoning in the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the typical pattern had already evolved:

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive . . . U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening . . .

Id. at 380.

⁵ The "single family" is only one of the exclusionary techniques employed. Other weapons in the arsenal of the exclusion-minded suburban planner include (1) minimum building size requirements, (2) prohibition of multiple dwellings, (3) restrictions on the number of bedrooms, (4) prohibition of mobile homes, and (5) lot size or lot width requirements. See Williams & Norman, *supra* note 2, at 481, 484. This list is by no means exhaustive. The widespread use of discretionary devices such as variances and special permits achieves the same end by promoting high cost development and consequent economic exclusion. See Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 522 (1971).

Use of these exclusionary devices has largely been accepted by the judiciary. See, e.g., *Fischer v. Township of Bedminster*, 11 N.J. 194, 93 A.2d 478 (1952) (five acre minimum lot size upheld); *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) (minimum building size held to be a reasonable bulk regulation). The Supreme Court of New Jersey has recognized, however, that a single municipality's view of the suburban ideal must be balanced against regional needs.

What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously.

Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 513, 64 A.2d 347, 349-50 (1949).

⁶ See note 142 and accompanying text *infra*.

⁷ One-sixth of America's 66 million housing units are substandard or overcrowded. Many are dilapidated and lack indoor plumbing. About 7.8 million families—one in every eight—cannot afford standard housing. Many of them are backed into city slums, with little hope of escape. In housing racial segregation remains the norm. It exists in cities large and small, in all parts of the country, and cuts across all income levels. It persists regardless of local laws and national policies.

FORD FOUNDATION, *A DECENT PLACE TO LIVE* 3 (1971). See Jackson, *Attacking the Affluent Islands: A Legal Strategy for the 70's*, 1971 URBAN L. ANN. 3.

⁸ See note 2 *supra*. Even if a municipality provides areas for uses, such as apartments, by unrelated people, its R-1 "single family" zone may be more desirable in terms of both locale and facilities. A clear example of this pattern is found in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where the prime residential area contained "single family dwellings, public parks, water towers and reservoirs, [and] suburban and interurban electric railway and passenger stations and rights of way." *Id.* at 380.

"unrelated."⁹ A developing constitutional analysis of the interests of excluded unrelated individuals is revealing the flaws in the traditional single family zoning approach.

I

EFFECTS OF REGULATORY SCHEMES

The multiplicity of criteria historically used to define the "single family"¹⁰ has contributed to the uncertain scope of suburban residential exclusion. It is evident, however, that in barring entry by unrelated individuals into prime residential areas, the "blood relation" element of single family provisions constitutes the most severe restriction to be found in zoning ordinances.¹¹ Although there are variations in legislative definition,¹² suburban zoning ordinances typically limit their R-1 areas to a single family related by "blood, marriage, or adoption."¹³

⁹ See *Brady v. Superior Court*, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1st Dist. 1962); *City of Des Plaines v. Trotter*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970); *Marino v. Mayor & Council*, 77 N.J. Super. 587, 187 A.2d 217 (Law Div. 1963). In invalidating single family zoning ordinances, each of these cases has considered the problems of unrelated individuals residing together.

¹⁰ In addition to blood relation, the following have been utilized as yardsticks to determine whether a living group is a "family": duties of support (*Jaycox v. Brune*, 434 S.W.2d 539, 544 (Mo. 1968)), common goals and objectives (*Stafford v. Village of Sands Point*, 200 Misc. 57, 59, 102 N.Y.S.2d 910, 913 (Sup. Ct. 1951)), the number of individuals in the unit (*City of Takoma Park v. County Bd. of Appeals*, 270 A.2d 772, 775 (Md. 1970)), use of common housekeeping facilities (*Harmon v. City of Peoria*, 373 Ill. 594, 601-02, 27 N.E.2d 525, 528-29 (1940)), control by a single head (*Kiska v. Skrensky*, 145 Conn. 28, 33, 138 A.2d 523, 526 (1958)), and permanence (*Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 911 (N.D. Cal. 1970)).

¹¹ See notes 14-16 and accompanying text *infra*.

¹² In *Town of Ithaca v. Lucente*, 36 App. Div. 2d 560, 317 N.Y.S.2d 679 (3d Dep't 1971), the court considered an ordinance which allowed not only the traditional "blood, marriage, or adoption" family, but also permitted "a group of one or more persons occupying the premises and living as a single housekeeping unit, as distinguished from a group occupying a boarding house, rooming house, lodging house, club, fraternity, hotel or motel." *Id.* at 560-61, 317 N.Y.S.2d at 680-81 (Ithaca, N.Y., Zoning Ordinance). A "single housekeeping unit" thus emerges as another criterion to be considered. See notes 64, 132 & 136 and accompanying text *infra*.

Another type of ordinance leaves the term "family" undefined, thereby ultimately requiring judicial interpretation. Section 22-5 of the zoning regulations of Atherton, California, exemplifies the vagueness of this approach, defining a "single family dwelling" as "[a] detached building designed for or occupied exclusively by one family." *Brady v. Superior Court*, 200 Cal. App. 2d 69, 71, 19 Cal. Rptr. 242, 243 (1st Dist. 1962) (Atherton, Cal., Ordinance 146, § 22-5).

¹³ The Palo Alto, California zoning ordinance, considered in *Palo Alto Tenants Union*

Critical practical problems exist for individuals or groups falling outside these definitional boundaries. The zoning obstacles facing unrelated individuals wishing to live under one roof respect no age barriers or social status,¹⁴ although their impact is often greater on persons of limited means.¹⁵ To the extent that the housing needs of unrelated individuals exceed the narrow limits usually tolerated by the municipal scheme, their choice is often between high density urban life or "illegal" residence in the suburbs.¹⁶ The "unrelated" are denied not only suburban homes, but also the concomitant benefits of prime municipal services and a "greener" life style. The critical issue is whether the plight of unrelated individuals is sufficiently cognizable as a matter of constitutional law to mandate alternative planning approaches in the context of municipal zoning ordinances.

II

THE CONSTITUTIONAL SETTING

The due process clause of the fourteenth amendment has developed as the accepted constitutional vehicle for overriding unreasonable zoning ordinances.¹⁷ Consequently, lower courts have consistently

v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), is typical, with "family" defined as "one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit." *Id.* at 909 (Palo Alto, Cal. Munic. Code § 18.04.210).

¹⁴ Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971) recognized the impact of the single family restriction in New Jersey's resort communities of Belmar and Manasquan:

[T]wo unrelated families of spouses and children cannot share an adequate cottage or house for the summer, nor could a small unrelated group of widows, widowers, older spinsters or bachelors—or even of judges. Likewise barred from seasonal use would be a perfectly respectable group or organization of older persons, unless (under the Belmar ordinance) they were all members of a recognized religious order. . . . Moreover, it appears that a violation would occur . . . if the related family unit had house guests.

Id. at 248, 281 A.2d at 517.

¹⁵ The aged make up the group perhaps most limited by a single family restriction since they are often of moderate means and have need for access to the facilities and comforts which suburbia can provide. See generally 1971 WHITE HOUSE CONFERENCE ON AGING, BACKGROUND AND ISSUES: HOUSING THE ELDERLY.

¹⁶ See Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (1970); Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1st Dist. 1962); City of Des Plaines v. Trotter, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970); Marino v. Mayor & Council, 77 N.J. Super. 587, 187 A.2d 217 (Law Div. 1963). These cases illustrate the possible legal consequences of situations in which individuals opt for the latter course.

¹⁷ This may at least in part be a result of the paucity of Supreme Court guidance on

avoided expressly basing their zoning decisions on grounds other than due process.¹⁸ Yet a marked de facto judicial shift has taken place, with courts reaching due process holdings grounded in first amendment associational¹⁹ or fourteenth amendment equal protection²⁰ rationales. Thus, operating in the shadows of *Euclid v. Ambler Realty Co.*,²¹ some courts have tacitly opted for broad consideration of the associational and egalitarian effects of single family zoning within a due process framework.²²

the matter. The only two cases in which the Court has directly dealt with zoning are *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which sustained zoning as a permissible exercise of the police power, and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), which held that there are reasonable limits on the extent of this regulatory power. Both the challenges to the ordinances and the Court's opinions were framed in terms of due process. Thus, lower courts have for the last four decades been left to deal with zoning within this limited framework. A typical judicial evaluation was promulgated by the New Jersey Supreme Court in *Schmidt v. Board of Adjustment*, 9 N.J. 405, 88 A.2d 607 (1952):

The Fourteenth Amendment in the domain of state action does not operate as a limitation upon the *quantum* of the power, reasonably exercised. It merely conditions the exertion of the power by the demands of due process. And the guaranty of due process requires "only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

Id. at 414, 88 A.2d at 611 (emphasis in original), quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

18 See, e.g., the cases cited in note 9 *supra*, which consider single family blood relation standards vis-à-vis unrelated individuals from a variety of perspectives. All, with the exception of the *Trottner* decision's technical determination of an overextension of legislative power, explicitly based their decisions on due process.

19 For a discussion of the associational effects of the ordinances, see *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 435, 216 N.E.2d 116, 118 (1966); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 251, 253, 281 A.2d 513, 518-19 (1970). The court in *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970), although sustaining the validity of the ordinance, at least directly confronted the associational issue in first amendment terms:

The Court thus reaches the merits. Plaintiffs' argument is that the right of unrelated persons to live together "as a family" in a single dwelling place is an "emanation" of the freedom of association specifically guaranteed by the Bill of Rights.

Id. at 910. But the court was not convinced that an infringement of plaintiffs' constitutional right to freedom of association had been demonstrated. *Id.* at 911.

20 Emphasizing the comparison of permissible and impermissible uses, both the Illinois and New Jersey Supreme Courts have engaged in a rather restrained equal protection analysis. See *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); note 14 *supra*; note 81 *infra*. See generally notes 66-93 and accompanying text *infra*.

The Pennsylvania cases come closer to applying equal protection to zoning, but even they, recognizing the lack of precedent, are finally decided in terms of due process. See *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965); note 77 *infra*.

21 272 U.S. 365 (1926).

22 E.g., *Brady v. Superior Court*, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1st Dist. 1962);

This expansion of constitutional reasoning is quite acceptable given the breadth of the due process clause. Both equal protection and freedom of association are intimately related to substantive due process.²³ Conceptually, due process is the broadest of the three, allowing for the input of a host of factors centering on fairness considerations with reasonableness as the foundation.²⁴ Recent decisions, exemplified by that of the New Jersey Supreme Court in *Kirsch Holding Co. v. Borough of Manasquan*,²⁵ have considered the associational and equal protection rights of unrelated individuals pivotal in holding single family zoning ordinances unconstitutional.²⁶

A. Single Family Zoning and Freedom of Association

One of the most troublesome aspects of the blood relation criterion is its infringement upon a number of associational interests arguably meriting constitutional protection.²⁷ These interests include a broad range of living arrangements, which, if shown to merit associational recognition protected by the first amendment, may preclude summary zoning exclusion without a showing of a compelling state interest.²⁸

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

²³ See *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969) (relation between equal protection and substantive due process); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (equal protection and due process are not mutually exclusive); cf. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1957) (general relation between due process and first amendment rights).

In his dissent in *Adamson v. California*, 332 U.S. 46, 68 (1947), Justice Black stated that the fourteenth amendment fully incorporates the first eight amendments and makes them applicable to the states. Despite the "selective incorporation" approach of the majority of the Supreme Court, time has vindicated Justice Black, with "selective incorporation" becoming almost total incorporation of the Bill of Rights. See Mykkeltvedt, *The Judicial Development of the Fourteenth Amendment's Due Process Clause—Prelude to the Selective Incorporation of the Bill of Rights*, 22 MERCER L. REV. 533, 533 (1971). The process judicially pursued in zoning is better termed "absorption," with the focus on the implicit input of associational and equal protection interests. Given the breadth of the due process clause and its accompanying "reasonableness" criterion (see note 24 and accompanying text *infra*), the standards applicable to the first and fourteenth amendments become inherent in due process, effectuating by a "back door" approach a constitutional theory neglected by precedent.

²⁴ The due process clause has attained independent significance as a "reasonableness test," and, when coupled with the fifth amendment concept of "liberty," it allows for "virtually unlimited judicial development." Mykkeltvedt, *supra* note 23, at 554.

²⁵ 59 N.J. 241, 281 A.2d 513 (1971).

²⁶ See, e.g., *id.* at 248, 281 A.2d at 517.

²⁷ See *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971), where the New Jersey Supreme Court grappled with overly proscriptive effects of single family ordinances. See also note 14 *supra*.

²⁸ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). "[S]tate action which

The scope of first amendment associational protection clearly encompasses political, economic, religious, and cultural groups.²⁹ Although the Supreme Court has frequently recognized the *public* expression of associational rights,³⁰ the parameters of *private* expression are less clear.³¹ Notwithstanding the classic *Griswold v. Connecticut*³² "penumbra where privacy is protected from governmental intrusion,"³³ there is no doubt that municipal zoning may regulate living conditions pursuant to the permissible goals of the police power.³⁴ Whether municipal zoning can accomplish this through overly proscriptive blood relation requirements may be questioned. Although the limits of *Gris-*

may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460-61. Freedom of association may limit the ability of private landowners, as well as municipal authorities, to restrict the uses of land to the single family. Under *Shelley v. Kraemer*, 334 U.S. 1 (1948), judicial enforcement of restrictive covenants may constitute state action restricting freedom of association in violation of the fourteenth amendment. A number of courts have refused to enforce unduly restrictive single family private covenants. *See, e.g., Jones v. Smith*, 241 F. Supp. 913 (D.V.I. 1965); *Neptune Park Ass'n v. Steinberg*, 138 Conn. 357, 84 A.2d 687 (1951); *Boston-Edison Protective Ass'n v. Paulist Fathers, Inc.*, 306 Mich. 253, 10 N.W.2d 847 (1943). *See also Kalb v. Mayer*, 164 App. Div. 577, 150 N.Y.S. 94 (2d Dep't 1914) (pre-zoning discussion of the parameters of negative reciprocal covenants).

²⁹ *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

³⁰ *E.g., Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

³¹ Group activity has been held "undeniably [to] enhance" the "effective advocacy of both public and private points of view." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). *See also Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Douglas, speaking for the Court in *Griswold* (*id.* at 485) cited *Lanza v. New York*, 370 U.S. 139 (1962) (prisons not within zone of privacy protecting conversations engaged therein between brothers from electronic eavesdropping); *Monroe v. Pape*, 365 U.S. 167 (1961) (unreasonable search and seizure under color of state law a cognizable violation of the Civil Rights Act of 1871); *Frank v. Maryland*, 359 U.S. 360 (1959) (city health inspection not such an unwarranted invasion of privacy as to contravene the fourteenth amendment); *Public Util. Comm'n v. Pollack*, 343 U.S. 451 (1952) (transit radio programs on streetcars and buses did not invade constitutional right of privacy of passengers); *Breard v. Alexandria*, 341 U.S. 622 (1951) ("Green River ordinance" held not violative of first amendment freedoms but a legitimate exercise of state police power to safeguard the right of privacy); and *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (discriminatory sterilization violates the equal protection clause), as indicative of the controversy extant in the field of private associational rights.

³² 381 U.S. 479 (1965).

³³ *Id.* at 483.

³⁴ After the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), there could no longer be any doubt that a municipality could zone to ensure the public health, safety, morals, and general welfare. Moreover, the living conditions of all suburban groups, including the traditional family, are regulated by a statutory matrix composed of building and housing codes, bulk regulations, and zoning ordinances. *See notes 100, 143-47 infra.*

wold and its notions of family privacy are not yet settled,³⁵ its prohibition of sweeping and excessive curtailment of associational freedom is clear: "[A] 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"³⁶

In *Palo Alto Tenants Union v. Morgan*,³⁷ the District Court for the Northern District of California squarely questioned whether *Griswold's* guarantee of family privacy extended to "alternate," voluntary families.³⁸ Although acknowledging the right of individuals to engage in concerted action to achieve political or social goals,³⁹ the court never-

³⁵ The privacy concept of *Griswold* has recently been extended far beyond the marital relationship. See *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225 (1970) (statute compelling public officials to disclose financial interests not related to their official duties violates right of privacy); *People v. Belous*, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1967), cert. denied, 397 U.S. 915 (1970) (fundamental right of women to choose whether or not to bear children falls within the scope of privacy related to marriage, the family, and sex).

Perhaps the most significant extension of *Griswold* is the Supreme Court's recent decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In that case the Court, relying chiefly on the equal protection clause, extended *Griswold's* right of privacy to unmarried as well as married individuals:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. 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 heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. 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.

Id. at 453 (emphasis in original). This type of rationale questions the very foundation of ordinances which support associational recognition solely on the basis of the blood relation classification. It is clear that associational recognition now goes beyond the marital relationship in the area of privacy.

³⁶ 381 U.S. 479, 485 (1965), quoting *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964). See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

³⁷ 321 F. Supp. 908 (N.D. Cal. 1970). Plaintiffs sued on behalf of themselves and all other groups of more than four unrelated persons who, contrary to the terms of the Palo Alto zoning ordinance, inhabited dwellings in R-1 neighborhoods and lived "together as families, treating themselves and treated by others as family units." *Id.* at 909. They sought to enjoin the enforcement of the ordinance on the grounds that the right of unrelated persons to live together "as a family" in a single dwelling place is an "emanation" of the freedom of association specifically guaranteed by the Bill of Rights. *Id.* at 910.

³⁸ *Id.* at 911-12. For an excellent and systematic treatment of the rights of "voluntary" communal families, see Comment, *All in the "Family": Legal Problems of Communes*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393 (1972). The constitutional arguments for the recognition of voluntary families are discussed *id.* at 396-416.

³⁹ 321 F. Supp. at 911. The district court described freedom of association as "the

theless upheld the exclusion of a communal group under an ordinance limiting "family" to "one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit."⁴⁰

This court's narrow interpretation of the applicable scope of associational freedom is subject to critical analysis on several grounds.⁴¹ Its dictum that there are many long recognized values in the blood related family which are absent in the "voluntary family" of communal living groups⁴² is extremely controversial. The court stated:

The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which . . . is often compulsory. . . . [I]t has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings.⁴³

right to marry and raise children; to worship God—or not to worship Him—in or out of religious congregation; and to engage in concerted action to achieve political or social goals." *Id.*

⁴⁰ *Id.* at 909 (Palo Alto, Cal., Munic. Code § 18.04.210).

⁴¹ The admission of religious communes and associations into suburban "R-1" areas is an already well established "exception." In *Boston-Edison Protective Ass'n v. Paulist Fathers, Inc.*, 306 Mich. 253, 10 N.W.2d 847 (1943), the Michigan Supreme Court determined that priests and servants living together were a "family" in the context of a negative reciprocal covenant. *Accord*, *Missionaries v. Village of Whitefish Bay*, 267 Wis. 609, 66 N.W.2d 627 (1954). *But see* *Simons v. Work of God Corp.*, 36 Ill. App. 2d 199, 183 N.E.2d 729 (1962). Some municipalities make specific exceptions for religions orders in zoning ordinances. *See, e.g.*, *City of Des Plaines v. Trottnier*, 34 Ill. 2d 432, 435-36, 216 N.E.2d 116, 118 (1966) (Des Plaines, Ill.), *Zoning Ordinance*; *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 247, 281 A.2d 513, 516 (1970) (Belmar, N.J., *Zoning Ordinance* §§ 19-2.33, 19-3.4).

A second ground for disagreement with the court in *Palo Alto Tenants Union* may be found in its application of pertinent associational criteria as promulgated by the Supreme Court. In rejecting the freedom of association argument, the district court applied its own standards, stating that the fluctuating membership of a commune is without "legal obligations of support or cohabitation." 321 F. Supp. at 911. Neither of these factors has been identified as an essential prerequisite to constitutional associational recognition by the Supreme Court. The Court has weighed freedom of expression and association against a number of factors, including (1) national security (*United States v. Robel*, 389 U.S. 258 (1967)), (2) the administration of justice (*Wood v. Georgia*, 370 U.S. 375 (1962)), (3) the preservation of local law and order (*Kunz v. New York*, 340 U.S. 290 (1951)), (4) deference to an individual state's policy (*Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957)), (5) the right of privacy (*Time, Inc. v. Hill*, 385 U.S. 374 (1967)), and (6) standards of decency and morality (*Ginzburg v. United States*, 383 U.S. 463 (1966)). The absence of formal stability in membership and of legal obligations found in the traditional blood related family would not seem to merit status as a competing factor capable of offsetting recognition of associational rights.

⁴² 321 F. Supp. at 911. Both the court and, apparently, the plaintiffs dwelt less on the breadth of first amendment associational rights than on a qualitative comparison of the traditional family and the commune. *Id.*

⁴³ *Id.*

A more penetrating examination of alternate living arrangements reveals that they do not merit such summary rejection. The commune, for instance, is *potentially* capable of fulfilling each of the familial functions identified by the court. Communal living may feasibly restore some of the family's importance as an economic unit;⁴⁴ serve as a total life experience for the perpetuation of religious values;⁴⁵ develop alternative methods of child care and educational innovations;⁴⁶ implement equality of the sexes;⁴⁷ and provide a framework for the emotional fulfillment of its members and a viable alternative social experience in an urbanized, competitive society.⁴⁸ Moreover, perhaps the greatest value of the commune to our society is its creation of a useful social workshop, an experiment promoting reevaluation and improvement of the traditional family.⁴⁹

⁴⁴ The true commune is typified by common ownership of property with economic success dependent upon a common effort of all members in the larger extended "family." See R. HINE, *CALIFORNIA'S UTOPIAN COLONIES* 6 (1953). In 1874 the wealth of established communes in the United States was estimated at \$12,000,000. C. NORDHOFF, *THE COMMUNISTIC SOCIETIES OF THE UNITED STATES* 386 (1875). But wealth is neither a goal nor a premise of today's rural communal movement which espouses a rejection of the "cash nexus" between people and seeks sharing and self-sufficiency of the communal group as a goal. See generally W. HEDGEPEETH, *THE ALTERNATIVE* (1970).

⁴⁵ Traditionally, religion has played a major role in the development of the alternative communal family. See R. HINE, *supra* note 44, at 5. See also W. HEDGEPEETH, *supra* note 44, at 28, for an indication of the importance of "religion" to the cohesiveness of the less stable urban commune.

⁴⁶ An example is the experience of the Israeli kibbutz. See M. SPIRO, *CHILDREN OF THE KIBBUTZ* 3-24, 281-315 (1958).

The Kibbutz is a child-oriented community, par excellence. In observing parental behavior, and from interviews with them, one cannot escape the conclusion that children are prized above all else, and that no sacrifice is too great to make for them.

Id. at 49. Education in the kibbutz is collective, with children living in nurseries from the age of four or five days, organized into small peer groups, and raised by teachers rather than their parents. *Id.* at 8-9. See also *CHILDREN IN COLLECTIVES: CHILDREARING AIMS AND PRACTICES IN THE KIBBUTZ* xv-xvi, 4, 148, 317 (P. Neubauer ed. 1965).

⁴⁷ See W. HEDGEPEETH, *supra* note 44, at 185; cf. *CHILDREN IN COLLECTIVES*, *supra* note 46, at 4; M. SPIRO, *supra* note 46, at 6-7, 16.

⁴⁸ See G. HILLERY, *COMMUNAL ORGANIZATIONS: A STUDY OF LOCAL SOCIETIES* 122-23, 287-88 (1968). Although Hillery recognizes only a minimal disorganization of the traditional family in cities (limited chiefly to a stripping away of its nonessential elements), he sees the "extended family," a communal-type larger organization, as a more effective device for rendering mutual aid in the city of today. *Id.* See also W. HEDGEPEETH, *supra* note 44, at 122.

Another authority has promulgated the idea of small "intentional communities" on the model of utopian colonies as a total approach toward obtaining a superior human environment. See P. MARKS, *A NEW COMMUNITY—FORMAT FOR HEALTH, CONTENTMENT, SECURITY* 25-75 (1969).

⁴⁹ See generally *THE FAMILY AND CHANGE* (J. Edwards ed. 1969) for varied discussions of the directions in the evolution of family life and delineations of the current pressures on the family. The demands for recognition of more flexible life styles are made obvious

The voluntary family is only one of many potential living arrangements composed of unrelated individuals. An analysis of other groups possessing far fewer associational qualities than the commune indicates that the *Palo Alto* rationale cannot be considered determinative of the issue. In *City of Des Plaines v. Trottner*,⁵⁰ the Illinois Supreme Court invalidated a zoning ordinance similar to that involved in *Palo Alto*.⁵¹ Utilizing first amendment considerations, the court concluded that protection of associational rights proscribes both the methodology used by the *Palo Alto* court and the enforcement of that form of municipal regulation.⁵² Zoning ordinances which "penetrate so deeply . . . into the internal composition of a single housekeeping unit"⁵³ were held to be overextensions of the police power.

Citing *Trottner* with approval, the New Jersey Supreme Court decisively rejected the single family blood relation criterion in *Kirsch*

by social reality. "Trial marriages," for example, have become increasingly popular; a large number of the young are seeking out personal relationships beyond the scope of present legal cognizance. See N.Y. Times, Aug. 29, 1972, at 38, col. 1.

Although many communes will possess only a few of the ideal qualities mentioned (see text accompanying notes 44-48 *supra*), this type of comparative analysis dealing in "potentials" is precisely that used by the *Palo Alto Tenants Union* court in lauding the traditional family. Federal District Court Judge Wollenberg entered into an openly sociological evaluation in his conclusory discussion of the traditional family and communes:

The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. . . .

[On the other hand,] communal living groups represented by plaintiffs share few of the above characteristics. They are voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation. They are in no way subject to the State's vast body of domestic relations law. They do not have the biological links which characterize most families. Emotional ties between members may exist, but this is true of members of many groups. . . . [T]he communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs.

321 F. Supp. at 911.

⁵⁰ 34 Ill. 2d 432, 216 N.E.2d 116 (1970).

⁵¹ The invalidated zoning ordinance defined "family" as consisting of one or more persons each related to the other by blood (or adoption or marriage), together with such relatives' respective spouses, who are living together in a single dwelling and maintaining a common household. A "family" includes any domestic servants and not more than one gratuitous guest residing with said "family".

Id. at 433-34, 216 N.E.2d at 117 (Des Plaines, Ill., Zoning Ordinance). Compare text accompanying note 40 *supra*. The Illinois Supreme Court upheld the right of four unrelated young men to live together as a single housekeeping unit. *Id.* at 437-38, 216 N.E.2d at 119-20.

⁵² *Id.*

⁵³ *Id.* at 438, 216 N.E.2d at 120. The Illinois Supreme Court specifically condemned the municipal usurpation of undelegated power in the absence of appropriate state enabling legislation. *Id.*

Holding Co. v. Borough of Manasquan.⁵⁴ Whereas *Trottner* dealt with unrelated individuals residing together for strictly economic purposes,⁵⁵ *Kirsch* considered various resort rental situations.⁵⁶ Neither factual setting possessed the obvious associational characteristics of the communal family. Nevertheless, both decisions emphasized the privacy of the "single housekeeping unit"⁵⁷ as a separate and distinct associational entity, the parameters of which go far beyond the limits of the consanguineous family. The New Jersey approach stresses the emerging right of "unrelated people in reasonable number to have recourse to common housekeeping facilities in circumstances free of detriment to the general health, safety, and welfare."⁵⁸

Such sweeping authority protecting living arrangements with only tenuous associational interests would seem to imply that freedom of association might altogether preclude the use of blood relation standards in municipal zoning.⁵⁹ Although the force of these holdings lends

⁵⁴ 59 N.J. 241, 281 A.2d 513 (1971). Justice Hall, writing the opinion of the court, struck down the ordinances of Belmar and Manasquan, New Jersey. The Belmar ordinance defined a family as:

a. One or more persons related by blood or marriage occupying a dwelling unit and living as a single, nonprofit housekeeping unit.

b. A collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct domestic character, and cooking as a single housekeeping unit. This definition shall not include any society, club, fraternity, sorority, association, lodge, combine, federation, group, coterie, or organization, which is not a recognized religious order, nor include a group of individuals whose association is temporary and resort-seasonal in character or nature.

Id. at 247, 281 A.2d at 516 (Belmar, N.J., Zoning Ordinance § 19-2.33). The Manasquan and Belmar ordinances were identical except for the former's inclusion of maids, servants, and employees as members of the "family." *Id.*

The court also cited *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970), with approval. In that case the Margate City ordinance defined a single family as "one or more persons related by blood, marriage or adoption or not more than two unrelated persons occupying a dwelling unit as a single non-profit housekeeping unit." *Id.* at 342, 271 A.2d at 430 (Margate City, N.J., Zoning Ordinance).

⁵⁵ See notes 50-53 and accompanying text *supra*.

⁵⁶ See notes 14 & 54 *supra*.

⁵⁷ Cf. notes 64, 132 & 136 and accompanying text *infra*.

⁵⁸ *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 349, 271 A.2d 430, 434 (App. Div. 1970).

⁵⁹ Both the *Kirsch* and *Trottner* holdings are phrased in broad constitutional terms, although the limits of such application await delineation. The *Kirsch* decision has already begun to take effect in New Jersey. In *J.D. Constr. Corp. v. Board of Adjustment*, 119 N.J. Super. 140, 290 A.2d 452 (Law Div. 1972), the court invalidated an ordinance that limited the number of apartment units to not more than 15% of the total number of single family residences. The court found that the ordinance "clearly does not fulfill any of the purposes of zoning . . . and fails to set forth sufficient standards to govern its application." *Id.* at 150, 290 A.2d at 458. The California District Court of Appeals, however, in *Brady v.*

itself to a general invalidation of single family ordinances because of unconstitutional overbreadth or vagueness,⁶⁰ such a result would create chaos in the area of municipal zoning by leaving to legislatures the task of reenacting more acceptable ordinances, without providing comprehensive guidelines.⁶¹ Supreme Court language protecting the right "to engage in association for the advancement of beliefs and ideas"⁶² scarcely provides a definitive test and reflects the lack of judicial certainty concerning the limits of protected *private* association.⁶³ Similarly, the judiciary has not yet promulgated specific criteria to define the proposed new "single housekeeping unit."⁶⁴ Standards other than blood relation traditionally used in defining "family," coupled with the historically protected interests of zoning such as the welfare of children,⁶⁵ may often be helpful in a case by case analysis. But the broader effect of the *Trottner* and *Kirsch* decisions remains undiluted; by protecting living arrangements with minimal associational contacts between members and by emphasizing the right of unrelated individuals to reside together, they have contributed to a growing argument for flexibility in, and corresponding legislative reform of, single family suburban zoning.

Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1st Dist. 1962), chose to sidestep the dilemma created by numerous single family zoning ordinances in its jurisdiction by reinterpreting "family."

⁶⁰ The courts in both *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970), and *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971), used the "unconstitutionally overbroad" technique within a due process context to invalidate single family ordinances. Cf. *NAACP v. Button*, 371 U.S. 415, 433 (1963): "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." See also *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Shelton v. Tucker*, 364 U.S. 479 (1960); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

⁶¹ Cf. Note, *Constitutional Law—Due Process—Zoning—Suburban Township Ordinance Which Does Not Provide for Apartments as Permissible Residential Use Violates Due Process*, 23 ALA. L. REV. 157, 167 (1970), criticizing the piecemeal judicial approach to the zoning problem.

⁶² *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

⁶³ See notes 30-31 and accompanying text *supra*.

⁶⁴ In *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966), the housekeeping unit was composed of four young unrelated men, who had rented the premises for one year. Other than holding that ordinances which "penetrate so deeply" into the composition of the single housekeeping unit were not authorized by the state enabling legislation (*id.* at 438, 216 N.E.2d at 120), the Illinois Supreme Court provided few definitional clues. There are, however, obvious outer limits to even so vague a test. The weight of authority rejects the argument that fraternities, sororities, and other social clubs deserve associational recognition as a family. See Annot., 25 A.L.R.3d 921 (1969).

⁶⁵ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391, 394 (1926).

B. *Single Family Zoning and Equal Protection*

Although single family zoning ordinances place no limit on the number of blood related individuals able to live in a single family residence, they generally either prohibit groups of unrelated individuals from living in the same area or set a strict numerical ceiling on such living arrangements.⁶⁶ The same courts that have grappled with the first amendment implications of R-1 zoning have also realized that this discrimination, without further justification, inherently conflicts with the equal protection of the laws.⁶⁷

The basic equal protection test demands that an ordinance bear a reasonable relation to a legitimate governmental objective to justify the classification which it has created.⁶⁸ The *Trottner*, *Kirsch*, and *Palo Alto Tenants Union* courts confronted ordinances which prima facie prejudiced unrelated potential residents while favoring members of traditional single family units.⁶⁹ Although reaching different results in assessing the validity of this classification,⁷⁰ all evaluated the effects of the municipal legislation in the context of its relation, or lack thereof, to a legitimate governmental objective.⁷¹

A stricter test of equal protection has also evolved: if the classifi-

⁶⁶ See, e.g., notes 13, 51 & 54 *supra*. See also *Brady v. Superior Court*, 200 Cal. App. 2d 69, 80 n.3, 19 Cal. Rptr. 242, 249 n.3 (1st Dist. 1962) for a survey of California zoning ordinances.

⁶⁷ See notes 86-88 and accompanying text *infra*; cf. text accompanying notes 75-77 *infra*.

⁶⁸ See *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Tigner v. Texas*, 310 U.S. 141 (1940). See also Note, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971); Note, *Constitutional Law—Equal Protection—Zoning—Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339 (1970).

There is, of course, a strong presumption in favor of the ordinance's validity. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (emphasis added); see *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

⁶⁹ See notes 13, 51 & 54 *supra*.

⁷⁰ In *Trottner*, the Illinois Supreme Court invalidated the ordinance as an over-extension of local zoning power in the absence of express enabling legislation from the Illinois General Assembly. 34 Ill. 2d at 438, 216 N.E.2d at 120. In more specific constitutional terms, the New Jersey Supreme Court in *Kirsch* overturned the municipal ordinances of Belmar and Manasquan as overly proscriptive violations of due process. 59 N.J. at 251-52, 281 A.2d at 518. The U.S. District Court in *Palo Alto Tenants Union*, on the other hand, sustained the validity of Palo Alto's single family ordinance. 321 F. Supp. at 912.

⁷¹ *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 912 (N.D. Cal. 1970); *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 437, 216 N.E.2d 116, 119 (1966); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 251, 281 A.2d 513, 518 (1970).

cation is "suspect" on its face,⁷² or violates a fundamental interest,⁷³ the statute must be supported by the demonstration of a compelling state interest.⁷⁴ Judicial orientation has leaned increasingly towards examining the *effect* rather than the possibly permissible legislative *intent* of questioned ordinances.⁷⁵ The Supreme Court has applied the compelling state interest test to de facto economic classifications,⁷⁶ and at least one jurisdiction has moved in the direction of overt application of equal protection to the economic aspects of exclusionary zoning.⁷⁷

The exclusionary effects of blood related zoning are patent. Its blanket prohibition encompasses a wide variety of innocuous property uses by unrelated individuals⁷⁸ and ignores both regional housing needs and adverse economic implications affecting both property owners⁷⁹ and potential users.⁸⁰ This indiscriminate elimination of an entire spectrum of living arrangements provided both the Illinois and

⁷² See, e.g., *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (miscegenation statute's racial orientation was prima facie "suspect").

⁷³ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (the right to travel).

⁷⁴ See Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 767-80 (1969), for a characterization of the traditional doctrine of equal protection (rationality as the test of the validity of the legislation) as the "older" test with the compelling state interest criterion used as the "newer" test.

⁷⁵ See Note, *supra* note 68, 56 CORNELL L. REV. at 351-52.

⁷⁶ The equal protection clause has been applied to strike down the imprisonment of indigents to work off fines (*Williams v. Illinois*, 399 U.S. 235 (1970)), transcript fees as a prerequisite to appeal (*Griffin v. Illinois*, 351 U.S. 12 (1956)), and poll taxes (*Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)). See Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970). *But see* note 92 *infra*.

⁷⁷ The Pennsylvania Supreme Court has gone far in recognizing the economic aspects of regional housing needs. See *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965). While these cases were decided on due process grounds, the consideration of regional needs in both lends support to an equal protection analysis—the needs of residents of a municipality balanced against the needs of less wealthy non-residents. See note 80 and accompanying text *infra*. See also Aloï & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9, 18-21, suggesting that both *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), and *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970), reveal a judicial recognition of the socio-economic equal protection aspects of urban renewal and zoning. *But see* *James v. Valtierra*, 402 U.S. 137 (1971); note 92 *infra*.

⁷⁸ See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 248-49, 281 A.2d 513, 517 (1971).

⁷⁹ See notes 105-10 and accompanying text *infra*.

⁸⁰ Suburban land values have in some cases increased at a rate of fifteen percent a year. Inevitably the price of suburban land escapes the capacity of the lower orders to purchase it, because in no event is their purchasing power increasing at the same scale . . . [T]his escalation of land values must in and of itself price more and more people out of the market.

Roberts, *supra* note 1, at 41 (footnotes omitted).

New Jersey Supreme Courts with grounds for holding such ordinances unconstitutionally overbroad.⁸¹ As a standard, "single family, blood related" markedly fails to provide the precise guidelines necessary to differentiate harmful from permissible associational uses.⁸²

Against these observations, single family zoning may arguably effect positive results by ostensibly propagating and protecting the traditional family as a social unit.⁸³ Yet this speculative accomplishment is constitutionally unimportant in the absence of a showing that reasonable uses by unrelated individuals not inimical to the "general welfare" would threaten the traditional family, or that the blood relation standard itself bears an intrinsic relation to governmental objectives sufficient to overcome its exclusionary effects. While this question merits fuller discussion in a due process context,⁸⁴ it is significant that the courts in both *Kirsch* and *Trottnor* consider legitimate uses by unrelated individuals compatible with the residential future of the traditional family.⁸⁵

A comprehensive range of first amendment associational interests,

⁸¹ The *Trottnor* decision was phrased in terms of the unreasonable "penetration" into individual living arrangements, which, if within the scope of municipal power, would "generate severe constitutional questions." 34 Ill. 2d at 438, 216 N.E.2d at 120. The New Jersey Supreme Court in *Kirsch* emphasized the sweeping excessiveness of the ordinance, which, in light of its explicit prohibitory sections, "became at least ambiguous and probably inconsistent." 59 N.J. at 248-49, 281 A.2d at 517.

⁸² See *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 251-52, 281 A.2d 513, 518-19 (1971).

⁸³ In *Palo Alto Tenants Union*, the court stressed this theme, particularly emphasizing the economic "threat" which would be posed by a more pluralistic neighborhood policy:

Many older neighborhoods have large, once-distinguished town houses which are not owner occupied. Often owners find it more profitable to rent these dwellings, not to single families, but to large groups of unrelated persons with independent sources of income. Such groups are able to pay, collectively, far more in rent than can traditional families with one, or at best, two, wage earners. Thus the rent structure of a whole neighborhood may be affected by opening R-1 zones to large, unrelated living groups. As the rent and property value structure of the neighborhood is changed, single families move out, and the character of the area is altered.

321 F. Supp. at 912-13. Compare notes 105-14 and accompanying text *infra*.

⁸⁴ See notes 116-27 and accompanying text *infra*.

⁸⁵ In *Trottnor*, Justice Schaefer, writing for the Illinois Supreme Court, described several such legitimate uses in his discussion of the proscriptive effects of the zoning ordinance:

[I]f the four tenants in this case were cousins, no matter how distant, or if two of them were servants and one was a gratuitous guest, the same four individuals could live in the same home in an identical manner. School teachers who might choose to live together are prohibited by the ordinance from doing so, and a widow whose grown-up children have established homes of their own can not take in a friend who would share the expenses of the establishment

⁸⁴ Ill. 2d at 435, 216 N.E.2d at 118. The New Jersey Supreme Court in *Kirsch* forcefully used parallel examples in illustrating compatible uses. See note 14 *supra*.

the expression of which is either totally proscribed or drastically limited by the burdens of single family zoning schemes, may also submit this form of municipal regulation to the closer scrutiny of the compelling state interest test.⁸⁶ Apparently weighing the merits of this type of single family ordinance under the more rigid standard, the courts in *Trottner* and *Kirsch* emphasized the equal protection consequences of such legislation.⁸⁷ Rejecting municipal arguments to the contrary,⁸⁸ both decisions found no interest sufficiently compelling to overcome the ordinances' deletion of an entire associational class from their respective communities.⁸⁹

⁸⁶ "[A]ny classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1968) (emphasis in original). In *Dunn v. Blumstein*, 405 U.S. 330 (1971), the Court struck down Tennessee's durational residence requirements for voting registration under the compelling state interest test because of interference with both the right to vote and the right to travel.

Although many municipalities do not totally bar uses by unrelated individuals, their preclusion from prime residential areas may have a "chilling" effect on the expression of their first amendment associational rights. Moreover, certain alternative living arrangements may qualify for constitutional first amendment recognition under either the "political, economic, religious or cultural" criteria for public association (see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)) or the less specifically defined standards of private association expressed in *Griswold*. See notes 31-36 *supra*.

⁸⁷ See note 75 and accompanying text *supra*. In *Trottner*, the court used a comparative analysis to illustrate the flaws in the municipal regulation; four cousins could live together whereas four friends could not. 34 Ill. 2d 432, 435, 216 N.E.2d 116, 118 (1966).

In *Kirsch*, the court based its decision on the legislative ostracism inherent in such ordinances, and it explicitly noted that any number of unrelated individuals, regardless of their propriety, could not make use of the same land as an equal number of those possessing the element of blood relation. 59 N.J. at 252, 281 A.2d at 518-19.

In *Brady v. Superior Court*, 200 Cal. App. 2d 69, 72, 19 Cal. Rptr. 242, 243 (1st Dist. 1962), the court, cognizant of the equal protection dilemma, pursued an alternative course by interpreting the ordinance's bare term "family" in such a way as to allow unrelated individuals to live together. See note 132 *infra*.

⁸⁸ In *Trottner*, the plaintiff municipality argued that single family zoning prevented overcrowding of one-family housing and kept out transients who caused property to depreciate in value. 34 Ill. 2d at 437, 216 N.E.2d at 119.

In *Kirsch*, two seashore municipalities argued that such zoning was necessary to keep out raucous groups of young adults who rented summer homes and annoyed neighbors with "excessive noise at all hours, wild parties, intoxication, acts of immorality, lewd and lascivious conduct and traffic and parking congestion." 59 N.J. at 245, 281 A.2d at 515.

⁸⁹ Another possible "fundamental interest" which may subject single family zoning to the more stringent test is a suggested ninth amendment right to housing derived from Justice Goldberg's discussion of implicit rights in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (concurring opinion). See *Aloi & Goldberg, supra* note 77, at 34-35; *Sager, supra* note 74, at 790; Note, *supra* note 68, 69 MICH. L. REV. at 350. This argument is buttressed by Supreme Court concern for housing, as well as racial equality, exemplified in *Jones v. Alfred Mayer Co.* (392 U.S. 409 (1968)), *Reitman v. Mulkey* (387 U.S. 369 (1967)), and *Shelley v. Kraemer* (334 U.S. 1 (1948)).

Viewed in a wider perspective, however, the equal protection concept is of limited importance to those who would challenge single family zoning's criteria. Although the Pennsylvania Supreme Court has gravitated towards adapting equal protection to the difficult questions of zoning,⁹⁰ the doctrine remains most effective in a racial context, since the Supreme Court's decision in *James v. Valtierra*⁹¹ severely inhibits the possibility of its future expansion into the economic or social spheres.⁹² Perhaps the greatest value of the equal protection concept is that it calls attention to the discrimination inherent in the single family classification. A comparison of the situations of similar individuals, who differ only in the presence or absence of blood relation to other members of a group, reveals an anomalous regulatory pattern in which one person has legal access to the suburban "ideal"⁹³ while another is excluded because of an over-simplified criterion.

C. *Single Family Zoning and Due Process*

*Village of Euclid v. Ambler Realty Co.*⁹⁴ and *Nectow v. City of Cambridge*⁹⁵ established the due process parameters of permissible zoning legislation: the ordinance in question must have a "foundation in reason and [bear a] substantial relation to the public health, the public morals, the public safety or the public welfare in its proper

⁹⁰ See note 77 *supra*.

⁹¹ 402 U.S. 137 (1971).

⁹² In the field of public housing, at least, the Supreme Court has apparently drawn the equal protection line. In *Valtierra*, the Court, reversing the district court, held that an article of the California constitution providing for mandatory referenda for low-cost housing did not violate the fourteenth amendment's equal protection clause. This decision gains additional impetus from the Court's prior decision in *Hunter v. Erickson*, 393 U.S. 385 (1969), holding a provision in a city charter to be an unconstitutional classification based on race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election. The Court distinguished *Hunter* by limiting it to classifications placing "special burdens on racial minorities" while refusing to extend it to economic minorities. 402 U.S. at 140-41. Thus, the type of interest infringed, rather than the economic classifications involved, is now crucial.

Nevertheless, the emerging right of unrelated individuals to reside as a new entity—the "single housekeeping unit"—may merit increased future recognition, particularly in those jurisdictions where the regional crush of housing needs squarely confronts the realities of single family suburbia. "It is conceivable that this [judicial] awareness [of regional housing demands] could take the form of an extension of the close-scrutiny test to snob-zoning laws." Note, *supra* note 68, 69 MICH. L. REV. at 350.

⁹³ See generally Roberts, *supra* note 1, for a not altogether enthusiastic look at the "suburban bias."

⁹⁴ 272 U.S. 365 (1926).

⁹⁵ 277 U.S. 183 (1928).

sense."⁹⁶ This standard, coupled with an understanding of associational and equal protection elements in the reasonableness approach of substantive due process, has served as a useful test for the constitutionality of single family zoning. Justice Schaefer, writing for a unanimous court in *City of Des Plaines v. Trottner*,⁹⁷ discussed the unreasonableness of single family standards in light of the permissible zoning objective of limiting intensity of land use:

Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the "respective spouses" of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the size of family units.⁹⁸

The Illinois Supreme Court directly refutes the later argument in *Palo Alto Tenants Union* that the transient qualities of unrelated groups would adversely affect neighborhood stability.⁹⁹

There are excellent policy reasons for regulation of the intensity of land use: to avoid overcrowding and congestion; to provide open land on residential lots; to space buildings adequately; and to prevent overloading of street and transit services, schools, parks, and other community facilities.¹⁰⁰ But while single family zoning possesses the appeal of tradition, it lacks concrete regulatory force in an area which so intimately affects health, safety, and general welfare.¹⁰¹ The American family does have a comparatively small "average" size,¹⁰² but the exis-

⁹⁶ *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928), quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Although these ingredients of the due process "reasonableness" test lack inherent specificity and consequently depend on evolving judicial construction for their definition, they nevertheless have served as a useful framework for the determination of legitimate exercises of the police power through zoning. But the breadth of this framework subjects the due process test to almost unlimited judicial expansion. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954), for the proposition that the "public welfare" encompasses the aesthetic aims of urban renewal, justifying the condemnation of a structurally sound and sanitary building to achieve a better balanced and more attractive community after slums had been cleared.

⁹⁷ 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

⁹⁸ *Id.* at 438, 216 N.E.2d at 119.

⁹⁹ *Id.* at 437-38, 216 N.E.2d at 119; see note 108 *infra*.

¹⁰⁰ CITY PLANNING COMM'N, REZONING NEW YORK CITY 20-21 (1959).

¹⁰¹ See notes 97-99 and accompanying text *supra*; notes 102-27 and accompanying text *infra*.

¹⁰² The American "family," defined as "a group of two or more persons related by blood, marriage, or adoption and residing together in a household" (U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 3), has an average size of 3.62 members. *Id.* at 36. Interestingly, the American "household," de-

tence of large traditional families or even larger extended families¹⁰³ calls into question the consistency of an argument opposed to unrelated individuals for reasons of unit density.¹⁰⁴

Economic considerations, often a salient factor in traditional due process challenges to zoning,¹⁰⁵ also offer evidence of the flaws in single family regulation. Even the *Palo Alto* court recognized that group rental and corresponding uses would be "far more" profitable than renting to traditional families, and suggested further that this factor might potentially alter the rent structure of an entire neighborhood.¹⁰⁶ Moreover, both the *Kirsch* and *Trottnor* courts rejected the *Palo Alto* hypothesis¹⁰⁷ that rental to unrelated individuals would depreciate property values.¹⁰⁸ There seems to be no valid reason why a more pluralistic zoning approach, coupled with police power limitations on obnoxious uses,¹⁰⁹ would not be economically compatible with existing single

fined to include both related families and unrelated individuals "who share the [same] housing unit" (*id.* at 3), has a smaller average size of only 3.17. *Id.* at 36. These statistics lend credence to the argument that property use by unrelated groups should not be barred on the grounds of land use density.

¹⁰³ The extended family is that larger group of family members who are blood related—aunts, uncles, cousins, grandparents, etc. The "blood, marriage, or adoption" criterion, so frequently used to define "family" in municipal zoning ordinances, places no limit on the degree or distance of blood relation.

¹⁰⁴ The equal protection concept as used by the *Trottnor* and *Kirsch* courts serves as a ready approach to this type of comparative analysis. See note 87 and accompanying text *supra*.

¹⁰⁵ The opinion of the Supreme Court in framing the issues in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), illustrates the historical approach:

The suit was brought by an owner of unimproved land within the corporate limits of the village, who sought the relief upon the ground that, because of the building restrictions imposed, the ordinance operated to reduce the normal value of his property, and to deprive him of liberty and property without due process of law. *Id.* at 367 (syllabus by the Court). This type of argument is not in and of itself conclusive. It is only one element in a balancing process used to determine the constitutionality of a statute. See *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 349, 271 A.2d 430, 434 (App. Div. 1970).

¹⁰⁶ *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 912-13 (N.D. Cal. 1970).

¹⁰⁷ *Id.* at 913.

¹⁰⁸ In terms of permissible zoning objectives, a group of persons bound together only by their common desire to operate a single housekeeping unit, might be thought to have a transient quality that would affect adversely the stability of the neighborhood, and so depreciate the value of other property. . . .

But none of these observations reflect a universal truth.

34 Ill. 2d at 437, 216 N.E.2d at 119.

The New Jersey Supreme Court chose to discuss the situation in terms of the "financial bonanza" of group rental in resort areas. *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 245, 281 A.2d 513, 515 (1971).

¹⁰⁹ See *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 253, 281 A.2d 513, 520 (1971), positing "general police power ordinances and criminal statutes" as protection from obnoxious uses by either unrelated or related individuals.

family uses.¹¹⁰ Consideration of the needs of potential residents of suburbia, in addition to the historically accepted analysis of the interests of existing property owners in the community, must play an important role in the opening of the suburbs.¹¹¹

Regional housing needs also demand increased recognition as a major challenge confronting zoning.¹¹² Although no court dealing with the single family zoning issue has gone so far as the Pennsylvania Supreme Court has in invalidating an ordinance because of its regional exclusionary effects,¹¹³ judicial notice has been taken of the reality of "population expansion and ensuing land contraction."¹¹⁴ Allowing unrelated groups to occupy residential areas offers a partial response to the problem although creating new concerns about land use density.¹¹⁵

¹¹⁰ In some areas, particularly those in which available land is scarce, the prices of single family homes may rise with the advent of rental to unrelated persons. But to see only this half of the problem is to neglect the obvious economic exclusionary effects of the present scheme; at present, low and moderate income single families have been zoned out of the already high-priced suburban market to the "benefit" of those families who can afford homes. See note 80 *supra*. Concomitantly, low income unrelated groups (for example, the aged) have been deprived of access to suburbia. See note 15 *supra*. The housing market is responsive to supply and demand. Unrelated persons moving to the suburbs under a more flexible scheme will also have to vacate present living quarters, thus presumably reducing rental and purchase prices in the latter areas. Additionally, the occasional hardship worked in some areas by higher purchase prices will be more than compensated for by an increase in rental values stemming from the overall access of all groups to suburbia.

¹¹¹ See notes 1-3, 5 *supra*. The Pennsylvania Supreme Court has overcome serious difficulties with standing in considering the needs of those who neither own property nor reside in the given municipality. In both *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), and *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965), the court consciously weighed the interests of those outside the municipality. Although these interests may be relevant under a general reasonableness analysis, they do not fit easily under the standing requirements of the narrower *Euclid-Nectow* approach.

¹¹² See notes 77-80 and accompanying text *supra*.

¹¹³ See note 77 and accompanying text *supra*. *National Land & Investment* emphasized that a municipality may not refuse to accept its portion of regional expansion by zoning out all but the wealthy through excessive minimum lot size requirements. 419 Pa. at 528, 215 A.2d at 612. The court further noted the relevance of a consideration of "the means of at least a significant segment of the people." *Id.* *Girsh* enlarged this judicial mandate by requiring a multiplicity of permissible uses in municipal zoning ordinances and invalidating a local ordinance excluding multiple unit dwellings. 437 Pa. at 243, 263 A.2d at 398.

Although these cases involved *total* exclusion of certain uses by a municipality, it may well be that overly large single family residential districts are themselves forbidden by a logical extension of these holdings. Rising land costs, the devotion of large amounts of land to R-1 uses, and the proscriptive effect of the single family residential classification all tend to bring the R-1 rubric within the forbidden exclusionary ambit of these cases. See notes 2-16 and accompanying text *supra*.

¹¹⁴ *Brady v. Superior Court*, 200 Cal. App. 2d 69, 82, 19 Cal. Rptr. 242, 250 (1st Dist. 1962).

¹¹⁵ Cf. notes 100-04 and accompanying text *supra*.

Against these overt defects in the characterization of single family zoning as a "permissible exercise" of the police power, the municipality's interest must also be weighed. It may be argued that the single family as a fundamental social unit bears an intimate relation to the public health, safety, morals, and general welfare.¹¹⁶ Analysis of the "family" employed as a criterion in municipal zoning regulation reveals, however, that such is not the case. Although reasonable limitations on both the amount and kind of land use are legitimate goals of the exercise of police power,¹¹⁷ single family zoning has failed to realize these positive aims.¹¹⁸ Similarly, the suggestion that this type of ordinance is intimately linked to the preservation of public morals is without justifiable foundation. Although the single family is utilized in the socialization process to propagate certain ethical and cultural mores,¹¹⁹ there is no evidence that reasonable incorporation of unrelated individuals into the residential scheme would threaten this process. If a nuisance situation does arise, vigorous enforcement of carefully circumscribed general police power ordinances constitutes a far more potent control mechanism than does single family zoning. "The practical difficulty of applying land use regulation to prevent the evil is found in the seeming inability to define the offending groups precisely enough so as not to include innocuous groups within the prohibition."¹²⁰

The preservation of the single family is unquestionably conceptually related to "the general welfare."¹²¹ However, there is no sug-

¹¹⁶ This was the position postulated by the court in *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 911 (N.D. Cal. 1970).

¹¹⁷ See, e.g., *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 169-70, 89 A.2d 693, 695 (1952); *Nolden v. East Cleveland City Comm'n*, 12 Ohio Misc. 205, 232 N.E.2d 421 (C.P. 1966).

¹¹⁸ See notes 98, 100-04 and accompanying text *supra*.

¹¹⁹ See generally M. MEAD & K. HEYMAN, *THE FAMILY* (1965).

As far back as our knowledge takes us, human beings have lived in families. We know of no period when this was not so. We know of no people who have succeeded for long in dissolving the family or displacing it. Instead, men have exercised their imagination in the elaboration of different styles of family living and different ways of relating the family to the larger community.

Id. at 77.

¹²⁰ *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 253, 281 A.2d 513, 519 (1971).

¹²¹ In *Griswold*, Justice Douglas pointedly discussed the right to marry and to have or to refrain from having children:

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.

381 U.S. at 486.

gestion that the protection of this unit could not be achieved in a multi-use atmosphere and by less restrictive, but more precise, means of regulation.¹²² A number of interests crucial to the general welfare have in fact been prejudiced by single family exclusionary zoning: regional housing needs are often ignored;¹²³ innocent land use by unrelated persons is frequently prohibited;¹²⁴ and economic interests of both owners and potential users of land are adversely affected.¹²⁵ In many instances the single family blood relation classification simply shifts general welfare problems from the hinterland into the cities with the result that comprehensive solutions are barred by the rigidity of the suburban zoning pattern.¹²⁶ The question must be raised "whether . . . it is the *public* welfare which is being benefited or whether, disguised as legislation for the public welfare, a zoning ordinance actually serves purely private interests."¹²⁷ The cumulative force of associational, equal protection, and due process reasoning demands an urgent search for alternatives to the dominance of single family zoning in suburbia.

¹²² See notes 139-49 and accompanying text *infra*.

¹²³ See notes 77-79, 112-14 and accompanying text *supra*.

[I]ntransigent administrators have created an unresponsive body of remedial zoning law and have erected an impenetrable exclusionary wall based upon race and economic class. These conditions might have gone unheeded but for the problems of the inner cities—the population explosion, the housing shortage, the increasing economic mobility of minority groups and today's "tight money" condition whereby housing starts are at their lowest levels since 1966.

Aloi & Goldberg, *supra* note 77, at 11-12 (footnotes omitted). The problem cannot be understood through piecemeal analysis since today's housing crisis is a comprehensive phenomenon. See generally FORD FOUNDATION, *A DECENT PLACE TO LIVE* (1971).

¹²⁴ See notes 14, 50-58 and accompanying text *supra*.

¹²⁵ See notes 105-14 and accompanying text *supra*.

¹²⁶ [N]o matter how extensive the rebuilding of our central cities [is], a major share of new housing, including housing for low-income families, will have to be developed in outlying areas. There is also a growing awareness that, in these outlying areas, constraints in the form of land use regulation are often employed—sometimes intentionally—to prevent sites from being used for low income housing. The power to exclude is in the hands of local officials. The challenge to the federal government is to use federal programs to assist in widening the range of choices without resorting to federal control of land.

This challenge entails resolving two objections advanced by localities: (a) that the admission of lower-income families results in a net financial loss to the locality; and (b) that the acceptance of lower-income families would inevitably lead to social disruption.

PRESIDENT'S TASK FORCE ON LOW INCOME HOUSING, REPORT: TOWARD BETTER HOUSING FOR LOW INCOME FAMILIES 4 (1970). See generally NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT (1968).

¹²⁷ *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 530, 215 A.2d 597, 611 (1965) (emphasis in original). The Pennsylvania Supreme Court supplied its answer: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid." *Id.* at 532, 215 A.2d at 612.

CONCLUSION

The single family zoning ordinance is the most formidable obstacle limiting access of unrelated persons to suburbia.¹²⁸ While judicial examination of this problem is still in its embryonic stages, the viability of the single family blood relation ordinance as a practical standard is open to serious question in light of regional approaches to zoning¹²⁹ and a severe national housing crisis.¹³⁰

Alternatives do exist. Faced with a plethora of single family zoning ordinances within its jurisdiction, the California Court of Appeals, in *Brady v. Superior Court*,¹³¹ elected to confine its solution to the existing structure, interpreting the term "family" to encompass widely varied uses by unrelated individuals.¹³² This approach, although desirable from the standpoint of working minimal havoc on the present statutory scheme, is only possible with ordinances employing the term "family" without further legislative definition.¹³³ The Illinois Supreme Court

¹²⁸ See generally Aloï & Goldberg, *supra* note 77, at 11; Williams & Norman, *supra* note 2, at 481.

¹²⁹ A number of jurisdictions are progressing toward a regional land use outlook and have assumed a more comprehensive stance in regulatory controls. See HAWAII REV. STAT. § 205-2 (Supp. 1971); N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1972); P.R. LAWS ANN. tit. 23, §§ 311-311s (1964). See also Roberts, *supra* note 1, at 36-49.

¹³⁰ See notes 7, 123 & 126 and accompanying text *supra*.

¹³¹ 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1st Dist. 1962).

¹³² The court observed:

While we recognize the importance of zoned and planned community development in this day of population expansion and ensuing land contraction, Atherton, despite an opportunity for clarity, has enacted an ordinance of ambiguity. It has left to the courts the task of attempting to fill in the content, an undertaking which may be better discharged by the legislative rather than judicial branch of the government.

Id. at 82, 19 Cal. Rptr. at 250. As to the ordinance in question, however, the court stated: We must interpret the words of the ordinance in their strict sense because, although Atherton could have endowed them with restrictive or wide coverage, it did not do so; we can attach to them only their bare meaning. "Single family dwelling" must mean, in our judgment, an individual or a group of persons living on the premises as a single housekeeping unit.

Id. at 77, 19 Cal. Rptr. at 247.

¹³³ For example, the Atherton, California, zoning regulations provided: "In one family residential districts 'A,' 'B' and 'C' no lot or parcel of land, building, structure, or improvement shall be used, and no building, structure or improvement shall be hereafter erected, constructed, structurally altered or enlarged, except for a single family dwelling and accessory buildings thereto." *Brady v. Superior Court*, 200 Cal. App. 2d 69, 71, 19 Cal. Rptr. 242, 243 (1st Dist. 1962) (Atherton, Cal., Ordinance 146, § 3-1). A "one-family dwelling" was defined as "[a] detached building designed for or occupied exclusively by one family." *Id.* (§ 22-5).

The municipality assumed both a naive and circular approach in enacting such regulations. Even a cursory precedential evaluation would have indicated the wide disparity in definitions of "family" (see, e.g., notes 2, 12 & 13 *supra*) and that regulating dwellings, rather than numbers, bears no relation to land use intensity. In effect, the Atherton ap-

has taken another path: invalidation of a zoning regulation on constitutional or other grounds, such as insufficiently broad enabling legislation, leaving to the municipality the task of enacting a less obnoxious ordinance.¹³⁴ Unfortunately, this approach, although pointedly indicating the defects of single family zoning, is too piecemeal to constitute a total solution.¹³⁵ Alternatively, the New Jersey Superior Court has recommended the criterion of the "single housekeeping unit" as a legislative substitute for the "single family" in zoning.¹³⁶ Although such a standard might well succeed in curtailing difficulties in the narrow confines of a resort rental conflict in New Jersey,¹³⁷ it bears with it concomitant imprecision and the inability to limit the intensity of land use.¹³⁸

The New Jersey Supreme Court in *Kirsch* has, however, suggested certain eminently reasonable alternatives:

[C]onsideration might quite properly be given to zoning or housing code provisions, which would have to be of general application, limiting the number of occupants in reasonable relation to available sleeping and bathroom facilities or requiring a minimum amount of habitable floor area per occupant.¹³⁹

Regulating the intensity of land use by restricting the number of individuals allowed to occupy a given land area is not the entire answer. However, the continued existence of large traditional blood related families, which would undoubtedly be protected by the legislature,

proach is to zone by buildings, to define buildings in terms of "family," and to leave "family" undefined.

¹³⁴ *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

¹³⁵ See Roberts, *supra* note 1, at 37; Comment, *Exclusionary Zoning: A Legislative Approach*, 22 SYRACUSE L. REV. 583 (1971); Note, *supra* note 61, at 167.

¹³⁶ *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 350, 271 A.2d 430, 435 (App. Div. 1970). Whereas the court in *Brady* employed the "single housekeeping unit" as a matter of statutory construction to uphold the ordinance in question (see note 132 *supra*), the *Gabe Collins* court invalidated a single family ordinance and proposed the single housekeeping unit as a matter of legislative reform.

¹³⁷ See *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 343-45, 271 A.2d 430, 431-32 (App. Div. 1970); cf. *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 243-45, 281 A.2d 513, 514-15 (1971).

¹³⁸ The same type of definitional problems would persist in the "single housekeeping unit" as are now present in the term "family." Such a unit would similarly fail to regulate the intensity of land use. Note, however, that the unrelated "household," as a practical matter, has a smaller average size than does its blood related counterpart. See note 102 *supra*. *Gabe Collins* posits a good argument for legislative revision of zoning definitions of "family," which would allow more precise expansion to a "single housekeeping unit." See note 136 and accompanying text *supra*. See also *Town of Ithaca v. Lucente*, 36 App. Div. 2d 560, 317 N.Y.S.2d 679 (3d Dep't 1971).

¹³⁹ 59 N.J. at 254, 281 A.2d at 520.

would require expansive numerical limits which could open the suburban door to multiple dwellings¹⁴⁰ with rentals to varied unrelated groups.¹⁴¹

The problem must ultimately be faced on two levels. In planning for *future* communities, new approaches are already available. The "new towns" stand as convincing proof that a more diversely planned suburbia can work.¹⁴² A flexible coalition of reasonable bulk regulations¹⁴³ and "incentive,"¹⁴⁴ "floating,"¹⁴⁵ and "cluster"¹⁴⁶ zoning tech-

¹⁴⁰ Among those architects and planners who have a special interest in housing costs, there has long been a widespread consensus that the most promising opportunity for good inexpensive housing is to be found in some form of multiple dwellings. With the recent sharp rise in housing costs, this is probably even more true nowadays.

Williams & Norman, *supra* note 2, at 481. See generally M. NEUTZE, *THE SUBURBAN APARTMENT BOOM* (1968); PRESIDENT'S COMM'N ON URBAN HOUSING, REPORT: UNITED STATES HOUSING NEEDS 1968-1978 (1967).

¹⁴¹ This prospective trend might force suburban zoning into a more flexible posture and aid in the implementation of much needed regional housing schemes. See notes 123 & 129 and accompanying text *supra*. See also Davidoff & Davidoff, *supra* note 5, at 528-31. But see E. YONKLEY, *THE LAW OF SUBDIVISIONS* § 12, at 23 (1963):

The right to exercise control over the subdivision of land should properly be placed in the hands of local planning authorities. From a planning standpoint, any other method of exercising control over the regulation of land subdivision serves only to hamstring the planning commission in developing . . . its comprehensive plan for community development.

¹⁴² For a description of the new town concept, see E. HOWARD, *GARDEN CITIES OF TOMORROW* 50-57 (F.J. Osborne ed. 1965). Mr. Howard's ideas, originally published in an 1898 text of this work, have met with renewed interest today as evidenced by the apparent success of Columbia, Maryland. See G. BRECKENFELD, *COLUMBIA AND THE NEW CITIES* (1971). See also E. EICHLER & M. KAPLAN, *THE COMMUNITY BUILDERS* (1967), for a wider discussion of the movement to create new towns as a reaction to the failure of urban development. The new town idea seeks to unite the ideals of the city and the country into the "garden city." In so doing, it emphasizes the needed pluralism of a multi-use scheme, with jobs and all types of living accommodations united in a planned environment.

¹⁴³ "Bulk regulations" govern the size (including height and floor area) of buildings, lot size, the number of residential units, the shape of structures, the relation of exterior walls of buildings to lot lines or to other buildings, and the relation of buildings to open areas. See CITY PLANNING COMM'N, PROPOSED COMPREHENSIVE AMENDMENT OF THE ZONING RESOLUTION OF THE CITY OF NEW YORK 20 (1959). For a comprehensive look at bulk regulation controls, see CITY PLANNING COMM'N, REZONING NEW YORK CITY 20-37 (1959). Compare *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952) (minimum floor space requirements necessary to protect the character of the community are reasonable within a broadly construed "general welfare"), with *Medinger Appeal*, 377 Pa. 217, 104 A.2d 118 (1954) (minimum floor space requirements for aesthetic and economic reasons are not sufficiently related to health, morals, safety, or general welfare of the community).

¹⁴⁴ Incentive zoning in New York City includes zoning by negotiation, zoning by contract, zoning by design, zoning by politics, and zoning by economics. B. SPATT, *A PROPOSAL TO CHANGE THE STRUCTURE OF CITY PLANNING* 83 (1971). While its often vague criteria and considerable delegation of discretion may be criticized, this form of regulation can, by

niques¹⁴⁷ would ensure in expanding communities both the continued welfare of the traditional family and a retention of the desirable elements of suburban character.

More acute, however, are the problems of *existing* suburban municipalities, particularly those in which additional land is not readily available for multi-use growth. Here the segregation of industrial, and possibly commercial, uses from residential ones should continue,¹⁴⁸ but with "residential uses" defined in the broadest of terms. Reasonable bulk regulations and precisely drawn general police power ordinances could separate desirable from obnoxious uses within a broad "residential" zoning district, while living arrangements of unrelated individuals could flourish. Thus, the regulatory impetus would shift from what is now exclusionary zoning to more tolerant and precise schemes of land use control.

providing rewards or a "bonus" to the developer, secure desirable results (*e.g.*, open spaces). *Id.* at 83-93.

An important technique of suburban subdivision regulation is "contribution"—requiring a developer to donate land as a park, etc., as a precondition to approval of his subdivision design. *See Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966). This is a particularly effective measure to ensure the planned development of new communities, with approval of a developer's plan as the "incentive" for contribution.

¹⁴⁵ Floating zoning involves a municipal plan in which a number of use districts are provided but are not specifically bound to the zoning map. The permissibility of a use is considered on a "reasonable" parcel by parcel basis by the local planning board. Such a plan implements a significant degree of flexibility in the municipal scheme. *See, e.g., Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731, 96 N.Y.S.2d 58 (1951).

¹⁴⁶ Cluster zoning consists of the concentration of residences in one small lot size area and the concurrent retention of large "greenbelts" for the general use of the neighborhood or community. For example, instead of building ten homes on ten uniform one-acre lots, a developer may be required to "cluster" ten homes on three acres and transfer the remaining land to an association of the ten homeowners. *See E. ROBERTS, LAND USE PLANNING* 6-115 to 6-116 (1971). This technique is ideal for implementing suburban growth while retaining the open and "green" character of a community.

¹⁴⁷ The implementation of these techniques at the suburban level may, in some instances, require expanded state enabling legislation. *See ADVISORY COMMISSION ON INTER-GOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH* 107-21, 163-72 (1968).

¹⁴⁸ The planned separation of industrial from residential uses would seem to be more important today in light of increased interest in environmental problems. The now classic decision in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), illustrates the serious problems which can arise from the proximity of residential areas to industrial districts. *But cf. J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 143-77 (1961), suggesting that integration of business with residential uses is not only permissible, but crucial to the survival of urban areas. *See also R. BABCOCK, THE ZONING GAME* 130-33 (1966), discussing current dissatisfaction with exclusive use districts and advocating "performance standards" as a means of controlling industry and "planned unit development" in residential areas—the antithesis of the exclusive districting principle.

Admittedly, the solution must be both legislative and comprehensive.¹⁴⁹ Nevertheless, the case by case judicial approach has laid the foundation for future reform by questioning the most basic tenet of suburban zoning and replacing it with less restrictive, more effective means of regulation. In the words of one judicial spokesman, a perpetuation of the status quo would be not unlike "burn[ing] the house to roast the pig."¹⁵⁰

James A. Smith, Jr.

¹⁴⁹ See notes 129 & 135 and accompanying text *supra*.

¹⁵⁰ *Larson v. Mayor & Council*, 99 N.J. Super. 365, 374, 240 A.2d 31, 36 (Law Div. 1968). The expression was subsequently used in *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 346, 271 A.2d 430, 432 (App. Div. 1970) and later in *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 252, 281 A.2d 513, 519 (1971).

Pigs seem quite popular in the zoning context. In discussing the "nuisance" of inappropriate uses, the Supreme Court in *Euclid* stated, "[It] may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).