THE HOUSING OF AMERICA'S FAMILIES: CONTROL, EXCLUSION, AND PRIVILEGE

Frank S. Alexander[*]

I. INTRODUCTION

In recent years, and especially in the latest round of state, local, and national political campaigns, three topics seem to be at the top of our cultural agenda: families, housing, and religion. Families are a consistent topic of conversation: the advancement of "family values," the preservation of the autonomy and sanctity of the family, and the relationships which count as creating a family. There is also a great emphasis on housing, and pride in the fact that the rate of homeownership in America is now at a record high, with roughly sixty-eight percent of Americans owning the home in which they live.[1] President George W. Bush, in his most recent inaugural address, proclaimed a vision of a new "ownership" society, premised on his belief in the liberty of each family to own their own homes.[2] Religion, of course, is everywhere, present in virtually every conversation on each and every topic. Though many bemoan the absence of religion in the public square, religion is far from absent; indeed it has become a defining element of the public square.

This emphasis on families and on housing is intriguing, for there are many common threads in the provision of housing and in the promotion of family

[*] Interim Dean and Professor of Law, Emory Law School. Founder and Co-Director, Emory University Law and Religion Program; Director, Project on Affordable Housing and Community Development. This essay represents the preliminary phase of a much larger multi-year project investigating the influences of housing laws on America's families. Portions of this work have been undertaken as part of project on "The Child in Law, Religion and Society" of the Center for the Study of Law and Religion, Emory University. I am indebted to numerous colleagues for excellent advice, guidance, and suggestions, and to superb research assistance from Erin Bailey, Laurie-Ann Fallon, Katie Good, David Harris, Jesse Herman, and Eileen Hintz. The views expressed herein are, of course, solely the views of the author.

[1] U.S. Census Bureau, *Housing Vacancies and Homeownership, Annual Statistics: 2003*, tbl. 15, http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t15.html.

[2] President George W. Bush, Second Inaugural Address (Jan. 20, 2005), *available at* http://www.whitehouse.gov/inaugural/index.html ("To give every American a stake in the promise and future of our country, we will bring the highest standards to our schools, and build an ownership society. We will widen the ownership of homes and businesses, retirement savings and health insurance—preparing our people for the challenges of life in a free society.").

life. Over fifty years ago, Congress declared the "goal of a decent home and a suitable living environment for every American family."[3] We have indeed made great progress during this period of time in eliminating substandard housing and in making it possible for more and more families, across the entire spectrum of incomes, to own their own homes. Pride in such progress, however, must be tempered with the truth that, in the midst of this prosperity, over two million individuals live without any shelter whatsoever.[4] These are our citizens whose "home" is their car, the overpass under which they huddle at night, or, if they are so fortunate, the night shelter which gives them a mattress at 6:00 p.m. on the condition that they leave at 6:00 a.m. Though homeownership rates may now be at sixty-eight percent, we also are witnessing the highest recorded rates of residential foreclosures,[5] and the average family has less equity in their home than ever before.[6]

What is both intriguing and puzzling about the dual emphasis on families and housing is not the importance of each but rather the manner in which they have been tied together. Housing laws should focus on the production, maintenance, and ownership of residential units. Concerns with our families, our lives together, our relationships and commitments one to another, seem oddly out of place as we survey housing laws over the past 150 years. The result of such an examination is quite surprising.

Our housing laws have been used, directly and indirectly, consciously and unconsciously, as vehicles for the definition and control of families, of what relationships count in determining what constitutes a family. If you have three sons, and they all happen to share one large bedroom, you may well be in violation of a local building code. If you have a basement or garage apartment that is occupied by grandparents as they become advanced in their years, there is a good chance that you are in violation of the law. If you elect to share a

---

[3] Housing Act of 1949, Pub. L. No. 81-171, ch. 338, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 (2000)). Congress reaffirmed this goal in 1968. Pub. L. No. 90-448, § 2, 82 Stat. 476 (codified at 12 U.S.C. § 1701t (2000)).

[4] *See* Dennis P. Culhane et al., *Public Shelter Admission Rates in Philadelphia and New York City: The Implications of Turnover for Sheltered Population Counts*, 5 HOUSING POL'Y DEBATE 107, 108 (1994) (summarizing various homelessness estimates).

[5] *Foreclosure Rate Climbs to a Record*, L.A. TIMES, June 29, 2003, at K2.

[6] Ruth Simon, *Home-Equity Loans Hit Record Levels*, WALL ST. J., Jan. 20, 2005, at D1. Home equity debt is now equal in aggregate volume to the total amount of credit card debt in the United States and is expected to surpass it shortly. SMR RES. CORP., HOME EQUITY LOANS: 2005 OUTLOOK, *available at* http://www.smrresearch.com/heoutlook05.html.

house with four college roommates or one or two professional friends, you may find yourself facing the wrath of your neighbors and fighting eviction.

Housing laws have been used, and are being used, in ways that simply do not make sense. Instead of focusing on the creation of decent housing, some of the laws have been used to discriminate and to deny. Instead of creating places of hospitality, they breed hostility. Instead of providing support, they serve to segregate. It is much easier to build houses; it is much tougher to build families. Over the past 150 years, we have too often let the building and control of houses become a vehicle for building and controlling families. Housing laws simply cannot and should not be a tool by which our society determines the essential nature of a family.

The Fields of Inquiry

There are a myriad of ways in which housing laws and policies, understood broadly, have a profound impact on the definition of American families. This overall project focuses on six primary fields of inquiry:

(1) Homelessness
(2) Public Housing
(3) Federal Subsidies
(4) Restrictive Covenants
(5) Housing & Building Codes
(6) Zoning & Fair Housing

The focus of this essay is on the latter three topics: restrictive covenants, housing and building codes, and zoning laws. There are certain topics which, though quite relevant to this thesis, are not included. The most obvious example of such an omission is the history of discrimination in our housing laws on the basis of race, religion, and national origin. This is excluded not because it does not support the thesis, but because it is simply too large of a topic—deserving of its own separate treatment—and it is addressed in part by separate constitutional and statutory provisions.[7] The primary focus of this essay is instead on the family—its definition and discrimination, its control and exclusion—in the context of housing laws.

Our social and cultural norms are oftentimes most poignantly demonstrated by how we treat those who have the least.[8] Federal law defines a homeless person as "an individual who lacks a fixed, regular and adequate nighttime

[7] The overlap of racial discrimination with the control of family is most evident in the constitutional foundations of *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Civil Rights Act of 1866, 42 U.S.C. § 1982 (2000), and the enactment of the original Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2000).

[8] *Matthew* 25:40–45.

residence" or a person who resides in a shelter, welfare hotel, transitional program, or place not ordinarily used as regular sleeping accommodations.[9] Although there may be strong disagreement on the number of individuals and families who are homeless in America on a given night this year,[10] there is widespread agreement that the numbers have increased dramatically in the past two decades. Of the two to three million individuals who will be without housing at some point during this year, approximately forty percent of them are families with children,[11] and more than fifty percent of homeless children are under the age of six.[12] As striking as this data is, what is key for this thesis is the mismatch between the housing resources our society makes available to serve those who have the least and the families in need of help.

In 2004, thirty-two percent of homeless families in the United States were denied shelter requests, and eighty-one percent of cities reported that their shelters turned away homeless families due to a lack of resources.[13] Why is this? The answer, at one very simple level, is that it is easier and cheaper to provide large numbers of shelter beds for adult males than for a mother and father with a fourteen-year-old son and a six-year-old daughter. In over half of the cities in the United States, families are required to break apart and go to separate facilities in order to have shelter.[14] Boys over the age of ten are not commonly allowed in shelters where women are present, and fathers may be sent to shelters for single males.[15]

There is very little "housing law" that directly pertains to those who are homeless among us. There are government assistance programs,[16] and there

---

[9] 42 U.S.C. § 11302(a) (2000).

[10] Culhane et al., *supra* note 4, at 108. In 2000, the Urban Institute reported that 3.5 million persons were homeless at least once in a given year, of whom more than 1.35 million were children. *See* MARTHA R. BURT & LAUDAN Y. ARON, URBAN INST., AMERICA'S HOMELESSNESS II: POPULATIONS AND SERVICES 10–11 (2000), *available at* http://www.urban.org/url.cfm?ID=900344 (presentation summarizing the 1996 National Survey of Homeless Assistance Providers and Clients).

[11] U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 4 (2004), *available at* http://www.usmayors.org/uscm/hungersurvey/2004/onlinereport/HungerAndHomelessnessReport2004.pdf.

[12] NAT'L CTR. ON FAMILY HOMELESSNESS, HOMELESS CHILDREN: AMERICA'S NEW OUTCASTS 1, *available at* http://www.familyhomelessness.org/pdf/fact_outcasts.pdf (last visited Jan. 21, 2005).

[13] U.S. CONFERENCE OF MAYORS, *supra* note 11, at 4.

[14] *Id.*

[15] *Id.* at 70–72.

[16] For example, the U.S. Department of Housing and Urban Development manages the Supportive Housing Program, which provides funding for providers of supportive housing services to the homeless. *See* U.S. Dep't of Hous. & Urban Dev., *Overview of the Supportive Housing Program: Program Components* (2001), http://www.hud.gov/offices/cpd/homeless/library/shp/understandingshp/components.cfm.

are local ordinances designed to keep the homeless out of sight.[17] What our housing policies reveal as they impact homeless families is that families at this level of income are a very low priority. We house individuals and make little effort to preserve, support, and nurture families on the streets. In every city there is often a striking and moving exception to this—such as The Genesis Shelter in Atlanta[18]—but the point is that these are exceptions and not the primary focus of housing those who are homeless.

II. RESTRICTIVE COVENANTS

There is, at least in the human community, a prevailing and recurring tendency to hold simultaneously two conflicting attitudes—a strong desire to control the lives of our neighbors and an insistence on being free from control by our neighborhoods. In American law, restrictive covenants are by nature private agreements which courts interpret and enforce. They are agreements in which one property owner seeks to restrict and control the use of property by another owner. At the heart of these restrictions lies the desire to define and regulate who lives in the neighboring property, how they live together, and whether they are likely to occupy the same social and economic status as oneself. The law of restrictive covenants mirrors these social and cultural priorities and biases.

In the history of western law, restrictive covenants are a relatively recent invention, emerging in the latter half of the nineteenth century. The early covenants laid the foundation for the practices of the following century in stating expressly what activities and uses were permitted on property, and frequently listing those activities that were expressly prohibited. From the middle to the late nineteenth century, these covenants focused on excluding commercial and public activities, prohibiting specific forms of activities considered to be "nuisances," and striving to protect the "first class residence."[19] They were used primarily to ensure that property would be used "for residential purposes," as "a dwelling" with a superficial emphasis on the nature of the structures that could be erected. The express emphasis on

---

[17] Paul Tolme, *Criminalizing the Homeless: Anti-begging Ordinances Proliferate Across the U.S.*, IN THESE TIMES, Mar. 24, 2003, http://www.inthesetimes.com/site/main/article/309/ (discussing various local ordinances designed to keep homeless off the streets).

[18] *See* Genesis Shelter, http://www.genesisshelter.com (last visited Jan. 22, 2005). Genesis Shelter's vision is to enable the families of homeless newborns to move from homelessness to self-sufficiency by making a range of services available, including counseling, education, and child development services. *Id.*

[19] *See infra* notes 29–33 and accompanying text.

structure, however, was judicially interpreted to reveal the underlying intent to exclude entire economic strata of society. Restrictive covenants were initially used as a bulwark against the feared degradation of tenement houses, and by the beginning of the twentieth century they reflected the desire to control flats, duplexes, and apartments on neighboring property.[20]

Because restrictive covenants are private agreements subject to judicial interpretation—often decades after they were originally written—courts invoked a series of canons of interpretation to reach conclusions as to how to enforce a specific restrictive covenant. Whether a covenant limiting the use of property to "a dwelling" or to "a private residence" would bar apartments or boarders or use as a group residence for a religious order became an intense struggle in many jurisdictions and, not surprisingly, different states reached very different conclusions.[21] Courts in New York, Pennsylvania, and New Jersey were far more willing to find expansive meanings to these limiting terms, while Michigan struggled over the presence of "doubles" and flats as permitted uses, and Missouri quickly concluded that the single word "dwelling" would not permit any use other than residential structures occupied by one family.[22]

As this field of law was not constrained by federal or state limitations on discrimination until late in the twentieth century, talented attorneys quickly realized that a method for resolving uncertainty in judicial interpretation of restrictive covenants was to add express provisions defining the permitted uses and the permitted occupants. A restrictive covenant limitation to the use of property by a "single family" emerged in the early twentieth century and became a powerful limitation.[23] The lack of a contractual definition of "family," however, simply prompted a second wave of judicial interpretation on whether the presence of servants, guests, or boarders was inconsistent with the intent of the author. Fraternities and sororities were excluded from single family neighborhoods, but courts could not agree on the status of group homes for disabled children, residences for religious orders, or unrelated individuals choosing to live together.

By the middle of the twentieth century, restrictive covenants had begun to specify with precision the nature of the permitted relationships that would

[20] *See infra* text accompanying notes 26–62.
[21] *See infra* text accompanying notes 81–88.
[22] *See* discussion *infra* Part II.A.
[23] *See infra* text accompanying notes 89–99.

qualify for a "single family" restriction, and this was limited to persons related by "blood or marriage" or by "blood, marriage, and adoption."[24] Subject only to the significant constraints created by federal antidiscrimination laws in the latter half of the twentieth century, private restrictive covenants remain enforceable as written. Because, by their nature, restrictive covenants are functionally possible only in the context of newly developing (or redeveloping) properties, the struggle to control one's neighbor shifted towards the end of the twentieth century to zoning and its definitions of what constitutes a family.

From the mid-nineteenth century to the mid-twentieth century, the language of restrictive covenants pertaining to housing reflected a gradual and unmistakable trend of increasing specificity and precision. Many of the earliest cases relied upon the language of restricting property to a "first class residence," though without providing any definition of "first class."[25] The most common restrictive covenant provided simply that no building other that a "dwelling house," a "private residence," or a "private dwelling" would be built on the property. As courts confronted challenges on whether such language prohibited structures occupied by two families or boarding houses, the drafters of restrictive covenants become more precise, expressly prohibiting not only tenements but also boarding houses and apartments. They also placed a greater reliance on the term "private" to exclude not just commercial activities but also rental property. As courts in some jurisdictions continued to find ambiguity, and declined to enforce a "private dwelling" restriction against a two-family duplex, restrictive covenants were drafted to make clear that structures could be occupied only by one family—leaving it to later generations to define the family.

A. Control over the Structure: The "First Class Residence" and Fear of Tenements and Apartments

The practicing bar of the Middle Atlantic states and New England following the Civil War drafted restrictive covenants in a cultural milieu which found self-evident meaning to a restriction that "first-class dwelling-houses only, with their appurtenances, are to be erected" on the property.[26] Interpreting these covenants in subsequent decades led New York courts to conclude, with little effort, that "a first class dwelling house" did not prohibit a

---

[24] *See infra* text accompanying notes 92–94.

[25] *See infra* notes 27–29 and accompanying text.

[26] Hano v. Bigelow, 155 Mass. 341, 342, 29 N.E. 628, 629 (1892); *see also* McDougall v. Schneider, 118 N.Y.S. 861, 862 (N.Y. App. Div. 1909).

seven-story apartment,[27] or a "six-story elevator apartment."[28] The slight change in the words to "first-class private houses" led one court to resort to the dictionary definition of "dwelling" (a word which did not, in fact, appear in the restrictive covenant) in order to conclude that a private sanitarium would not be allowed because "a house intended for a private residence or home is not intended for a place for the temporary gathering of diseased persons for treatment."[29]

Other jurisdictions had a different conception of a "first-class residence." The California District Court of Appeal held in 1919 that the words "a first-class private residence" were clear and unmistakable and barred the construction of a duplex for two families.[30] A 1922 restrictive covenant in Houston, Texas identified as its purpose the creation of "a high class and exclusive residential and business community" and expressly prohibited apartment houses and duplexes.[31] A garage apartment could not be permitted in such a neighborhood.[32] In some jurisdictions, the social and economic class intended to be protected by a restrictive covenant was not necessarily identified in the express words of the covenant. Even absent any guiding language, however, the Missouri Supreme Court in 1910 nonetheless characterized a restrictive covenant that each "building should be used exclusively for private residence . . . [and] that no building should be arranged, used or occupied as flats" as designed "to insure the use of [the property] for high-class residence purposes."[33] Whether a tenement house or an apartment could be placed in a first-class residential neighborhood became the center point of the debates.

In New York City in the 1860s, a key focus of such restrictive covenants was on tenement housing, a widely perceived social and demographic condition attributed in significant measure to "a great tide of imigration [sic]

---

[27] Holt v. Fleischman, 78 N.Y.S. 647, 650 (N.Y. App. Div. 1902) (restrictive covenant dated 1866).

[28] Bates v. Logeling, 122 N.Y.S. 251, 252 (N.Y. App. Div. 1910) (restrictive covenant dated 1866).

[29] Barnett v. Vaughan Inst., 119 N.Y.S. 45, 46 (N.Y. App. Div. 1909), *aff'd*, 197 N.Y. 541, 542, 91 N.E. 1109, 1110 (1910); *see also* Baumert v. Malkin, 235 N.Y. 115, 121–22, 139 N.E. 210, 212 (1922) ("first class private dwellings designed for use of one family only" does not permit music school).

[30] Walker v. Haslett, 44 Cal. App. 394, 398–99, 186 P. 622, 624 (Cal. Dist. Ct. App. 1919) (relying in part on the article "a" as requiring a single residence, not multiple residences, and on the proposition that a duplex can not be a "private residence" because it has two distinct parts).

[31] The text of this covenant is found in *Pardo v. Southampton Civic Club*, 239 S.W.2d 141, 142–43 (Tex. Civ. App. 1951).

[32] Rudy v. Southampton Civic Club, 271 S.W.2d 431, 433 (Tex. Civ. App. 1954).

[33] King v. St. Louis Union Trust Co., 226 Mo. 351, 354, 126 S.W. 415, 415–16 (1910). Perhaps the court was able to infer the purpose of the covenant because the property was located in the "Rex Subdivision." *Id.* at 354, 126 S.W. at 415.

[that] had swept into the lower wards of the city, crowding the tenements far beyond the limits of safety and health."[34] Legislation in 1867 for portions of New York City defined a tenement house as a structure rented to more than three families living independently of each other, or more than two independent families living on the same floor.[35]

Articulating the underlying rationales for the exclusion of tenement houses in restrictive covenants was not an easy task for the courts, as they sought to apply the first constructional principle of determining the intent of the author. Some courts relied on the proposition that the intent was to protect the economic value of the property, which would decline in the presence of high density dwellings.[36] Others focused on characterizing tenement houses or apartments as "businesses" which were inherently incompatible with "first class private residences."[37] Running throughout all forms of the residential restrictive covenants, however, was the simple and powerful underlying desire—which was judicially sanctioned—to exclude families who did not occupy the highest economic strata of the community. This was accomplished, in the first instance, by excluding tenement houses.

The latter portion of the nineteenth century also witnessed the evolution in large urban areas of new architectural forms of socially acceptable living arrangements. The advent of electricity and elevators made taller structures possible and indoor plumbing made them desirable. The earlier simplistic two-tiered formulae of first-class private residences and lower-class tenements was no longer viable, leaving courts to wrestle with what to do with "flats" and apartments. The authors of restrictive covenants may have required first-class residences and expressly prohibited tenements, but they did not anticipate multi-unit buildings which cut across economic spectrums. This left the courts to construct the meaning of such covenants.

Initially, a restrictive covenant that limited structures to "dwellings" and offered nothing more in the way of restriction was found to permit a broad

---

[34] Kitching v. Brown, 180 N.Y. 414, 422, 73 N.E. 241, 243 (1905) (quoting an unidentified report of an association created out of the 1834 philanthropic movements for tenement house reform).

[35] *Id*. at 420–21, 73 N.E. at 242–43.

[36] *See* Amerman v. Deane, 132 N.Y. 355, 360, 30 N.E. 741, 742 (1892).

[37] *See* Musgrave v. Sherwood, 54 How. Pr. 338, 359 (N.Y. Sup. Ct. 1878) (holding that covenant against tenement houses did not apply to hotels or apartment houses; "[t]here is nothing permanently offensive about a rented dwelling-house"), *rev'd*, Musgrave v. Sherwood, 60 How. Pr. 339 (N.Y. Gen. Term 1881) (evidence was that restriction was for "first class private residence" which excluded use for business purposes as family hotel).

range of residential units in jurisdictions within older urban areas. Thus New York,[38] New Jersey,[39] and Pennsylvania[40] all found that a restrictive covenant that required or permitted only a "dwelling" was broad enough to include flats, apartments, and duplexes.[41] These same jurisdictions, however, had a difficult time deciding whether an express prohibition of "tenements" extended to flats, or whether a prohibition of tenements and flats also applied to apartments.

This imprecision in terminology and reasoning at times gave rise to results that are difficult to reconcile. For example, a New Jersey court in 1906 was asked to determine whether a restrictive covenant, created in 1888, that expressly prohibited "any building that shall be used or occupied as a flat or tenement house" would permit the construction of apartments.[42] Reasoning that the only distinction "between an 'apartment' and a 'flat' is the amount of rent" the court held that the covenant prohibited apartments.[43] At the same time, however, the court observed that this restriction would not prohibit a duplex in which two families occupied separate units side by side, sharing a common roof and dividing wall.[44] In contrast, a New York court in 1903 permitted apartments in the face of a restrictive covenant against tenements holding that "the modern apartment house is a building entirely distinct from what was then [in 1873] understood as a tenement house."[45]

Just one year prior to the New Jersey court's decision, the judiciary in Missouri chose to follow a very different approach. The Missouri Court of Appeals in *Sanders v. Dixon* interpreted a limitation to "one dwelling on each lot" as barring the construction of a four-family flat.[46] After surveying cases throughout the country, the court concluded that the words were not intended

---

[38] *See* Bennett v. Petrino, 235 N.Y. 474, 480, 139 N.E. 578, 580 (1923) ("dwelling" does not exclude two-family structure); Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co., 214 N.Y. 268, 273, 108 N.E. 444, 445 (1915) ("dwelling house" permits apartments); Pierson v. Rellstab Bros., Inc., 219 N.Y.S. 404, 405, 219 A.D. 552, 553–54 (N.Y. App. Div. 1927) ("dwelling" permits apartments).

[39] *See* Crane v. Hathaway, 4 N.J. Misc. 293, 294, 132 A. 748, 748 (N.J. Ch. 1926) ("one dwelling house" does not prohibit a two-family house).

[40] *See* Hamnett v. Born, 247 Pa. 418, 419, 93 A. 505, 505 (1915) (restriction to "one dwelling house" permits a duplex as it is still a single structure); Johnson v. Jones, 244 Pa. 386, 389–90, 90 A. 649, 650–51 (1914) (restriction to "dwelling house" permits flats because they are accommodations and not a business).

[41] A similar conclusion was reached in other jurisdictions. *See, e.g.*, De Laney v. Van Ness, 193 N.C. 721, 727, 138 S.E. 28, 32 (1927) ("a dwelling house" permits apartments); Schwarzschild v. Welborne, 186 Va. 1052, 1064–65, 45 S.E.2d 152, 158 (1947) ("dwelling" permits boarding house).

[42] Lignot v. Jaekle, 72 N.J. Eq. 233, 234, 65 A. 221, 222 (1906).

[43] *Id.* at 241, 65 A. at 224.

[44] *Id.* at 243, 65 A. at 225.

[45] White v. Collins Bldg. & Constr. Co., 81 N.Y.S. 434, 437, 82 A.D. 1, 5 (N.Y. App. Div. 1903).

[46] 114 Mo. App. 229, 253, 89 S.W. 577, 585 (1905).

to permit "plural residences." The court held, "[a] house arranged for plural occupancy is much more likely to be used by several families, and to attract an unwelcome class of inhabitants into a restricted residence district, than a house arranged for single occupancy."[47] Eight years later in 1913, this issue was again considered by the Missouri Court of Appeals in the case of *Bolin v. Tyrol Investment Co.* and the same conclusion was reached—a restriction to one dwelling house would not permit a flat or apartment house.[48] This later decision, however, went up to the Missouri Supreme Court for review on the argument that the express words of the limitation pertained to the nature of the building constructed, and not how it was used. Choosing to follow this line of reasoning adopted in other states, the Missouri Supreme Court decided, in 1918, that apartments were permitted.[49] Within just three short years, however, the Missouri Supreme Court reconsidered this position and chose to overrule its 1918 decision in *Bolin* and return to the position reflected by *Sanders*—a restriction to "a dwelling" does not permit apartments, flats, or duplexes.[50]

At the turn of the nineteenth to twentieth century, Michigan faced a similar struggle, but one less focused on tenements and high-rise apartments. Instead, the issue in Michigan centered on the acceptance of a "double"—in today's parlance, a two-family duplex. The Michigan Supreme Court had declared in 1904 that a limitation of "one dwelling house to each lot" would not permit the construction of a two-story structure designed for two dwellings.[51] Relying upon the constructional principle of ascertaining the intent of the parties, the court offered little reasoning other than that the parties obviously agreed that "a building planned and designed for two or more dwellings cannot properly be described as one dwelling house."[52] Subsequent Michigan Supreme Court opinions simply cited this opinion in concluding that "a dwelling house" restriction could not be read to tolerate a "double."[53]

47 *Id.* at 252, 89 S.W. at 584.

48 178 Mo. App. 1, 14, 160 S.W. 588, 592 (1913), *rev'd*, Bolin v. Tyrol Inv. Co., 273 Mo. 257, 200 S.W. 1059 (1918).

49 *Bolin*, 273 Mo. at 265, 200 S.W. at 1061.

50 Morrison v. Hess, 231 S.W. 997 (Mo. 1921) (noting some ambiguity in the covenant as to whether a single apartment building would be permitted).

51 Harris v. Roraback, 137 Mich. 292, 293–95, 100 N.W. 391, 392 (1904).

52 *Id*. at 294, 100 N.W. at 392.

53 Schadt v. Brill, 173 Mich. 647, 654, 139 N.W. 878, 881 (1913); *see also* Kingston v. Busch, 176 Mich. 566, 567, 142 N.W. 754, 754 (1913); Bagnall v. Young, 151 Mich. 69, 70, 114 N.W. 674, 675 (1908).

When the author of a late nineteenth century restrictive covenant expressed his or her intentions by the addition of the term "private" to references to a dwelling, or a residence, many courts found a basis for excluding any building uses other than by one family. In Pennsylvania, even though the term "dwelling house" would permit apartments and "one dwelling house" would permit a duplex, a limitation to "a private dwelling house" would effectively bar apartments and flat houses.[54] "Private dwelling" was found in other jurisdictions to exclude apartments,[55] two-family structures such as duplexes,[56] and boarding houses.[57] The early New York decisions relied upon the presence of the adjective "private" to exclude apartments,[58] dwellings in which distinct families lived together cooperatively,[59] and sanitariums.[60] By 1915, however, the New York Court of Appeals concluded that the use of the term "private" did not add substance to the nature of the restriction, and apartments were permitted.[61] "There is no way," the Court held, "in which we can fairly engraft upon these particular words considered by themselves any further limitations of definition which would make a structure used for ordinary dwelling purposes more or less a dwelling house merely because of the number of people who dwelt in it."[62]

[54] *Compare* Hamnett v. Born, 247 Pa. 418, 420, 93 A. 505, 505 (1915) ("one dwelling house" permits a duplex), *and* Johnson v. Jones, 244 Pa. 386, 390, 90 A. 649, 651 (1914) ("dwelling house" permits apartments), *with* Taylor v. Lambert, 279 Pa. 514, 517–18, 124 A. 169, 170 (1924) ("private dwelling house" prohibits apartments), *and In re* Hoffman's Petition, 7 Pa. D. & C. 88, 91 (1925) ("private residence" bars apartments).

[55] Loudenslager v. Stafford, 91 N.J. Eq. 1, 3, 116 A. 770, 771 (N.J. Ch. 1919); Skillman v. Smatheurst, 57 N.J. Eq. 1, 5, 40 A. 855, 856 (N.J. Ch. 1898).

[56] Walker v. Haslett, 44 Cal. App. 394, 400, 186 P. 622, 624 (Cal. Dist. Ct. App. 1919) (construing "first class private residence"); Koch v. Gorruflo, 77 N.J. Eq. 172, 174, 75 A. 767, 768 (N.J. Ch. 1910); Fox v. Sumerson, 338 Pa. 545, 547, 13 A.2d 1, 2 (1940).

[57] Gannett v. Albree, 103 Mass. 372, 374 (1869) ("a private dwelling" excludes a boarding house).

[58] Levy v. Schreyer, 50 N.Y.S. 584, 586, 27 A.D. 282, 284 (N.Y. App. Div. 1898) (private dwelling means private residence, which excludes construction of three apartments).

[59] Kalb v. Mayer, 150 N.Y.S. 94, 95, 164 A.D. 577, 579 (N.Y. App. Div. 1914) (private dwelling house means "no congregation of families").

[60] Barnett v. Vaughan Inst., 119 N.Y.S. 45, 46, 134 A.D. 921, 921 (1909), *aff'd*, 197 N.Y. 541 (1910).

[61] Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co., 214 N.Y. 268, 108 N.E. 444 (1915). This conclusion was consistent with an earlier decision which found that language restricting use to "a family residence" would permit apartments. Sonn v. Heilberg, 56 N.Y.S. 341, 343, 38 A.D. 515, 517 (N.Y. App. Div. 1899).

[62] *Reformed Protestant Dutch Church*, 214 N.Y. at 273, 108 N.E. at 445.

B. Control over Use: Boarders, Lodgers, and Fraternities

The second phase in these restrictive covenants was that they limited not just the physical nature of the structure but the use of the structure as well. By construing the restriction broadly—and prohibiting all forms of tenement houses, flats, apartments, and duplexes—states such as Missouri relied on these covenants as a direct form of economic class discrimination, barring the "unwelcome class of inhabitants."[63] This class included those who could not afford to own their homes, those who sought the lower rental rates of flats, and those who of necessity lived together in higher numbers and greater density.[64] Population density per lot, or per structure, became the method of protecting the higher values of "first-class neighborhoods."

The very purpose of restrictive covenants limiting the property to private dwellings was to prevent the encroachment of broad definitions of community, to prevent "the destruction of individuality by multiplication that creates community."[65] The tenement houses of the nineteenth century were perceived as "nuisances," places "occupied by persons of small means . . . crowded into insufficient space and deprived of many of the essentials to privacy, decency, and health."[66] These restrictive covenants sought not to remedy the harms experienced by the occupants of this form of housing, but to protect the property values and aesthetic sensibilities of the wealthy, who sought the sanctity of segregated spaces.[67] Exclusion of forms of housing was exclusion of entire classes of people.

The presence of "boarders" and "roomers" in residential units presented a serious challenge to the desire to control the nature of life together in neighborhoods. The majority of cases that addressed the possibility of boarding or rooming houses in the context of a residential covenant found such uses prohibited. Restrictions for private residence,[68] "a private dwelling,"[69] or a "one-family dwelling-house"[70] were all sufficient to exclude boarding and

---

63 Sanders v. Dixon, 114 Mo. App. 229, 252, 89 S.W. 577, 584 (1905).

64 Gillis v. Bailey, 21 N.H. 149 (1850).

65 Skillman v. Smathehurst, 57 N.J. Eq. 1, 5, 40 A. 855, 856 (N.J. Ch. 1898).

66 Kitching v. Brown, 180 N.Y. 414, 419, 425, 73 N.E. 241, 242, 244 (1905).

67 Godfrey v. Hampton, 148 Mo. App. 157, 163, 127 S.W. 626, 628 (1910) ("We think a building of that character [a duplex] would cause all the mischief intended to be prevented by the covenant, would depreciate the value of the property, and diminish the attractiveness of the neighborhood as a place of residence.").

68 Sayles v. Hall, 210 Mass. 281, 284, 96 N.E. 712, 714 (1911).

69 Thackray v. Crager, 43 Pa. D. & C. 301, 309 (Pa. Com. Pl. 1941).

70 Hooker v. Alexander, 129 Conn. 433, 435, 29 A.2d 308, 309 (1942).

rooming activities. The dominant rationale for such a conclusion was that operating a rental facility constituted a business contrary to the presumption (express or implied) that residential use was expected.[71] In contrast, restrictions specifying only that the building be used as a "dwelling" allowed its use as a rooming or boarding house.[72]

Upon closer examination, a prohibition on room rentals in an area restricted for dwellings or for residential use on the theory that boarding is a business use is not a distinction that bears weight. The conceptual problem lies in the attitude that renting rooms and obtaining meals in a residential structure is somehow a business activity, while renting a "single-family" house to one family is not. No cases have been found that suggest a single-family residential restrictive covenant is violated by renting the house to a single family, yet there are ample cases holding that renting rooms does create a violation.[73] The unspoken struggle in these cases is not over the presence of weekly or monthly payments in exchange for housing, for there is little difference in terms of pure economics between a monthly mortgage payment and monthly rent. There are two possible undertones that can explain these conclusions. First, there could be a concern with the short term versus long term occupancy of a structure. Second, the underlying goal may represent a fundamental desire to control relationships between residents.

When the house or dwelling is used primarily by a family which rents rooms occasionally to supplement income, courts have decided that such use is merely incidental to the primary use by a family and does not violate the covenant.[74] Too much use, however, is not acceptable. When the restriction specified use of the dwelling by a "private family," and the owner took in boarders and friends who stayed an average length of two weeks, the court concluded that there was a violation.[75] When eight rooms were rented by the week, a house was no longer a one-family house because "[a] one-family

---

[71] John Hancock Mut. Life Ins. Co. v. Davis, 173 Ga. 443, 443, 160 S.E. 393, 393 (1931) (restriction to residential use does not bar a boarding house, even though apartments are expressly prohibited).

[72] Gallon v. Hussar, 158 N.Y.S. 895, 898, 172 A.D. 393, 397 (N.Y. App. Div. 1916); Schwarzschild v. Welborne, 186 Va. 1052, 1064–65, 45 S.E.2d 152, 158 (1947).

[73] *See, e.g.*, *infra* notes 75–80.

[74] *See* Trainor v. Le Beck, 109 N.J. Eq. 823, 825, 139 A. 16, 17 (N.J. 1927) (citing Robbins v. Bangor Ry. & Elec. Co., 100 Me. 496, 507, 62 A. 136, 141 (1905)) (test is whether use by boarders is incidental); Southampton Civic Club v. Couch, 159 Tex. 464, 468, 322 S.W.2d 516, 519 (1958) (renting rooms incidental to family use does not violate single family restriction); *see* Mayer v. Livingston, 172 N.Y.S.2d 45, 46 (N.Y. Sup. Ct. 1958) (renting rooms "strictly incidental to the maintenance of a family relationship" is not a violation).

[75] Sayles v. Hall, 210 Mass. 281, 284, 96 N.E. 712, 713–14 (1911).

house is a house occupied by one family,"[76] and boarding ten children in an area restricted to "dwelling house[s]" was considered a clear violation.[77]

By the middle of the twentieth century, restrictive covenants became increasingly explicit in defining who may live in neighboring property. Covenants were written to exclude not just tenements, flats, and apartments but also commercial and business uses—such as the renting of rooms—that could occur in a residential structure. The provisions became much more specific in requiring that structures be used only by one family, which inevitably led to direct confrontations over the definition and meaning of family. When a set of individuals reside together in a single facility, have common meals in a single kitchen, share life responsibilities, and possess personal and emotional ties that bind beyond time and place, are they a family who can be one's neighbors? This was the issue presented by fraternities and sororities, by religious orders, and by homes for dependent individuals who were disadvantaged and disabled.

Early in the twentieth century, a college fraternity sought to build in a neighborhood with a restrictive covenant limiting the land to "one single private dwelling house."[78] Arguing that its members were "bound by ties of friendship and mutual obligations," the fraternity asserted that it operated as one family sharing a single kitchen.[79] The Michigan Supreme Court rejected such a proposition quickly, reasoning simply that "it is obvious that the relation is purely artificial" and closer in nature to a club or boarding house than a family.[80]

Facilities that served as residences for religious orders initially received more favorable treatment. A 1917 decision of the Washington Supreme Court concluded that a house in a neighborhood limited to "a single detached residence" could be used as a residence by twelve to fifteen members of the Ursuline Order, and the fact that it was labeled a convent did not mean it was not also a residence.[81] A decision that same year by the Oregon Supreme Court acknowledged that a dwelling house for a convent was within the scope of a limitation "for residence purposes. . . ."[82] Fifty years later, however,

---

76 Hooker v. Alexander, 129 Conn. 433, 436, 29 A.2d 308, 310 (1942).
77 Nerrerter v. Little, 258 Mich. 462, 466–67, 243 N.W. 25, 27 (1932).
78 Seeley v. Phi Sigma Delta House Corp., 245 Mich. 252, 253, 222 N.W. 180, 181 (1928).
79 *Id.* at 254, 222 N.W. at 181.
80 *Id.* at 255, 222 N.W. at 181.
81 Hunter Tract Improvement Co. v. Corp. of Catholic Bishop of Nisqually, 98 Wash. 112, 113–15, 167 P. 100, 101–02 (1917).
82 Scott Co. v. Roman Catholic Archbishop for Diocese of Or., 83 Or. 97, 107–08, 163 P. 88, 91 (1917).

judicial decisions came to the opposite conclusion. In a 1967 decision, the Missouri Court of Appeals held that a Roman Catholic convent could not possibly fall within the scope of a detached single-family dwelling:

> There can be no argument with the proposition that a building for occupancy by a group of people, all of whom are related to one another by blood or marriage, might properly be described as a "single family dwelling". We believe that the proposed residence for nuns may not be so described. . . . The residence for nuns might be described as a boarding house, sorority, or club. . . . But would most people describe the nuns that live there at a particular time as a "family" or their residence as a "single family dwelling"? We think not.[83]

The Illinois Appellate Court confronted a similar question in 1962 when determining whether five individuals who were members of Opus Dei, a Roman Catholic secular institute, could reside together in a dwelling restricted to the housekeeping of "one family."[84] The restrictive covenant had not defined "family," and the trial court ruled against the individuals in determining that family meant only persons related by blood or marriage (plus domestic servants).[85] Turning to dictionary definitions that ranged from open textured and broad in nature to restrictive and exclusive, the appellate court chose to adopt a "concept of a family [that] is centered around a nucleus composed of a father, mother, and children with one head of the household"[86] and found the members of Opus Dei to be excluded. In contrast, the Michigan Supreme Court in 1943 had explicitly rejected the invitation to define family as persons related by blood or marriage[87] and permitted a group of Roman Catholic priests, the Paulist Fathers, Inc., to reside in a neighborhood limited to "a single dwelling house."[88]

Restrictive covenants that control the nature of structures in residential neighborhoods are often a guise for controlling the economic class of one's neighbors. Restrictive covenants that determine the permissible activities of one's neighbors are commonly a pretext for controlling our neighbor's lives.

---

[83] Cash v. Catholic Diocese of Kansas City-St. Joseph, 414 S.W.2d 346, 349 (Mo. Ct. App. 1967) (quoting the trial court) (citation omitted).

[84] Simons v. Work of God Corp., 36 Ill. App. 2d 199, 202, 183 N.E.2d 729, 730 (1962).

[85] *Id.* at 205, 183 N.E.2d at 731.

[86] *Id.* at 208–09, 182 N.E.2d at 733.

[87] Boston-Edison Protective Ass'n v. Paulist Fathers, Inc., 306 Mich. 253, 260, 10 N.W.2d 847, 849 (1943).

[88] *Id.* at 256–57, 10 N.W.2d at 848.

When restrictive covenants define the family that can be one's neighbor, they reach into the soul of our relationships and who we are as human beings.

C. Control over Relationships

It is at the end of the nineteenth century that we see for the first time express provisions requiring that property be used by "one family,"[89] and by the early part of the twentieth century, covenants were drafted with express provisions that the property be limited to one structure occupied by not more than one family.[90] This is the third part of the story of restrictive covenants. Judicial decisions during this period began to use the language "single family houses" as synonymous with restrictions for a "private residence."[91] This shift in the controlling language was no doubt a response to the extensive litigation over the acceptability of flats, apartments, and duplexes. Such a shift, however, served to change the focus of attention from the structure, or its uses, to the core concept of what constitutes a single family. This subtle yet significant shift of property and housing law into the role of defining the substantive relationships between people pressed these laws beyond their competency. Deciding what activities were prohibited proved to be easier than determining who was permitted.

In the first half of the twentieth century, "single family" had a flexible meaning depending upon the context. For many purposes the concept was interchangeable with "household," the key terminology used by the U.S. Census and social demographers from the eighteenth to mid-twentieth century. In light of the emphasis decades later on defining families as those related by "blood, marriage or adoption," it is striking that until then (and even later) there was widespread agreement that a single-family residence restriction was not violated by the presence of servants and domestics residing on the premises. A dictionary relied upon by a 1905 decision defined family as "'persons collectively who live together in a house or under one head or manager; a household, including parents, children, and servants, and, as the case may be, lodgers or boarders.'"[92] Narrow interpretations that would

---

[89] *See* Baumert v. Malkin, 235 N.Y. 115, 118, 139 N.E. 210, 211 (1923) (1887 covenant provided for "first-class private dwellings designed for the use of one family only"); McDougall v. Schneider, 118 N.Y.S. 861, 862, 134 A.D. 208, 209 (N.Y. App. Div. 1909) (1899 covenant provided for "a detached dwelling house for one family only"); Hart v. Little, 171 N.Y.S. 6, 8 (N.Y. Sup. Ct. 1918) ("for one family only"); Walker v. McNulty, 45 N.Y.S. 42, 43 (N.Y. Sup. Ct. 1897) ("for the use of one family only").

[90] *E.g.*, Baker v. Lunde, 96 Conn. 530, 532, 114 A. 673, 675 (1921).

[91] *E.g.*, Ward v. Prospect Manor Corp., 188 Wis. 534, 541, 206 N.W. 856, 859 (1926).

[92] Robbins v. Bangor Ry. & Elec. Co., 100 Me. 496, 505–06, 62 A. 136, 140 (1905) (quoting WEBSTER'S

prohibit occupancy by servants and domestics were regularly rejected across the country in a manner that mirrored the cultural expectations of the higher economic classes seeking the protections of restrictive covenants.[93]

This preference for a narrow conception of family for purposes of single family residential restrictive covenants did not rest solely on the normative and cultural perspectives of members of the judiciary, though we do see trial courts in the middle of the twentieth century increasingly creating a definition of family as persons related by blood, marriage, or adoption.[94] The view that a "family" is a small set of individuals around a nucleus—composed of father, mother, and children—was thrust into prominence by the work of the anthropologist George Peter Murdock, who coined the term "nuclear family" in 1949.[95] A second source which reveals the cultural bias in favor of a narrow and exclusive definition of family was the growing use by the middle of the twentieth century of local zoning ordinances which presented formal legal definitions of family for purposes of residential restrictive zoning.[96]

This increasingly narrow view of the appropriate "family" that could be one's neighbor became even narrower upon confronting residences designed to be used as substitute family residences for those with special needs. At the beginning of the twentieth century, residential facilities for persons with special needs tended to be large scale in nature. As such, courts routinely characterized these facilities as institutions rather than residences and excluded them from locating in neighborhoods for "first-class private houses"[97] or "single private dwelling house[s]."[98] As the therapeutic model for serving

---

DICTIONARY); *see also* Liberty Nat'l Bank of Chi. v. Zimmerman, 333 Ill. App. 94, 100, 77 N.E.2d 49, 52 (1947) (quoting WEBSTER'S DICTIONARY, which defined family as "the collective body of persons who live in one house and under one head or manager").

93 *See* DeMund v. Lum, 5 Haw. App. 336, 341, 690 P.2d 1316, 1320 (1984) (restrictive covenant followed zoning definition of family, which included domestic servants); Simons v. Work of God Corp., 36 Ill. App. 2d 199, 207, 183 N.E.2d 729, 732 (1962) (the "fundamental unit is composed of a father, mother, children, and possibly others related by blood or marriage (servants excepted)"); Boston-Edison Protective Ass'n v. Paulist Fathers, Inc., 306 Mich. 253, 256, 10 N.W.2d 847, 848 (1943) (rejecting interpretation of "single dwelling house" as requiring relationships of blood and marriage, as "this would prevent the owner of property thus restricted from having a servant reside on the premises").

94 *See* Feely v. Birenbaum, 554 S.W.2d 432, 434 (Mo. Ct. App. 1977) (trial court excluded persons not related by blood, marriage, or adoption from single family residential neighborhood).

95 GEORGE PETER MURDOCK, SOCIAL STRUCTURE 1 (1949).

96 *See infra* Part IV.

97 *See* Barnett v. Vaughan Inst., 119 N.Y.S. 45, 46, 134 A.D. 921, 921, *aff'd*, 197 N.Y. 541 (1909) ("first-class private house[]" does not permit a sanitarium).

98 Neilson v. Hiral Realty Corp., 16 N.Y.S.2d 462, 464 (N.Y. Sup. Ct. 1939) ("a single private dwelling house" excludes a nursing or convalescent home); *see also* Neidlinger v. N.Y. Ass'n for Improving Condition

persons with special needs evolved in the 1960s and 1970s from institutional treatment to community based treatment facilities, the facility size dropped dramatically and the goal became providing a substitute family residential structure. However, facilities designed to function as a family residence posed a direct challenge to the cultural enforcement of private land use restrictions that sought to define a "single family."

These group homes for individuals unrelated by blood or marriage, but led by a distinct head of household and functioning in dependent relationships with common activities, pose the starkest challenge to the use of restrictive covenants as private land use controls that seek to define, regulate, and control one's neighborhoods.[99] They are all indicative of the fundamental problem in the attempt to use property rights as private control over family life.

As privately created and judicially enforced agreements controlling neighboring land, restrictive covenants serve many functions in regulating land use, improvements, building location, and quality of structures. They also, however, reflect a powerful desire to control who lives in the neighboring homes. Precisely because they are private agreements, courts—in the absence of overriding statutory or constitutional constraints—will enforce the restrictions as they are written.

In the mirror of restrictive covenants we can see the intense desire on the part of property owners to exclude entire economic classes of families, indeed, all but this wealthiest economic strata. In the willingness of the judiciary to find in the simple term "dwelling" or "residence" the unwritten intent to exclude flats, apartments, and duplexes, we see the courts affirming the economic bias of the landed gentry, if not their own personal convictions. Further, whenever the judiciary chose to rule in favor of current owners in the face of ambiguous or unforeseen uses, private agreements were modified to be increasingly specific in who and what was permitted.

The underlying cultural and social preferences for certain forms of family life—as lived by one's neighbors, if not by the authors of the covenant, comes into clearest focus in the mirror which reveals the attempt to define what

---

of Poor, 200 N.Y.S. 852, 854 (N.Y. Sup. Ct. 1923) ("private dwelling" restriction prohibits use as a facility for poor children).

[99] *Compare* Berger v. State, 71 N.J. 206, 216, 364 A.2d 993, 998 (1976) (a group home for handicapped children is permitted under restrictive covenant for single-family dwellings), *with* Shaver v. Hunter, 626 S.W.2d 574, 578 (Tex. Ct. App. 1981) ("single family dwelling" does not permit group home for handicapped).

constitutes a single family. In the aftermath of World War II, the covenants and the courts show marked preference for the "nuclear family," while always protecting servants, completely jettisoning the reliance in prior centuries on conceptions of households and dependency. The attempts to define and to control our neighbor's lives by defining families in narrow terms of blood, marriage, or adoption are unable to bear the normative weight of the confrontation with families of foster children, dependent elderly, or persons with disabilities.

By their nature, restrictive covenants are static and, once created, cannot be modified easily. The author disappears after creation, and subsequent generations of neighbors and courts are left to puzzle over enforcement. Largely because of this static nature in the face of dynamic social, cultural, and legal forces, restrictive covenants were supplanted in the second half of the twentieth century by two other legal tools that control housing for America's families. The second tool by which housing laws defined and controlled families was a haphazard and chaotic system of housing and building codes that established occupancy criteria for residential units. The third tool was the pervasive experience of single-family exclusionary zoning and formal legal definitions of what constitutes a family.

III. HOUSING AND BUILDING CODES

Most of us think of housing codes and building codes as rules and regulations dealing with the structural components of buildings—the walls, wiring, and plumbing. We think of things related to physical safety, and that indeed is the primary function of such codes. There is one additional feature, however, that is puzzling for several reasons. Since their creation in the late nineteenth century, housing codes also have established occupancy limits. Occupancy limits specify the minimum size of bedrooms, or conversely, the maximum number of persons who can reside in a housing unit. These occupancy limits are striking for three reasons. First, they carry the suggestion that they are based in sound engineering concepts, or result from an empirical analysis of public health concerns. Neither is true. Second, lacking a scientific basis in safety, occupancy limits instead reflect profound social and cultural biases about how a family "should" live. Third, our laws today continue to

accord significant validity and deference to "restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[100]

A. Cubic Space Limitations

The first housing codes in the United States were adopted in the 1870s by San Francisco and New York City. In both instances they were directed at the crowded housing conditions experienced by racial and ethnic minorities in boarding houses and tenements. The San Francisco "Lodging House" ordinance of 1870 created a requirement that every facility provide at least five hundred cubic feet of air space per person.[101] There was certainly some degree of genuine concern behind this ordinance about deplorable living conditions. The overwhelming motivation for this new rule, however, was the intense ethnic and cultural biases reflected in the leadership of the Anti-Coolie Association, an organization opposed to the use of Chinese labor.[102] During this same period of time, on the other side of the country, the city of New York was enacting its first set of ordinances dealing with tenement housing.[103] In contrast to the San Francisco actions, the initiatives in New York City—though directed at the large numbers of recent immigrants—were justified in part by the emerging field of public health.[104] In response to a survey of almost 15,000 tenements, providing housing to over 113,000 families,[105] the tenement law specified a minimum of six hundred cubic feet of air per person, beyond which the room was deemed overcrowded.[106] With no additional empirical

---

100 Fair Housing Act, 42 U.S.C. § 3607(b)(1) (2000).

101 ELMER CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 51 (1973).

102 The San Francisco Lodging House ordinance was subsequently enacted as state law, and enforced alongside of the "Queue Ordinance" which required the shaving of the hair braids of Chinese persons in custody for violation the Lodging House ordinance. The racism of the "Queue Ordinance" resulted in its being held unconstitutional. Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255–56 (C.C.D. Cal. 1879). The Lodging House ordinance was not overturned. *See* Ellen Pader, *Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land*, 19 J. ARCHITECTURAL & PLAN. RES. 300, 308 (2002). *See generally* SANDMEYER, *supra* note 101.

103 JOHN DUFFY, A HISTORY OF PUBLIC HEALTH IN NEW YORK CITY 1625–1866, at 522–32 (1968).

104 The American Public Health Association was organized in 1872, and held it first annual meeting and adopted its "constitution" in November 1873. *See* SELECTIONS FROM PUBLIC HEALTH REPORTS AND PAPERS PRESENTED AT THE MEETINGS OF THE AM. PUBLIC HEALTH ASS'N 1873–1883, at ix (Barbara Gutmann Rosenkrantz ed., 1977).

105 Edward H. Janes, *Health of Tenement Populations and the Sanitary Requirements of Their Dwellings* (1874), *reprinted in* SELECTIONS FROM PUBLIC HEALTH REPORTS AND PAPERS PRESENTED AT THE MEETINGS OF THE AM. PUBLIC HEALTH ASS'N. 1873–1883, *supra* note 104, at 115, 119 n.1.

106 Tenement House Act, 1879 N.Y. Laws, ch. 504, § 3. The act was amended in 1901 to allow for no less than four hundred cubic feet of air to each adult, and two hundred cubic feet of air to each child under twelve years of age in *one room*, and no less than six hundred cubic feet of air to each individual in *an*

justifications, the first model housing code adopted a minimum of six hundred cubic feet of air for each adult, and four hundred cubic feet of air for each child under twelve.[107]

With these idealistic yet culturally biased beginnings, housing codes over the past century have addressed occupancy concerns in two ways. One approach has been to set a minimum number of cubic feet, or square feet, per person. The second approach has been to establish a threshold for overcrowding, a standard for the maximum number of persons per room. In both instances, the scientific basis for the standards has been less than overwhelming. Initially, the public health support for early occupancy standards was the conclusion (based on the science of epidemiology of the day) that inadequate ventilation created "atmospheric impurities" in the air that were exhaled as people breathed, and that spread disease.[108]

B. Square Footage Limitations

Over the course of the twentieth century, the American Public Health Association (APHA) played a critical role in developing the occupancy standards which have ultimately been embraced by the law. In 1950, the APHA published *Standards for Healthful Housing: Planning the Home for Occupancy*, in which it recommended a minimum dwelling size of 400 square feet for one person, and 1150 square feet for a family of four.[109] What is most startling, at least in hindsight, is not that the APHA developed a specific empirical recommendation, but rather the actual basis for its recommendation.[110] With a curious sense of reasoning, it explained that its

---

apartment. Tenement House Act, 1901 N.Y. Laws, ch. 334, § 112.

[107] LAWRENCE VEILLER, A MODEL TENEMENT HOUSE LAW 68, § 99 (1910). The requirement was again included in the model housing law published in 1920. LAWRENCE VEILLER, A MODEL HOUSING LAW 229, § 110 (2d ed. 1920).

[108] *See* COMM. ON THE HYGIENE OF HOUS., AM. PUB. HEALTH ASS'N, BASIC PRINCIPLES OF HEALTHFUL HOUSING (2d ed., 1939), *reprinted in* HOUSING FOR HEALTH: PAPERS PRESENTED UNDER THE AUSPICES OF THE COMMITTEE ON THE HYGIENE OF HOUSING OF THE AM. PUBLIC HEALTH ASS'N 191 (1941).

[109] AM. PUB. HEALTH ASS'N, STANDARDS FOR HEALTHFUL HOUSING: PLANNING THE HOME FOR OCCUPANCY vi (1950). This report was derived in part from the earlier committee report distributed in 1939, COMM. ON THE HYGIENE OF HOUS., *supra* note 108. The earlier report was influenced by the 1935 British Housing Act on Overcrowding. *Id*. at v; *see* Pader, *supra* note 102, at 310.

[110] In 1949 the U.S. Surgeon General, Leonard A. Scheele, testified before Congress that the relationship between housing and health was not easy to establish:

> It is self-evident—although frequently overlooked—I believe, that the quality of housing bears a distinct relation to the health of the people. However, it is extremely difficult to demonstrate the precise relationship between housing and health. Statistical techniques have not yet been found

analysis of the minimum areas needed for healthy activities was based on a survey of housing units, and that its "figures closely approximate[d] actual practice in the high-income groups."[111] Sixteen years later, in 1969, the APHA and the Public Health Service jointly published a model housing ordinance. With virtually no scientific explanation, the ordinance reduced the minimum requirements.[112] This time the model ordinance recommended a minimum of 150 square feet per person, plus an additional 100 square feet for each additional person (or 450 square feet for a family of four).[113]

The APHA was not the only professional organization working to develop and promulgate housing occupancy standards during the twentieth century. Associations representing the insurance industry, building officials, and fire departments all developed variations on minimum standards.[114] Most striking about all of these model codes was the consistency in their recommendations, coupled with the absence of any additional scientific or empirical validation for the conclusions.[115] By 1968, three of the four major associations were establishing a minimum square footage of 450 square feet of habitable space for units occupied by four persons.[116]

> which can separate housing from all other social factors—economic status, education, nutrition, and so on—as it relates to health.

GENERAL HOUSING LEGISLATION: HEARINGS BEFORE SUBCOMMITTEE ON BANKING AND CURRENCY 434 (1949) (statement of Leonard A. Scheele).

[111] AM. PUB. HEALTH ASS'N, *supra* note 109, at vi.

[112] U.S. DEP'T OF HEALTH EDUC. AND WELFARE, APHA-PHS RECOMMENDED HOUSING MAINTENANCE AND OCCUPANCY ORDINANCE § 8.01 (1969).

[113] *Id.* In 1986, the APHA, this time in conjunction with the Centers for Disease Control, published a revised model ordinance. ERIC W. MOOD, APHA-CDC RECOMMENDED MINIMUM HOUSING STANDARDS § IX (1986). In this revision the APHA maintained the minimum square footage of 150 square feet for one person, and 100 square feet for each additional person. *Id.* It also stipulated a minimum room size of seventy square feet for one person, and an additional fifty square feet for each additional person. *Id.* Significantly, it removed the "overcrowding" standard of two persons per habitable room. *See id.*

[114] The American Insurance Association (AIA), the International Conference of Building Officials (ICBO), the Southern Building Code Congress International (SBCCI), the Building Officials and Code Administration (BOCA), and the National Fire Protection Association (NFPA) all developed, either separately or jointly, versions of models codes. *See generally* RICHARD L. SANDERSON, CODES AND CODE ADMINISTRATION: AN INTRODUCTION TO BUILDING REGULATIONS IN THE UNITED STATES 9 (1969); Eric W. Mood, *The Development, Objective, and Adequacy of Current Housing Code Standards*, *in* HOUSING CODE STANDARDS: THREE CRITICAL STUDIES 1, 15 (1969); David Listokin & David Hattis, *Building Codes and Housing* 8–9 (2004), http://www.2004nationalconference.com/papers/Building-Codes.pdf (presentation at Research Conference on Regulatory Barriers to Affordable Housing).

[115] *See supra* note 114.

[116] NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, at 278 tbl.3 (1969).

These standards of 100 to 150 square feet per person and no more than two persons per habitable room were not simply suggestive in nature. The twentieth century witnessed the rapid proliferation of housing codes by local and state governments. By 1910, over one fourth of the states had adopted some variation of New York's early Tenement Law,[117] and the passage of the National Housing Act by Congress in 1934[118] called for the Federal Housing Administration to create a set of minimum property standards. The 1949 amendments to the National Housing Act, which created "the goal of a decent home and suitable living environment for every American family,"[119] pushed the federal government to consider the essential elements of a "decent home." By 1956, the Urban Renewal Administration had explained, "[t]he purpose of space and occupancy provisions of housing codes is to set forth minimum requirements of space conducive to healthful living and to prevent the overcrowding of dwellings and dwelling units which accelerates the deterioration of structures and neighborhoods."[120] The National Commission on Urban Problems similarly identified, in 1968, that a housing code should cover "[o]ccupancy, which concerns the size of dwelling units and of rooms of different types, the number of people who can occupy them, and other issues concerned on the whole with the usability and amenity of interior space."[121]

C. *Overcrowding and Maximum Occupancy*

If our culture has gradually accepted, for reasons that are less than scientifically clear, a minimum standard of 100 to 150 square feet per person, we can be equally puzzled by the concept of "overcrowding" that has become a measure of housing conditions. Between 1900 and 1950 the general standard for overcrowding was perceived to be two persons per habitable room (which excludes kitchens, closets, and bathrooms).[122] In 1950, the overcrowding threshold was lowered to 1.5 persons per room, and further reduced to 1.0 person per room in 1960.[123] Using any of these measures of crowded conditions, national census statistics indicate that the extent of overcrowding in

---

[117] Mood, *supra* note 114, at 8.

[118] National Housing Act, Pub L. No. 73-479, 48 Stat. 1246 (1934).

[119] *See supra* note 3.

[120] URBAN RENEWAL ADM'N, HOUS. & HOME FINANCE AGENCY, PROVISIONS OF HOUSING CODES IN VARIOUS AMERICAN CITIES 11 (1956).

[121] NAT'L COMM'N ON URBAN PROBLEMS, *supra* note 116, at 274 (1969).

[122] Dowell Myers et al., *The Changing Problem of Overcrowded Housing*, 62 J. AM. PLAN. ASS'N. 66, 68 (1996).

[123] *Id.*

the United States steadily declined from 1940 to 1980, but has been slowly increasing over the past two decades.[124]

Data on overcrowding has certainly influenced federal policies. The National Affordable Housing Act of 1990 contemplated "overcrowding" as one of the indicia to be considered in the preparation of every state and local Comprehensive Housing Affordability Strategy.[125] The Department of Housing and Urban Development has strongly suggested its own variation of a "two person" rule with respect to the occupancy of public housing units. The General Counsel of the Department advised in 1991 that a general standard of "two persons in a bedroom" would be consistent with federal law.[126] Under current federal law, local public housing authorities may adopt their own occupancy guidelines consistent with local law and the Fair Housing Act.[127]

As we look at how housing laws and policies define America's families, we are confronted with these two powerful standards: minimum floor area and maximum occupancy designed to avoid overcrowding. In each instance, however, we are left hungry for the empirical or scientific justification for such standards. In the absence of an explanation, the standards may well reflect the values, customs, or prejudices of a dominant subclass of American culture. The APHA proudly asserted that its criterion of minimum square footage was derived in part from upper class usage,[128] and it has been suggested that the APHA created a standard of six hundred square feet from "thin air."[129] Others have argued that there is simply no evidence for the public health justifications and that they represent primarily the social preferences of politically influential groups.[130]

---

[124] *Id.*

[125] Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (codified in scattered sections of 42 U.S.C.); 24 C.F.R. § 91 (2004); *see also* Myers et al., *supra* note 122, at 67.

[126] Memorandum of Frank G. Keating, General Counsel, Dep't of Hous. & Urban Dev. (Mar. 20, 1991), *in* 63 Fed. Reg. 70256 (Dec. 18, 1998); *see also* U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK ch. 5 (1993).

[127] National legislation has been introduced on several occasions, but not enacted, that would expressly deny authority to the Department of Housing & Urban Development to establish the equivalent of a national occupancy standard. *See, e.g.*, H.R. 3385, 104th Cong. 2d Sess. § 2(a) (1996); H.R. 2406, 104th Cong. 2d Sess. (1996), 142 Cong. Rec. H 4504-01, 4523 (May 7, 1996).

[128] AM. PUB. HEALTH ASS'N, *supra* note 109, at vi.

[129] Florida planning consultant Fred Bair, *as quoted in* RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 16 (1966).

[130] *See, e.g.*, FRANK P. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 143 (1968); Mood, *supra* note 114, at 8; Myers et al., *supra* note 122, at 68.

What is most striking about a limit of two persons per bedroom is the lack of any correlation to the size of the bedroom. In many homes in different parts of the country, there has been a custom of occupying a large room known as a "sleeping porch" where all of the children, and frequently cousins as well, sleep at night. Are we not missing some fundamental connections between the reality of people's living arrangements and the ordinances that define overcrowding?

Professor Ellen Pader, an anthropologist at the University of Massachusetts-Amherst, recently offered a profound critique of the very way in which our culture has chosen to interpret this goal of safe and decent housing for every American family. She related the story of two women sharing a room during their first night at college. Neither could fall asleep. Realizing that her roommate was still awake, the first student said, "I [am] . . . lonely and c[an]'t sleep. . . . I[] . . . [have never] slept alone in a bed." To this the other student responded, "[I] . . . can't sleep either. . . . I've never shared a room before."[131] This story illustrates Professor Pader's core argument that our minimum room sizes coupled with our overcrowding guidelines explicitly derive from "upper-class, English and Anglo-American definitions of reasonable" which are simply inconsistent with a broader conception of cultures and subcultures.[132]

This argument from Professor Pader is supported by the work which has been done in evaluating the census data on overcrowding.[133] Although the highest rates of overcrowding are found among recent immigrants, there is a significant cultural divide: Asian and Hispanic households have higher rates of overcrowding than do African-American or Caucasian households even when controlled for the length of time in the United States.[134] Further, even as their family income rises to the median family income, Asian and Hispanic households still continue to show a higher rate of overcrowding than other groups.[135] This data strongly suggests that for certain cultural and ethnic groups, the measures of one person per room, or even two persons per room, represent a conscious choice to allocate personal spending on something other than housing.

---

[131] Pader, *supra* note 102, at 301.
[132] *Id.* at 305.
[133] *See* Myers et al., *supra* note 122, at 68.
[134] *Id.* at 71.
[135] *Id.* at 72.

IV. ZONING

Restrictive covenants are private agreements that have been used to define and control the "single family" that lives in our neighborhoods. Housing and building codes establish minimum requirements for bedroom size and for living units, and maximum limits on the number of persons who can occupy a bedroom. In both instances these housing laws and policies contain implicit and explicit judgments about the relationships which really matter in defining a family and in defining our lives together. By the beginning of the second half of the twentieth century, zoning laws emerged as the third primary housing policy used to define, regulate, and control the housing of America's families. These zoning laws quite quickly, and in a surprisingly casual manner, embraced the social, cultural, and normative assumptions underlying the restrictive covenants and housing codes.

A. "Single Family" Zoning

Since its affirmation by the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[136] the exercise of zoning by local governments has become one the most common forms through which governmental entities exercise their inherent police power.[137] By its nature, zoning tends to be exclusionary; it is designed to segregate activities so as to minimize harm and conflict. For example, heavy industrial land use is to be located apart from residential use while intense commercial districts with heavy traffic are to be separated from elementary schools. Though justified in large measure by conflict avoidance and harm prevention, zoning has done more than focus on segregation of activities. It also has focused on the segregation of families and relationships that define families.[138] Similar to what occurred through the use of restrictive covenants, the dividing line between regulation of uses and activities blurred into the regulation of who and what counts as a family.[139]

---

[136] 272 U.S. 365 (1926).

[137] Ninety-eight percent of all cities with populations greater than ten thousand, and nearly ninety percent of suburban municipalities with populations larger than five thousand have adopted some form of zoning. *See* 1 EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF'S THE LAW OF ZONING & PLANNING § 1.3 (4th ed. 2004).

[138] As with restrictive covenants, the early history of the law of zoning mirrored the racial biases of our culture. By 1920 such practices were generally recognized as contrary to the fundamental precepts of our federal constitution. *See* Buchanan v. Warley, 245 U.S. 60 (1917); State v. Darnell, 166 N.C. 300, 81 S.E. 338 (1914); Irvine v. City of Clifton Forge, 124 Va. 781, 97 S.E. 310 (1918).

[139] Though most zoning by practice, if not by definition, is exclusionary, the phrase "exclusionary zoning" is generally zoning which tends to have as its predominant purpose or effect the exclusion of entire segments of our population. In its most common form the exclusion reflects the preferences of a narrow segment of the

Since the adoption of the earliest comprehensive zoning laws almost a century ago, use of property for purposes of the "single-family residence" has been one of the most revered and protected activities. As the South Carolina Supreme Court expressed in 1942:

> No higher use could be made of a piece of property than to have established thereon this greatest of all institutions, the home. It is not simply a place of residence, a house, but an institution that carries with it the idea of ultimate retreat, security, or release from the cares and struggles for a living, an atmosphere in which the young are reared, an atmosphere in which the aged are cared for, an institution definitely recognized and fostered under a wise public policy.[140]

Most of the earliest zoning ordinances—those enacted in the first half of the twentieth century—created geographic zones restricted to residential units without using the term "single family."[141] Even in early ordinances that identified a particular area as being for family residences, or even single-family residences, rarely, if ever, did such an ordinance provide a definition of "family." The focus of these housing laws during this period of time tended to be on the use or function of the structures on the property and not on the relationships among the occupants. The early ordinance of the Village of Euclid, Ohio did, however, create a zoning category for single-family use, and defined family as "any number of individuals living and cooking together on the premises as a single housekeeping unit."[142] Defining "single family residences" in terms of function and not relationships continued to be the dominant approach across the country into the 1930s, 1940s, and 1950s.[143]

---

wealthiest portion of the population. See *South Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 164, 336 A.2d 713, 719 (1975) (ordinance requirements "realistically allow only homes within the financial reach of persons of at least middle income") and successive decisions by the New Jersey Supreme Court.

140 Fraser v. Fred Parker Funeral Home, 201 S.C. 88, 96–97, 21 S.E.2d 577, 581 (1942).

141 *See, e.g.*, New York City Bldg. Zone Resolution of 1927 (as amended 1929), *reprinted in* JAMES METZENBAUM, THE LAW OF ZONING 312–13 (1930) (providing for restrictions as to dwellings without definition of families); Cleveland Zoning Ordinance of 1929, *reprinted in* METZENBAUM, *supra*, at 393–95.

142 Euclid Village Ordinance of 1922, *reprinted in* METZENBAUM, *supra* note 141, at 338.

143 Harmon v. City of Peoria, 373 Ill. 594, 597, 27 N.E.2d 525, 527 (1940) (citing the zoning ordinance definition of "family" as "one or more persons occupying a premises and living as a single housekeeping unit as distinguished from a group occupying a boarding house, lodging house, or hotel"); Carroll v. Arlington County, 186 Va. 575, 579–80, 44 S.E.2d 6, 8 (1947) (citing the zoning ordinance definition of "family" as "[a] number of individuals, living together on the premises as a single nonprofit housekeeping unit including domestic servants"); New York City Zoning Resolution of 1926 (as amended 1954), *reprinted in* 3 JAMES METZENBAUM, THE LAW OF ZONING 1959 (2d ed. 1955) (defining "family" as "one or more persons occupying a dwelling and maintaining a common household").

The most common test for determining whether individuals were living as a single housekeeping unit focused on the kitchen—a single kitchen and common meals suggested a single housekeeping unit.[144]

As occurred with restrictive covenants,[145] these zoning laws were confronted in the early part of the twentieth century with the presence of fraternities and social clubs. The question again arose as to whether they could exist in areas designated for single-family use. The legal and policy results were quite similar to those reached in the context of restrictive covenants. In the case of doubt or ambiguity, the courts usually ruled against fraternal and social groups on the grounds that they were simply not "families."[146] Alternatively, the zoning ordinances were amended to make explicit those geographic areas in which such living arrangements would be permitted.[147] Religious orders, when sharing common meals and facilities, tended to fare a bit better under zoning laws than under restrictive covenants.[148]

George Murdock's creation of the term "nuclear family" in 1949, and its characterization as consisting of a married man and woman with their offspring,[149] occurred at the same time that our housing laws—both restrictive

---

144 *See* Neptune Park Ass'n v. Steinberg, 138 Conn. 357, 359–60, 84 A.2d 687, 689 (1951) (four families relying on cooking and eating facilities which were common to all was a single housekeeping unit); Driscoll v. Brunner, 64 N.Y.S.2d 161, 162 (N.Y. Sup. Ct. 1945) (a common kitchen and meals indicates a single housekeeping unit). Consistent with this reasoning, the presence of multiple kitchens in a housing unit became problematic. *See* Baskin v. Zoning Bd. of Appeals, 40 N.Y.2d 942, 358 N.E.2d 1037 (1976) (reversing a lower court decision to deny a variance to add a second kitchen to a man who was building a residence in a single family zone for himself and his son and daughter-in-law); Stafford v. Vill. of Sands Point, 102 N.Y.S.2d 910, 911–14 (N.Y. Sup. Ct. 1951) (the presence of two kitchens did not violate a single-family zoning ordinance which did not define family).

145 *See supra* text accompanying notes 78–88.

146 City of Lincoln v. Logan-Jones, 120 Neb. 827, 235 N.W. 583 (1931); City of Schenectady v. Alumni Ass'n of Union Chapter, 5 A.D.2d 14, 168 N.Y.S.2d 754 (N.Y. App. Div. 1957).

147 *See* Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 529, 213 N.W. 835, 837 (1927) (express provision in ordinance providing that fraternities were permitted in "B" residential district); City of Schenectady v. Alumni Ass'n of Union Chapter, 168 N.Y.S.2d 754, 755, 5 A.D.2d 14, 15 (N.Y. App. Div. 1957) (ordinance expressly provided that "multiple dwelling zone" permitted fraternities).

148 Application of Laporte, 152 N.Y.S.2d 916, 918, 2 A.D.2d 710, 710 (1956) (permitting sixty students to live together as members of a religious order when the ordinance defined "family" as "one or more persons occupying a dwelling unit as a single, non-profit housekeeping unit"); Missionaries of Our Lady of La Salette v. Vill. of Whitefish Bay, 267 Wis. 609, 611, 619, 66 N.W.2d 627, 629, 633 (1954) (permitting three priests and two lay brothers to live together as a family when family is defined as "one or more individuals living, sleeping, cooking or eating on premises as a single housekeeping unit"). *Contra* Planning & Zoning Comm'n v. Synanon Found., Inc., 153 Conn. 305, 308–09, 216 A.2d 442, 443 (1966) (eleven to thirty-four unrelated persons belonging to a charitable institution were in violation of an ordinance that restricted use to one family per lot, but left family undefined).

149 MURDOCK, *supra* note 95, at 1.

covenants and residential zoning laws—shifted strategies away from a functional definition of a household unit to a definition of the family as persons related by blood, marriage, or adoption. The earliest example of a zoning law using such an approach is a 1945 zoning ordinance of the Village of La Grange Park, Illinois.[150] This "blood, marriage, or adoption" test rapidly spread across the country, and was picked up as a standard zoning definition of a family in model legislation in 1953.[151] By the 1960s and 1970s, most courts did not have to puzzle about the relationships that would "count" in defining a family, because local ordinances made it very simple: you had to be related by blood, marriage, or adoption to be within a family.[152]

This narrow nuclear definition of a family was not entirely exclusive, for local ordinances did permit occupancy by a small number of persons not related by blood or marriage. Allowing one or two unrelated persons to live with individuals who were related by blood, marriage, or adoption appears in some instances to have been a recognition of economic circumstances, as when an ordinance included the possibility of "not more than two (2) boarders or lodgers."[153] In other communities, it appears to reflect recognition that nuclear families did indeed have at times "domestic servants" or "gratuitous guests" living with them.[154] When relationships by blood, marriage, or adoption were entirely absent, zoning ordinances took a very restrictive approach by limiting permissible housing to no more than two, three, or four "unrelated" individuals,[155] or by refusing to permit their occupancy altogether.[156]

---

150 Wesemann v. Vill. of La Grange Park, 407 Ill. 81, 85, 94 N.E.2d 904, 907 (1950) (citing a 1945 zoning ordinance definition of "family" as "[a]ny number of individuals related by blood, marriage or adoption, living and cooking together in the same premises as a single housekeeping unit, but not including more than two (2) boarders or lodgers").

151 NAT'L INST. OF MUN. LAW OFFICERS, NIMLO MODEL ZONING ORDINANCE ch. 11 (1953) (defining "family" as "a single individual, doing his own cooking, and living upon the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage, or other domestic bond as distinguished from a group occupying a board house, lodging house, club, fraternity or hotel"). A parallel approach was set forth in a 1966 model zoning ordinance. FREDERICK HAIGH BAIR, JR. & ERNEST R. BARTLEY, THE TEXT OF A MODEL ZONING ORDINANCE WITH COMMENTARY § 18 (3d ed. 1966) (defining "family" as "[o]ne or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage, no such family shall contain over five persons").

152 Palo Alto Tenants' Union v. Morgan, 487 F.2d 883, 884 (9th Cir. 1973); City of Newark v. Johnson, 70 N.J. Super 381, 385, 175 A.2d 500, 502 (Essex County Ct. 1961).

153 1945 ordinance, *quoted in* Wesemann, 407 Ill. at 85, 94 N.E.2d at 907.

154 *See* City of Des Plaines v. Trottner, 34 Ill. 2d 432, 433–34, 216 N.E.2d 116, 117 (1966) (the ordinance defined a "family" as including "any domestic servants and not more than one gratuitous guest residing with said family").

155 *Morgan*, 487 F.2d at 884 (definition of family includes "a group not exceeding four persons living as a

We can only surmise the reasons for this profound shift in housing laws by this adoption of a narrow, mechanical definition of a family. Perhaps it was a reaction against judicial decisions which permitted groups of individuals (whether fraternities or religious orders) to live in single-family neighborhoods. Perhaps it was a mirror of cultural acceptance, as a normative proposition, of Murdock's nuclear family. Perhaps, as some have suggested, it was a reaction against the open emergence in the 1960s of collectivist and communal life styles in which marriage was absent or incidental.[157] Whatever the motivation or justification, the consequences were profound. Four, five, six, or more individuals not related by blood, marriage, or adoption simply could not qualify as a "family" and live in a "single-family" area, regardless of their personal, emotional, religious, or cultural commitments one to another.

B. Constitutional Boundaries of Zoning Family Relationships

Using housing laws to define families pushed against the outer boundaries of constitutional law in the last quarter of the twentieth century. From the perspective of the federal constitution, the U.S. Supreme Court examined the validity of single-family zoning in two key decisions: *Village of Belle Terre v. Boraas* (1974)[158] and *Moore v. City of East Cleveland* (1977).[159] In the tiny community of Belle Terre[160] an ordinance permitted no more than two persons, unrelated by blood, marriage, or adoption, to occupy a residence.[161] A group of six students occupying a residence challenged the ordinance on constitutional grounds. Finding no violation of any fundamental rights, the

single housekeeping unit"); *Trottner*, 34 Ill. 2d at 438, 216 N.E.2d at 120 (holding that ordinance would permit four unrelated individuals to reside together); Gabe Collins Realty, Inc. v. City of Margate, 112 N.J. Super. 341, 342, 271 A.2d 430, 430 (1970) (citing the zoning ordinance definition of "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 nonprofit housekeeping unit").

156 Marino v. Mayor of Norwood, 77 N.J. Super. 587, 592, 187 A.2d 217, 220 (N.J. Super. Ct. Law Div. 1963) (citing the zoning ordinance definition of "family" as "[a]ny number of individuals related by blood or marriage, and including servants, living together as a single housekeeping unit"); City of Newark v. Johnson, 70 N.J. Super. 381, 385, 175 A.2d 500, 502 (Essex County Ct. 1961) (ordinance recognized only occupants related by blood, marriage, or adoption).

157 *See* ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 9.30 (4th ed. 2004).

158 Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).

159 Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

160 At the time of the litigation Belle Terre was a community consisting of only one square mile in total land area, containing 220 homes inhabited by a total of 700 people. *Vill. of Belle Terre*, 416 U.S. at 2.

161 *Id.* at 1. The ordinance also expressly excluded lodging, boarding, fraternity, and multiple-dwelling houses. *Id.*

Court applied a deferential standard and held that the ordinance had a rational basis.[162]

Three years later, in *Moore v. City of East Cleveland*, the Supreme Court considered a local zoning ordinance which contained a very specific definition of a "family." The ordinance recognized as an acceptable "family" only the head of the household, his or her spouse, their parents, and their unmarried children, and up to one set of married dependents with grandchildren.[163] As a result, a grandmother could not lawfully occupy a residence with two grandsons who were first cousins. This time, the Court chose not to apply such a deferential standard to a local zoning decision on the grounds that it was an "intrusive regulation of the family."[164] Instead, the Court held:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.[165]

The concurrence by two justices to the plurality opinion was even more forceful in condemning the "cultural myopia of the arbitrary boundary" drawn by the ordinance.[166] As Justice Brennan argued, "The line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society."[167]

---

[162] *Id.* at 7–8.

[163] *Moore*, 431 U.S. at 496 n.2.

> Although there appear to be almost endless differences in the language used in these [single-family zoning] ordinances, they contain three principal types of restrictions. First, they define the kind of structure that may be erected on vacant land. Second, they require that a single-family home be occupied only by a "single housekeeping unit." Third, they often require that the housekeeping unit be made up of persons related by blood, adoption, or marriage, with certain limited exceptions. Although the legitimacy of the first two types of restrictions is well settled, attempts to limit occupancy to related persons have not been successful.

Id. at 515–16 (Stevens, J., concurring).

[164] *Id.* at 499 (majority opinion).

[165] *Id.* at 504. This is also the first instance of the use of the term "nuclear family" in Supreme Court jurisprudence since it was coined by George Murdock in 1949. *See generally* MURDOCK, *supra* note 95.

[166] *Id.* at 507 (Brennan, J., concurring).

[167] *Id.* at 507–08. "The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living." *Id.* at 508. In a third decision dealing with the constitutional boundaries of local zoning ordinances, the Supreme Court faced a local zoning ordinance which imposed special procedural hurdles for a group home for mentally retarded children, when such requirements did not apply to boarding houses, fraternities or social clubs. City of

Both *Belle Terre* and *Moore* continue to be valid propositions of federal constitutional law. As summarized by a recent decision of the Michigan Court of Appeals, "[t]he right to live with one's family is constitutionally protected [under *Moore*], but the right to live with any number of individuals who are not one's family is not [under *Belle Terre*]."[168]

Though the federal constitution imposes few, if any, constraints on a government's ability to restrict or prohibit unrelated persons from being a "family" for zoning purposes, a few state constitutions stand for a different perspective. For example, the California Supreme Court evaluated narrowly drafted single-family zoning ordinances in light of a state constitutional guarantee of freedom of association and the fundamental right of privacy, and concluded that ordinances defining "family" solely in terms of kinship, marriage, or adoption are not valid.[169] In New York, an ordinance defining "family" as any number of persons related by blood, marriage, or adoption will not be constitutional unless it also contains an alternative definition of family as any number of unrelated persons living together and constituting the functional equivalent of a traditional family.[170] The New Jersey Supreme Court also has invalidated narrow definitions under the due process provisions of its state constitution.[171]

Despite these examples of states forbidding such narrow definitions of family, the majority of states in the country, either on the basis of their own constitutions or in simple deference to the current interpretation of the federal constitution, regard as valid zoning ordinances that severely limit, or prohibit, persons not related by blood, marriage, or adoption from living together. It is thus entirely possible for a city to render it illegal, in its zoning laws, for an unmarried couple and a child to live in an area zoned for single-family use. In precisely such an instance, the Missouri Court of Appeals held that to be a family, "there must exist a commitment to a permanent relationship and a

Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 436 n.3 (1985). In this context and on these facts, the Court held that differential treatment of a group home for mentally retarded children lacked any rational basis and violated equal protection. *Id.*

[168] Citizens for Fair Hous. v. City of E. Lansing, 2001 WL 682491, at *2 (Mich. Ct. App. Apr. 20, 2001).

[169] City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 134, 610 P.2d 436, 442 (1980).

[170] McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 550–51, 488 N.E.2d 1240, 1244 (1985).

[171] State v. Baker, 81 N.J. 99, 113, 405 A.2d 368, 375 (1979). Michigan also invalidated a restrictive single-family zoning ordinance on state constitutional grounds, *Charter Township of Delta v. Dinolfo*, 419 Mich. 253, 276, 351 N.W.2d 831, 843 (1984), but a subsequent appellate court decision sustained an ordinance limiting use to persons related by blood, marriage, or adoption, or a maximum of six unrelated persons. Stegeman v. City of Ann Arbor, 213 Mich. App. 487, 489–90, 540 N.W.2d 724, 726 (1995).

perceived reciprocal obligation to support and to care for each other."[172] The consummate difficulty with such reasoning is the complete absence of a public or social decision on the "perceived reciprocal obligation," because the court made clear that it is the perception on the part of the court, not the perception of the individuals in the relationship, which controls.[173]

States and local governments which choose not to use a definition of "family" in their zoning laws tend to shift to a multifactor analysis centered on whether the group of individuals live as the "functional equivalent" of a family or as a single housekeeping unit. One factor that has been used in the "functional equivalent" analysis is *permanency and stability*,[174] but the lines demarcating transient use from permanent residence are anything but clear.[175] A second and more common defining element is one which predominated during the first half of the twentieth century: the presence of *shared activities and responsibilities*. Sharing of meals and recreational activities is strongly suggestive of a functional family,[176] as is evidence of a third common fact: the presence of a *relationship of nurture and support*.[177]

C. The Fair Housing Act and Familial Status

The bulk of our country today continues to be willing to tolerate restrictions on who counts as America's families, at least for purposes of living in the most economically privileged single family areas. Restrictive covenants and zoning laws which allow occupancy by an unrestricted number of persons

---

[172] City of Ladue v. Horn, 720 S.W.2d 745, 748 (Mo. Ct. App. 1986).

[173] *Id.*

[174] *See, e.g.*, Open Door Alcoholism Program, Inc. v. Bd. of Adjustment, 200 N.J. Super. 191, 199–200, 491 A.2d 17, 22 (N.J. Super. App. Div. 1985) (the individuals "must exhibit a kind of stability, permanency and functional lifestyle which is equivalent to that of the traditional family unit").

[175] *See* Albert v. Zoning Hearing Bd., 578 Pa. 439, 454, 854 A.2d 401, 410 (2004) (residence at half-way house for two to six months is transient in nature, not permanent).

[176] *See* City of Vinita Park v. Girls Sheltercare, Inc., 664 S.W.2d 256, 259 (Mo. Ct. App. 1984) (eight unrelated girls and three unrelated house parents constituted a functional family where the group shared responsibilities, meals, and recreational activities); Borough of Glassboro v. Vallorosi, 117 N.J. 421, 432, 568 A.2d 888, 894 (1990) (ten college students constituted a functional family where they ate meals together, cooked for each other, shared household chores and yard work, and shared a common checking account to pay for food and other bills); Township of Pemberton v. State, 178 N.J. Super. 346, 353, 429 A.2d 360, 363 (N.J. Super. Ct. App. Div. 1981) (ordinance defined "housekeeping unit" as "one or more persons 'living together in one dwelling unit on a non-seasonal basis and sharing living, sleeping, cooking and sanitary facilities on a non-profit basis'").

[177] *See, e.g.*, Group House of Port Wash., Inc. v. Bd. of Zoning and Appeals, 45 N.Y.2d 266, 272, 380 N.E.2d 207, 210 (1978) (foster home intended to function as a replacement family); *In re* Appeal of Miller, 511 Pa. 631, 640, 515 A.2d 904, 909 (1986) (support for elderly and handicapped residents is the support that the traditional family unit is designed to provide).

connected by blood, marriage, or adoption, yet impose a finite occupancy limit on unrelated individuals, share a common bond with the occupancy limits created by housing and building codes over the course of the twentieth century. Instead of admitting publicly that such limits on unrelated persons living together are nothing more than a social and cultural rejection of certain lifestyles, the proponents of these rules argue that local governments are free to adopt reasonable occupancy limits in order to protect health, safety, and welfare. The logical fallacy in these arguments is, of course, that there are no such occupancy limits in the context of families related by blood, marriage, or adoption. This suggests that either we do not care about the health and safety of families, or that we simply do not want "nonnuclear" families residing in our preferred neighborhoods.

The interpretation and application of the Fair Housing Act Amendments of 1988[178] present precisely the context for revealing these hidden social biases in our housing laws. These amendments made it illegal, for the first time, to discriminate in the provision of housing on the basis of "familial status," defined as the presence of a child (under the age of eighteen) together with the legal guardian of the child or an adult having permissive custody of the child.[179] The legislative history of this federal law makes it clear that the amendments were necessary to address widespread discrimination, both in housing laws and in private apartment leasing policies, against the presence of children.[180] Apartments and housing available to adults only were common, and justified by owners and landlords in the nature of peace and quiet, reduction of costs and damages, and for the prevention of harm to children. While seeking to protect children as victims of discrimination in housing, the Fair Housing Act says nothing about discrimination on the basis of marital status (or the lack thereof), and the legislative history of the 1988 amendments are clear that the addition of familial status as a protected category does not extend to marital status.[181]

---

[178] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. § 3601-3619 (2000)).

[179] 42 U.S.C. § 3602(k) (2000).

[180] *See, e.g.*, R.W. MARANS ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY (1980), *cited in* H.R. REP. NO. 100-711, at 19 n. 32 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2180.

[181] H. R. REP. NO. 100-711, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184. Discrimination against unmarried couples, if prohibited, is enforceable under state law. *See, e.g.*, Hoy v. Mercado, 698 N.Y.S.2d 384, 385, 266 A.D.2d 803, 804 (N.Y. App. Div. 1999) (holding that discrimination by landlord against unmarried couple was not in violation of state law protecting marital status).

The concept of familial status as embodied in the Fair Housing Act is not tied to relationships of blood, marriage, or adoption. The key test is a custodial relationship with a child, which includes foster children and children living in a group home with supervisory adults.[182] The conception of family protected by these 1988 amendments is thus much broader than the narrow tests of many jurisdictions.[183]

The prohibition against discrimination on the basis of familial status contains a significant and powerful exception, providing that the federal law does not limit "the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[184] What constitutes a "reasonable occupancy limit" for purposes of this federal law is not clear, and the Department of Housing and Urban Development has sidestepped establishing an empirically validated occupancy limit while suggesting that two persons per bedroom is reasonable.[185]

When a local zoning ordinance elects to define a single family as persons related by genetics, marriage, or adoption—without limit as to their number—or a limited number of unrelated persons, it is not creating a rule that falls within the Fair Housing Act exception for "reasonable occupancy limit."[186] Such a zoning ordinance "describes who may compose a family unit; it does not prescribe '*the* maximum number of occupants' a dwelling unit may house."[187] Family composition rules are synonymous with occupancy limits. Such rules may be constitutional in certain circumstances, but occupancy limits on unrelated persons do not permit the zoning ordinance to escape the provisions of the Fair Housing Act simply because they are grafted into the definition of single family zoning. As the Supreme Court held in *City of Edmonds v. Oxford House*, "It is curious reasoning indeed that converts a family values preserver into a maximum occupancy restriction once a town adds to a related persons prescription 'and also two unrelated persons.'"[188]

---

[182] *See* Gorski v. Troy, 929 F.2d 1183, 1187 (7th Cir. 1991) (foster parents); Keys Youth Servs., Inc. v. City of Olathe, 67 F. Supp. 2d 1228, 1229 (D. Kan. 1999) (group home for minors); Andujar v. Hewitt, 2002 WL 1792065, at *8 (S.D.N.Y. Aug. 2, 2002) (godparent with physical custody).

[183] Jim Morales, *The Emergence of Fair Housing Protections Against Arbitrary Occupancy Standards*, 9 LA RAZA L.J. 103, 104 (1996).

[184] 42 U.S.C. § 3607(b)(1) (2000).

[185] *See supra* note 126 and accompanying text.

[186] *See* Tim Iglesias, *Clarifying the Federal Fair Housing Act's Exemption for Reasonable Occupancy Restrictions*, 31 FORDHAM URB. L.J. 1211, 1233 (2004).

[187] City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 728 (1995).

[188] *Id.* at 737.

The advent of zoning laws by the middle of the twentieth century provided the opportunity for widespread expression of the preference for single-family housing that first emerged in the restrictive covenants of the late nineteenth century. As occurred in the context of restrictive covenants, zoning laws had to confront the profound pressure to create exclusive enclaves occupied by a socially perceived "norm" of a narrowly defined family. Buoyed by Murdock's nuclear family, local zoning ordinances placed highest value on families as defined by blood, marriage, or adoption. The federal constitution stepped in to circumscribe the power to limit too narrowly families that are indeed related by genetics, adoption, or marriage, but left wide discretion to regulate all other relationships. The Fair Housing Act protects children in very important ways from discrimination in housing, and demonstrates the fallacy of using occupancy limits as a subterfuge for controlling relationships. Within the very broad boundaries, however, most of our country continues to use housing laws to define America's families directly and indirectly based on implicit social norms in ways that have profound negative consequences for our lives together.

CONCLUSION

This inquiry into housing laws suggests both what we have done, and what we need to do in the future. First, housing laws carry tremendous normative assumptions, or at least tremendous normative consequences. Second, housing laws are not capable of bearing the weight of such profound social judgments. Third, housing laws should focus on function and use, not on relationships. Fourth, if there is to be a social and cultural judgment enforced by laws about the relationships that count in deciding who lives in our neighborhoods, then let us present these moral convictions openly for debate and not hide them in the varieties of housing laws.

Residential restrictive covenants may have arisen first out of a desire to separate homes and apartments from hotels and boarding houses, but they quickly emerged as tools to segregate by wealth and race. Occupancy standards were first created to address health concerns of inner city tenements, but they have been without empirical validation for over a hundred years, with the widely accepted—but we know not why—standards of two persons per bedroom, or one person per room, as indicative of overcrowding. For the past sixty years, zoning has been the dominant tool by which we define and control

"single families" and this has embraced the rubric of "blood, marriage, and adoption" as the talisman for that which constitutes the family.[189]

The vision of the American family, at least in housing laws, increasingly narrowed during the twentieth century. Conceptions of extended families, of friends taken in because they had no other place to go, of housing as sustenance to be shared, have been replaced by conceptions of exclusion, control, rejection, and denial. The narrowing of the nuclear family has come at great cost to the society at large and to specific subcultures in particular.[190] The examples provided here are but an indication of the need to explore this theme in related fields. As Emory Law Professor Martha Albertson Fineman has so poignantly and powerfully argued in her recent work, *The Autonomy Myth: A Theory of Dependency*, "we need to rethink old paradigms, set aside the misleading discourses about personal versus public responsibility, and cast a skeptical eye on current renditions of the social myths of independence and self-sufficiency."[191]

We should, for example, be ever mindful of the very concept of who counts as a living unit. From the birth of this country and its first census in 1790, until the census in 1950, we did not count "families," we counted households, groups of individuals living as a dependent single housekeeping unit. The earliest census takers were instructed to identify the "head of the family" without inquiry into the nature of the relationships among the persons living together.[192] Between 1850 and 1890 the concept of "family" was used in the census, but it rested on "common means of support" or the presence of a "common table."[193] It was not until the 1950 census that we first saw the definition of a family as persons related by "blood, marriage, or adoption."[194] As we rely upon this narrow definition, consider the fact that the most recent census data discloses that for the first time in American history, traditional

---

[189] *See supra* text accompanying notes 153–57.

[190] For example, larger households are common in the Hispanic population. In 1990, twenty-eight percent of Hispanic households in metro areas had two people or more per room, compared with two percent of white households. U.S. CENSUS BUREAU, STATISTICAL BRIEF: HOUSING IN METROPOLITAN AREAS—HISPANIC ORIGIN HOUSEHOLDS (1995), *available at* http://www.census.gov/apsd/www/statbrief/sb95_4.pdf. This number of people is classified as "crowded," thus subjecting such households to housing laws. *See id.*

[191] MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 239 (2004).

[192] *See* U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790 TO 2000, at 5 (2002), *available at* http://www.census.gov/prod/2002pubs/pol02marv-pt1.pdf.

[193] *Id.* at 9, 14, 19, 26.

[194] *See id.* at 70, *available at* http://www.census.gov/prod/2002pubs/pol02marv-pt2.pdf.

families—husband, wife, and children—make up less than one fourth of all households.[195]

Consider also the essence of our federal programs that support and subsidize the goal of safe, decent, and affordable housing. The entire annual budget for all of the programs of the Department of Housing and Urban Development is roughly $34 billion.[196] But that is not the primary federal subsidy for housing. The subsidy, for the home mortgage interest deduction, is probably two to three times as large—over $100 billion dollars.[197] This subsidy is expended solely on those taxpayers who itemize their tax deductions. This federal policy becomes even more curious when we realize that part of this federal subsidy is for second homes (including luxury boats), which by definition cannot be occupied by third parties and are vacant most of the time.[198] In a society with millions of families who are homeless, we spend billions subsidizing unoccupied vacation homes.

The preservation of the family and the relationships which lie at the core of familial bonds are not to be achieved by trying to do indirectly what we are uncomfortable with doing directly, or unable to do with accuracy. In the context of housing laws, the task should be to provide housing—housing that is described and defined according to use and activity, not according to genetics or custody. Living arrangements which are premised on the bonds we cherish—the commitments between persons to care and to nurture—will allow our society to affirm the presence of such bonds in relationships of blood, marriage, and adoption, and recognize the possibility of such bonds in relationships borne of simple commitment one to another. It is in this much broader vision that we may indeed pursue the American dream of safe, decent, and affordable housing for every American family, and treasure our lives

---

[195] U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000, at 4 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf.

[196] U.S. DEP'T OF HOUS. & URBAN DEV., FISCAL YEAR 2005 BUDGET SUMMARY 34, app. B (2004), *available at* http://www.hud.gov/about/budget/fy05/budgetsummary.pdf.

[197] *Compare* Mildred Warner et al., *Addressing the Affordability Gap: Framing Child Care as Economic Development*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 294, 301 (2003) ($97 billion in federal tax expenditure for home mortgage interest deduction in 2000), *with* JOINT COMM. ON TAXATION, 107TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2003–2007, at 20 (2002) (projecting a tax expenditure of $384.9 billion during the five year period from 2003–2007).

[198] 26 U.S.C. § 163(h)(4)(a) (2000). *See generally* Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347 (2000); William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43 (1996); Martin J. McMahon, Jr., *Individual Tax Reform for Fairness and Simplicity: Let Economic Growth Fend for Itself*, 50 WASH. & LEE L. REV. 459 (1993).

together. The houses we inhabit are not solely the fruits of our labors, and the houses we build are not for us alone. As we work towards a dream of safe, decent, and affordable housing for all American families, let us always recall that we are given

> ". . . flourishing cities you did not build,
> houses filled with all kinds of good things you did not provide,
> wells you did not dig,
> and vineyards and olive groves you did not plant. . ." [Deut. 6:10-12].