NOTES

BELLE TERRE AND SINGLE-FAMILY HOME ORDINANCES: JUDICIAL PERCEPTIONS OF LOCAL GOVERNMENT AND THE PRESUMPTION OF VALIDITY

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INTRODUCTION

Zoning ordinances began as a way for cities to control the negative externalities[1] associated with urban land uses, as well as a means of protecting property values.[2] By separating residential districts from factories and retail areas, early city planners hoped to stabilize neighborhoods and preserve the value of the homes in a given residential area.[3] As a suburban ideal of the private family home emerged,[4] however, local governments began to use zoning laws to regulate the characteristics and lifestyles of people living in certain neighborhoods.[5] By zoning districts for single-family use[6] and defining "family" narrowly, localities began to zone for direct social control,[7] allowing communities to exclude groups of people deemed "undesirable" as

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1 Externalities exist when people make decisions about how to use resources without taking full account of the effects of their decisions. People may ignore some of the costs and benefits of an activity because they are borne by others. See Jesse Dukeminier & James E. Krier, Property 49-53 (3d ed. 1993).

2 See J. Gregory Richards, Zoning for Direct Social Control, 1982 Duke L.J. 761, 762 (discussing history of zoning).

3 See id.

4 See infra note 92 and accompanying text.

5 See M. G. Woodroof III, Land Use Control Policies and Population Distribution in America, 23 Hastings L.J. 1427, 1434 (1972) (discussing use of zoning laws to control population distribution).

6 This Note will refer to such laws as "single-family home ordinances."

7 See Richards, supra note 2, at 765 (arguing that municipalities zone for direct social control by identifying which land users qualify to live in district on basis of relatively immutable personal characteristics).

neighbors.[8] Because single-family home ordinances with narrow definitions of family tend to zone out low-income individuals who cannot afford to live without roommates or extended family, and because historically, America's poor have been disproportionately ethnic minorities, these ordinances tend to perpetuate class and racial segregation.[9]

Many municipalities have sought to enact laws that define family in terms of biological or legal relationships and restrict the number of unrelated persons who can live together as a family.[10] The Supreme Court considered the constitutionality of such a provision in *Village of Belle Terre v. Boraas*,[11] where it upheld the ordinance and explained

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[8] See Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 241-42 (1985) (arguing that zoning is device to keep poor people out of affluent areas). Although in theory zoning was designed to protect the interests of all citizens by limiting land speculation and congestion, often it is actually used for exclusionary purposes. See id. at 242. Minimum lot and set-back requirements ensure that only members of wealthy classes can settle in certain areas; Southern cities even have used zoning to enforce racial segregation. See id. In addition, suburbs in all areas of the country have used zoning to keep "undesirable" racial, ethnic, and low-income groups out of their communities by excluding apartments, factories, and "blight." See id.

Single-family home ordinances traditionally sought to ensure low population density, residential, family-style living arrangements. See Linda M. Grady, Single-Family Zoning: Ramifications of State Court Rejection of Belle Terre on Use and Density Control, 32 Hastings L.J. 1687, 1690 (1981) (discussing historical development of single-family zoning). In order to regulate who could live in a single-family home, zoning ordinances had to define family. In the early days of zoning, many municipalities defined family as an unlimited number of persons living as a single housekeeping unit. See Richards, supra note 2, at 769. Perhaps in response to lifestyles and living arrangements that became popular in the 1960s, many municipalities adopted more restrictive definitions of family, see Grady, supra, at 1691, adding limitations on the number of unrelated persons who could live together as a single housekeeping unit.

Single-family home ordinances typically are enforced because a neighbor complains about the people living nearby, thereby triggering inspections by local officials. See Robert C. Ellickson & Vicki L. Been, Land-Use Controls 8-31 to 8-32 (2d ed. forthcoming 1999) (describing local enforcement mechanisms determining who occupies dwelling unit). Some suburbs have developed more systematic control devices. In 1967, University City, Missouri, a St. Louis suburb, enacted a system that requires new renters and owner-occupants to obtain occupancy permits from the municipality before moving in. See id. The permit asks for the number, age, and family relationships of all occupants, and city officials then inspect the dwelling unit to determine whether the household satisfies the city's occupancy restrictions. See id.

[9] See infra notes 93-95 and accompanying text.

[10] For a list of states that have upheld such ordinances, see infra Part I.B and note 39. New Jersey, New York, Michigan, and California have struck down such ordinances. See infra Part I.C. A typical provision defines "family" as:

> [O]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

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

[11] 416 U.S. 1 (1974).

that it was permissible for the state to designate areas for family-style living.[12] Since *Belle Terre*, challenges to single-family home ordinances have moved primarily to state courts. Because state courts can also review zoning ordinances based on state constitutions, they can offer more protection to individuals under "new federalism" than the Supreme Court's holding in *Belle Terre* would otherwise allow.[13]

The state courts have divided on the constitutionality of single-family home ordinances. Courts that have upheld them under their state constitutions generally follow the reasoning of *Belle Terre* and typically hold that such ordinances are rationally related to the legitimate state interests of promoting family and youth values and preserving the family and marriage.[14] Other courts have explicitly rejected the Supreme Court's holding and reasoning, holding instead that the enactment of such ordinances assumes without support that unrelated persons who live together behave differently than traditional families.[15]

The refusal of some state courts to follow *Belle Terre* may signal a shift away from the traditional definition of family and an increasing tolerance of "alternative" lifestyles. But the split between the state courts and the Supreme Court also reflects a divergence in views on the proper attitude of the judiciary toward zoning and degrees of deference due local governments.[16] This Note contrasts the different approaches federal and state courts have taken toward zoning ordinances, arguing that the difference between the Supreme Court's opinion and some state courts' opinions arises from differing conceptions of the function of local governments and the degree of deference they deserve. While the Supreme Court views local government—through the lens of the idealized American suburb—as a protector of family and home values, state courts that refuse to follow *Belle Terre* perceive local government as merely an extension of the state and therefore award it less deference in zoning decisions.

Part I examines the Supreme Court's early treatment of zoning and its decisions regarding single-family home ordinances. It then reviews how the state courts have interpreted *Belle Terre*. Part II explains why the Supreme Court and four state courts have disagreed on

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12 See id. at 9.

13 See infra note 61 and accompanying text.

14 See infra Part I.B. This Note uses the term "family values" to refer to the traditional family character of a neighborhood, as the *Belle Terre* Court pictured it. The *Belle Terre* Court explained that family values and needs refer to a family's interest in keeping residential areas free of noise and traffic, avoiding congestion, and preserving quiet and open spaces for children to play. See *Belle Terre*, 416 U.S. at 9.

15 See infra Part I.C.

16 See infra Part II.

the constitutionality of single-family home ordinances and granted varying levels of deference to local governments. This Part first argues that the Supreme Court endorses a suburban model of local government, and thus adopts a deferential attitude toward local power in zoning matters. The second section of this Part examines the reasons why four state courts have adopted a statewide view of zoning instead. A review of these courts' opinions in other restrictive zoning cases documents their skepticism toward local governments' zoning decisions. Finally, Part III analyzes the Supreme Court's tradition of deference to local governments in land-use decisions. It argues that state courts evaluating single-family home ordinances should follow the lead of the four courts described in Part II and shift the presumption of validity to require localities to justify their zoning regulations.

I

COURTS' TREATMENT OF SINGLE-FAMILY HOME ORDINANCES

The Supreme Court's treatment of both zoning and single-family home ordinances has had a tremendous impact on most state courts evaluating similar provisions under their state constitutions. The tradition of deference to local governments making zoning decisions, accomplished in part by a presumption of validity granted to zoning ordinances, originated with *Village of Euclid v. Ambler Realty Co.*[17] and continued for at least forty-eight years through *Belle Terre*.[18] Examining the history of Supreme Court zoning jurisprudence[19] and state courts' varying interpretations of *Belle Terre* reveals the development of this tradition of deference over the years and the move of some state courts toward heightened scrutiny of zoning ordinances.

A. Supreme Court Zoning Decisions

Between 1926 and the 1970s, the Supreme Court rarely became involved in local land-use matters,[20] and the decisions the Court is-

[17] 272 U.S. 365 (1926) (upholding ordinance regulating commercial activity in areas zoned for residential use).

[18] See infra Part III.A for a discussion of the Supreme Court's retreat from *Euclid*'s tradition of deference.

[19] This Part does not attempt to discuss all major Supreme Court cases dealing with zoning. Rather, it focuses on the important case of *Euclid*, which set the stage for subsequent zoning decisions, and discusses *Belle Terre* and Moore v. City of East Cleveland, 431 U.S. 494 (1977), precedential cases involving single-family home ordinances. Part III introduces additional Supreme Court zoning cases which do not deal with single-family home ordinances but which suggest a change in the level of deference the Supreme Court has given to local governments since *Belle Terre*.

[20] See William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 40-41 (1985) (stating that Supreme Court issued

sued were therefore especially significant. One of the first important cases to deal with zoning ordinances restricting rights of property owners was *Euclid*. In *Euclid*, a landowner challenged a village ordinance regulating commercial activity in areas zoned for residential use.[21] The owner claimed that under the restricted-use ordinance, his land would be greatly reduced in value,[22] violating the Due Process and Equal Protection Clauses under both the state and federal constitutions.[23] The Court held that the ordinance was a constitutional exercise of the state's police power and crafted a two-part test to determine the constitutionality of an ordinance: To be constitutional under the Federal Constitution, an ordinance must (1) bear a clear relationship to public health, safety, morals or general welfare; and (2) be reasonable, not arbitrary.[24] The Court reasoned that the segregation of industries and dwellings bore a rational relation to the health, morals, safety, and general welfare of the community because the establishment of zones could prevent congestion, secure quiet residential districts, increase the safety of home life, and prevent street accidents.[25] Because the ordinance met the rational basis test, the Court deferred to the village council and held that a municipality may use its police power to separate industrial areas from residential zones.[26] Thus, as early as 1926, the Court established a presumption of validity for local zoning ordinances.

Almost fifty years later, the Supreme Court in *Belle Terre* first confronted the constitutionality of a limited definition of family in a

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only handful of zoning decisions between *Euclid* and *Belle Terre* and citing significant cases since 1974).

21 See *Euclid*, 272 U.S. at 384.

22 See id. The owner argued that the market value of his land dropped from $10,000 per acre if used for industrial purposes to $2500 per acre if the use were limited to residential purposes. See id.

23 See id.

24 See id. at 395.

25 See id. at 392-94.

26 By upholding the ordinance as a valid exercise of police power, the Court arguably ignored the ordinance's class and racial implications. The district court that first heard the case struck down the ordinance on due process grounds and stated that the law aimed to regulate people's mode of living. See Ambler Realty Co. v. Village of Euclid, 297 F. Supp. 307, 316 (N.D. Ohio 1924). According to the district court, the result would be to "classify the population and segregate them according to their income or situation in life." Id. Recognizing that property values often dropped when people of color moved into a residential section, the lower court reasoned that upholding the Euclid ordinance would enable villages to zone out minorities in order to protect property values and prevent congestion. See id. at 312-13. For a description of the mounting racial tension in Cleveland and its suburbs around the time when Euclid's ordinance was drafted, see William M. Randle, Professors, Reformers, Bureaucrats, and Cronies: The Players in *Euclid v. Ambler*, in Zoning and the American Dream 31, 42-43 (Charles M. Haar & Jerold S. Kayden eds., 1989).

single-family home ordinance. The Belle Terre ordinance restricted land use to one-family dwellings and defined family as one or more related persons, or not more than two unrelated people.[27] The owners of a house in the village rented the house to six unrelated college students.[28] After the owners were cited for violating the ordinance, they challenged its constitutionality under the Federal Constitution, claiming that it violated the Equal Protection Clause of the Fourteenth Amendment and the rights of association, travel, and privacy.[29]

Applying the rational basis standard set forth in *Euclid*, the Court found the ordinance constitutional, noting that the land-use legislation reasonably addressed family needs.[30] The Court explained that the ordinance was not aimed at transients and neither violated equal protection nor infringed upon a "fundamental" right guaranteed by the Constitution.[31] The opinion also focused heavily on the city's legitimate interest in protecting traditional family life and preserving the atmosphere of the neighborhood.[32]

While *Belle Terre* upheld an ordinance imposing limits on the types of groups who could live together, three years later the Supreme Court struck down a similar ordinance because it imposed still narrower restrictions on the definition of family. In *Moore v. City of East Cleveland*,[33] a sixty-three-year-old woman who lived with her son and two grandsons was convicted of violating a housing ordinance that

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[27] See supra note 10.

[28] See Village of Belle Terre v. Boraas, 416 U.S. 1, 2-3 (1974).

[29] See id. at 3-4, 7.

[30] See id. at 8-9.

[31] See id. at 7-8. In defending the arbitrariness of the ordinance's two-person limit on unrelated housemates, the Court emphasized the differences between the judiciary and the legislature: "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." Id. at 8 (citation omitted). In dissent, Justice Marshall argued that deference does not mean abdication: "This Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights." Id. at 14 (Marshall, J., dissenting).

Justice Marshall also argued that the classification burdened the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments and that the Court should therefore have applied strict scrutiny. See id. at 13 (Marshall, J., dissenting). Marshall reasoned that because the choice of household companions involves deeply personal considerations about the nature of intimate relationships within the home, that decision falls within the ambit of the constitutional right to privacy. See id. at 16 (Marshall, J., dissenting). By limiting to two the number of unrelated persons bound by profession, love, friendship, or mere economics who can live in a single-family home, Marshall argued, the village essentially fenced out those individuals whose choice of lifestyle differed from that of its current residents. See id. at 16-17 (Marshall, J., dissenting).

[32] See id. at 9; see also infra Part II.A for a full analysis of the Supreme Court's views on traditional family life and neighborhood character.

[33] 431 U.S. 494 (1977).

limited occupancy of a dwelling unit to members of a single family and recognized as family only a few categories of related individuals.[34] Because the two grandsons were cousins, rather than brothers, the city found that one of the boys was an "illegal occupant" in violation of the ordinance.[35]

Justice Powell, writing for a plurality of the Court, held that the ordinance deprived the homeowner of her liberty in violation of the Due Process Clause.[36] Justice Powell distinguished *Belle Terre* on the ground that the ordinance in that case affected only unrelated individuals, whereas the ordinance in *Moore* made it a crime for a grandmother to live with her grandson.[37] Applying a heightened standard of scrutiny, Justice Powell found that the ordinance had only a "tenuous" relationship to the city's objectives of avoiding overcrowding, traffic, and financial burdens on schools. He therefore struck down the ordinance in the name of preserving the sanctity of the family beyond the confines of the nuclear family.[38]

Justice Powell was careful to distinguish *Moore* from *Belle Terre* by striking down only an ordinance that selected certain types of relatives who could live together and excluded others. Because the ordinance in *Belle Terre* restricted merely the number of *unrelated* persons who could live together, the *Belle Terre* decision remains good law

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[34] East Cleveland's housing ordinance defined family to include a number of individuals related to the nominal head of the household living as a single housekeeping unit, but limited to the following: husband or wife of the head of the household; unmarried children of the head of the household or of the spouse of the head of the household; head of the household's or spouse's father or mother; no more than one dependent child and her spouse and children. See id. at 496 n.2.

[35] See id. at 496-97. John Moore, Jr., the grandson who was considered an "illegal occupant," was ten years old when Mrs. Moore was prosecuted for violating the ordinance. He had lived with her and been brought up by her since his mother's death when he was less than one year old. See id. at 506 & n.2 (Brennan, J., concurring).

[36] See id. at 499-500.

[37] See id. at 498-99.

[38] Because Mrs. Moore and her family were African American, the case highlighted the racial implications of ordinances that could effectively prevent many minority and low-income families from living in the suburbs. In his concurring opinion, Justice Brennan explained that the United States has a tradition of extended families living together and argued that the line drawn by the *Moore* ordinance showed insensitivity to the economic and emotional needs of a large part of society. See id. at 507-08 (Brennan, J., concurring). Brennan noted that mostly nuclear families lived in white suburbia and that the Constitution could not be interpreted to tolerate the imposition by government of white suburbia's preference in patterns of family living. See id. at 508 (Brennan, J., concurring). Because many families live with their extended relatives out of economic necessity rather than by choice, Brennan argued that upholding the East Cleveland ordinance would obliterate this pattern of survival. See id (Brennan, J., concurring). In addition, the ordinance would affect African Americans more than other groups because extended-family living was "especially familiar" among African American families. Id. at 508-09 (Brennan, J., concurring).

and is controlling in federal cases. Most state courts that have addressed single-family home ordinances also have looked to *Belle Terre*'s holding and reasoning to uphold similar ordinances under their state constitutions.

B. State Court Cases Following Belle Terre

Jurisdictions that uphold zoning ordinances with a restrictive definition of family often adopt the reasoning of *Belle Terre* and apply it to their state constitutions, finding that the ordinances are rationally related to legitimate state interests in promoting family and youth values and protecting family life. Whether cases were decided shortly after *Belle Terre* or as recently as this decade, courts have continued to defer to legislatures, upholding ordinances on the assumption that local governments are correct that related family members behave differently from unrelated people. Recent state court decisions show that *Belle Terre*'s ideals have prevailed in the majority of states despite the passage of time.[39]

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[39] Fifteen other states, listed infra, have followed *Belle Terre* in upholding the constitutionality of single-family home ordinances. Many of the courts applied reasoning similar to the Supreme Court in *Belle Terre*, focusing on the locality's right to preserve the family character of a neighborhood and on the differences between related and unrelated groups living together.

The South Dakota Supreme Court tackled a single-family home ordinance in City of Brookings v. Winker, 554 N.W.2d 827 (S.D. 1996), where a provision limited to three the number of unrelated adults who could live together in one residential unit. See id. at 829 (citing Brookings, S.D., Rev. Ordinances § 50.02.195 (1994)). The plaintiff, a landlord who rented his property to four college students, challenged the ordinance under the equal protection and due process clauses of the South Dakota Constitution, claiming that there was no rational relationship between the ordinance's definition of family and the goal of controlling population density. See id. The court applied a more rigid test under the state constitution than the federal courts' rational basis test, requiring that a statute bear "a real and substantial relation to the objects sought to be attained." Id. at 830 (citation omitted). However, the court upheld the statute even under this stricter test, reasoning that because Brookings is a college town with unavoidable population density problems, the ordinance bore a real and substantial relation to the city's objectives. See id. at 831.

In Lantos v. Zoning Hearing Board, 621 A.2d 1208 (Pa. Commw. Ct. 1993), a landlord challenged the constitutionality of a student housing ordinance which prohibited more than three students from living in a house zoned for student housing. The court found that Haverford Township had a legitimate goal in preserving and fostering the residential character of the areas that are zoned for family use. See id. at 1211-12. The Pennsylvania court noted that preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion, and maintenance of property values are all legitimate purposes of zoning. See id.

Kirsch v. Prince George's County, 610 A.2d 343 (Md. Ct. Spec. App. 1992), involved the validity of the county's mini-dormitory ordinance, which placed limits on college student use of off-campus housing in residential neighborhoods. The court held that the ordinance did not violate the Equal Protection Clause of the Fourteenth Amendment, that it was not unconstitutionally vague or overbroad, and that it did not violate the county Human Relations Act. See id. at 348-49; see also Behavioral Health Agency v. City of

Most courts upholding single-family home ordinances highlight the differences in behavior between related individuals and unrelated persons living together. The rationales the courts use are similar in most cases because the courts usually adopt, almost literally, the reasoning used by the Supreme Court in *Belle Terre*. In finding the ordinances constitutional, the state courts similarly focus on a community's right to preserve the atmosphere of a neighborhood and to exclude groups that bring noise and disruption. Two cases, *Dinan v. Board of Zoning Appeals of the Town of Stratford*[40] and *State v. Champoux*,[41] illustrate fairly typical fact patterns and rationales used by state courts in striking down such ordinances.

In *Dinan*, the Connecticut Supreme Court upheld an ordinance restricting the use of single-family homes to related members of a family, which meant that no unrelated persons at all could live together.[42] The house at issue had two floors, each with shared cooking and bathroom facilities, and five unrelated persons occupied each floor of the house.[43] Each occupant had a separate rental arrangement with the landlords, who did not live on the premises.[44]

Applying a rational basis test, the court found that the zoning ordinance did not violate the due process or equal protection clauses of the state constitution because there was a reasonable basis for treating related and unrelated groups of people differently for zoning

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Casa Grande, 708 P.2d 1317 (Ariz. Ct. App. 1985) (upholding zoning ordinances restricting number of unrelated persons who could live in single-family zone); Rademan v. City and County of Denver, 526 P.2d 1325 (Colo. 1974) (same); Hayward v. Gaston, 542 A.2d 760 (Del. 1986) (same); Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n, 314 S.E.2d 218 (Ga. 1984) (same); Marsland v. International Soc'y for Krishna Consciousness, 657 P.2d 1035 (Haw. 1983) (same); Metropolitan Dev. Comm'n v. The Villages, Inc., 464 N.E.2d 367 (Ind. Ct. App. 1984) (same); Hamner v. Best, 656 S.W.2d 253 (Ky. Ct. App. 1983) (same); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981) (same); City of Ladue v. Horn, 720 S.W.2d 745 (Mo. Ct. App. 1986) (same); Town of Durham v. White Enters., Inc., 348 A.2d 706 (N.H. 1975) (same); Carroll v. Washington Township Zoning Comm'n, 408 N.E.2d 191 (Ohio 1980) (same); Browndale Int'l, Ltd. v. Board of Adjustment, 208 N.W.2d 121 (Wis. 1973) (same).

Twenty-nine state courts have not decided this issue: Alabama, Alaska, Arkansas, District of Columbia, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

40 595 A.2d 864 (Conn. 1991).

41 555 N.W.2d 69, 71 (Neb. Ct. App. 1996).

42 See *Dinan*, 595 A.2d at 865. The ordinance considered a family to consist only of persons related by blood, marriage, or adoption. See id. Under this ordinance, unmarried couples or unrelated roommates could not live together in a single-family home.

43 See id.

44 See id.

purposes.[45] Emphasizing that the town's ordinance had a presumption of validity and noting the tradition of deference to localities, the court explained that as long as this distinction was reasonable, it would defer to the police power of the locality to enact regulations to promote the general welfare.[46]

The court focused on the nature of the living arrangements to argue that unrelated persons lack the characteristics of related family members. Although tenants shared common facilities, and possibly even meals, the court pointed out that the tenants each had separate rental agreements and said there was no indication of any familial or other ties among the tenants that were likely to outlast their separate occupancies of the premises.[47] Most importantly, the court argued that transient tenants were not as likely as related family members to form friendly relationships with neighbors and to care about the long-term quality of living in the neighborhood:

> While the plaintiffs' tenants continue to reside on the property, they are not likely to have children who would become playmates of other children living in the area. Neighbors are not so likely to call upon them to borrow a cup of sugar, provide a ride to the store, mind the family pets, water the plants or perform any of the countless services that families, both traditional and nontraditional, provide to each other as a result of longtime acquaintance and mutual self-interest.[48]

Quoting extensively from the *Belle Terre* opinion and agreeing that the police power may be used to promote "'family values'" and "'youth values'" that contribute to creating "'a sanctuary for people',"[49] the court concluded that the distinction between a family of related persons and a group of ten unrelated individuals was justified.[50]

Similarly focusing on the distinction between related and unrelated "families," the Nebraska Court of Appeals recently upheld a zoning ordinance limiting to two the number of unrelated people who could constitute a family. In *State v. Champoux*,[51] the court found the ordinance constitutional under a highly deferential rationality stan-

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45 See id. at 867, 871.

46 See id. at 867. The court explained that the locality was authorized to regulate population density and to adopt provisions "'designed . . . to avoid undue concentration of population.'" Id. (quoting § 8-2 of Stratford zoning ordinance).

47 See id. at 870.

48 Id.

49 Id. at 868 (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)).

50 See id. at 871.

51 555 N.W.2d 69 (Neb. Ct. App. 1996).

dard.[52] Focusing even more than the Connecticut court on the tradition of deference to localities, the Nebraska court explained that a court presumes that an ordinance is valid, placing the burden on the challenger to demonstrate a constitutional defect.[53] Although the plaintiffs argued that the city had provided no evidence that the lack of a biological relationship between people living together destroys the character of the single-family neighborhood, the court upheld the ordinance because the plaintiffs failed to meet their burden of proof.[54] The effect of the presumption of validity, therefore, was to uphold the ordinance even though the locality did not demonstrate that its assumptions about families were warranted. Rather, the burden was on the plaintiffs to prove that the ordinance did not promote legitimate state interests. The court noted that it could offer more protection than the *Belle Terre* standard did, but it nevertheless adopted *Belle Terre*'s reasoning in upholding the ordinance.[55]

The majority of state courts addressing single-family home ordinances similarly have chosen not to offer greater protection for individual rights under state constitutions.[56] Instead, state court decisions continue to hold that these ordinances meet the rational basis test because they bear a reasonable relationship to a municipality's interest in keeping a neighborhood quiet and peaceful.

C. *State Court Cases Declining to Follow* Belle Terre

Although many state courts have adopted *Belle Terre*'s reasoning, four courts—New Jersey,[57] New York,[58] Michigan,[59] and California[60]—have declined to do so on the basis of their state constitutions and have struck down ordinances with restrictive definitions of family. The notion that state courts can interpret state constitutions to

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[52] See id. at 74 (upholding ordinance defining family as "'[o]ne or more persons immediately related by blood, marriage, or adoption and living as a single housekeeping unit in a dwelling . . . . A family may include, in addition, not more than two persons who are unrelated for the purpose of this title.'" (quoting Lincoln, Neb., Mun. Code § 27.03.220 (1994)). The plaintiff, who rented his property to five unrelated persons, had challenged the ordinance on the grounds that it violated his due process rights under the Nebraska Constitution and his tenants' rights to association and privacy under the First and Fourteenth Amendments to the U.S. Constitution. See id. at 71.

[53] See id. at 71.

[54] See id. at 74.

[55] See id. at 72, 74.

[56] For a discussion of state courts' interpretation of their own constitutions under new federalism, see infra note 61 and accompanying text.

[57] See State v. Baker, 405 A.2d 368 (N.J. 1979).

[58] See Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985).

[59] See Charter Township of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984).

[60] See City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980).

provide broader protections than the Supreme Court is willing to recognize under the U.S. Constitution is an accepted feature of American jurisprudence, often referred to as "new federalism."[61] Courts evaluating single-family home ordinances under state constitutions are therefore not bound to follow the Supreme Court's holding, as they can choose to offer more protection to individuals under their own constitutions by invalidating ordinances with narrow definitions of family.

The four courts that struck down single-family home ordinances resisted the use of zoning laws as a way for certain neighborhoods to exclude people who do not fit the traditional family model. Applying either rational basis or strict scrutiny tests and relying on state due process or right of privacy theories, these courts invalidated the restrictive definitions of family because they precluded "functional families" from living together and were not sufficiently linked to legitimate zoning goals.

Three state courts—New Jersey,[62] Michigan,[63] and New York[64]—have determined that these ordinances wrongly assume that related

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[61] A major question of state constitutional law is when state courts can interpret state constitutions more broadly than the Supreme Court has interpreted analogous provisions in the United States Constitution. See Robert F. Williams, In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication, 72 Notre Dame L. Rev. 1015, 1055-63 (1997) (discussing methodology of state courts in deciding whether to follow Supreme Court precedent in interpreting their own state constitutions); see also William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 502 (1977) (arguing that state court judges need not give even persuasive weight to analogous federal rulings unless they are worthy of deference).

However, many state courts continue to decide cases as though the federal and state constitutions were the same, without independent analysis of state constitutional claims. See Williams, supra, at 1017. In addition to the suburban model of local government, see infra Part II, this may explain why most state courts have followed the Supreme Court's holding in *Belle Terre*.

Despite this trend, many commentators have argued that variations among state and federal constitutional rules should be expected and welcomed. Professor Lawrence Sager argues that given the substantial role of "strategic" considerations in judicial enforcement of constitutional norms, state judges should not feel obliged to defer to the Supreme Court's constitutional judgments. See Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 Tex. L. Rev. 959, 973-76 (1985) (arguing that strategic disparities will often trigger state outcomes divergent from Supreme Court decisions). Because state judges confront environments and histories different from the Supreme Court's abstracted, national vision, it is natural that state courts' judgments differ from the Supreme Court's judgments in fashioning constitutional rules. See id. at 975-76. In addition, state judges' familiarity with their state's institutions and constant contact with the legislature make them more willing than federal courts to exercise the legislative oversight function. See id. at 976.

[62] See State v. Baker, 405 A.2d 368 (N.J. 1979). This was the first case where the New Jersey Supreme Court considered the constitutionality of such an ordinance. A lower court two years earlier ruled on such an ordinance, but the case was never appealed to the

families behave differently than unrelated persons living together and thus do not bear a rational relationship to legitimate zoning goals. Showing more suspicion of local government than other state courts, these courts refused to accept localities' claims that the ordinances merely aimed to preserve the character of a neighborhood. These three state courts all relied on similar arguments to support their divergence from the *Belle Terre* trend.

First, they noted that the challenged single-family home ordinances failed to achieve their goals because they were both over- and underinclusive: They prohibited uncongested households that did not meet the definition of family, but they permitted overcrowded households merely because the inhabitants were related. For example, the New Jersey Supreme Court pointed out that five unrelated retired men would violate the ordinance by sharing a large eight-bedroom estate, while a large extended family could share a small two-bedroom apartment legally.[65] The court also explained that the legislature's assumption that unrelated individuals are less socially desirable than re-

state supreme court. See Holy Name Hosp. v. Montroy, 379 A.2d 299 (N.J. Super. Ct. Law Div. 1977). In *Holy Name Hospital,* the New Jersey Superior Court invalidated a section of the Teaneck Code which restricted to three the number of unrelated persons who could live in a single-family house. See id. at 300, 303. Holy Name Hospital was charged with violating the ordinance by allowing groups of more than three unrelated nuns who worked at the hospital to live in a house the hospital owned. See id. at 300. The hospital challenged the ordinance on the ground that it violated the due process and equal protection clauses of the New Jersey Constitution. The court noted that fundamental changes were occurring in marriage and family living, and different types of housekeeping units were replacing the traditional family as defined by the Teaneck Code. See id. at 302. Pointing to the need for unrelated persons to live together for economic reasons, the court cited the increasing numbers of low-income individuals who banded together to share housing costs, including elderly people of limited means. See id. The court criticized Teaneck for becoming a "private club," where application for admission must be accompanied by a marriage certificate, and noted that the critical shortage of housing most affected the elderly and the poor. See id.

Taking an economic approach to zoning, the court explained that Teaneck's restriction on the number of unrelated people who can live together in a single-family home exacerbated the housing shortage problem. See id. But rather than striking down the entire ordinance, as other state courts have done to similar ordinances, the New Jersey court took a different approach of "judicial pruning"—altering the ordinance until it passed constitutional muster. See id. at 303 (adopting approach taken in Borough of Collingswood v. Ringgold, 331 A.2d 262, 267 (N.J. 1975)). The court thus invalidated the part of the ordinance which restricted the number of unrelated persons but allowed the ordinance to limit occupancy to single, nonprofit housekeeping units. See id.

[63] See Charter Township of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984).

[64] See Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985).

[65] See State v. Baker, 405 A.2d 368, 373 (N.J. 1979). In *Baker*, the court struck down an ordinance defining family as not more than four unrelated persons. See id. at 370. The court held that the ordinance violated due process under the New Jersey Constitution. See id. at 375.

lated persons or that they cause more overcrowding and congestion was misguided because a family could be less well-disciplined and overcrowded than a single housekeeping unit of unrelated individuals.[66] Michigan's Supreme Court, meanwhile, said that the "motorcycle gang argument"—that unruly individuals would move in next door if the ordinance were struck down—was symbolic rather than an accurate depiction of the lifestyle of unrelated people who sought to live together.[67] Finally, the New York Court of Appeals found a similar

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The defendants cited with violating the ordinance were Mr. and Mrs. Baker and their three daughters and Mrs. Conata and her three children. See id. at 370. The two families lived together in what they called an "extended family," viewing each other as part of one family and wishing to live all together in one home. See id. Mr. Baker, a Presbyterian minister, explained that the living arrangement arose out of religious beliefs and a "desire to go through life as 'brothers and sisters.'" Id. The two families ate together, shared common areas, prayed together, and shared household expenses. See id.

66 See id. at 372. The court thus held that these regulations were insufficiently related to the city's goals of preventing congestion and overcrowding to pass a rational basis test under the New Jersey Constitution. See id. at 375.

The court explained that it might have upheld the ordinance if there were no less restrictive alternatives available to control congestion, but other options did exist. For example, the municipality could prevent overcrowding without regard to the legal relationship of the persons by limiting the number of occupants in relation to the number of sleeping or bathroom facilities, or requiring a minimum amount of habitable floor area per occupant. See id. at 373 (citing Kirsch Holding Co. v. Borough of Manasquan, 281 A.2d 513, 520 (N.J. 1971)). Area or facility-related ordinances, the court reasoned, bear a greater relation to the problem of overcrowding than legal or biologically based classifications, and such ordinances do not impact the household composition. See id.

In dissent, Justice Mountain argued that in deciding the case on due process grounds rather than on statutory grounds, the majority eliminated all possibility of legislative cure and took away the power of the people to restrict home occupancy to single families. See id. at 375-76 (Mountain, J., dissenting). Because the court found a constitutional rather than a statutory violation, the legislature could not simply amend the Zoning Enabling Act to provide expressly that municipalities should have power to restrict home occupancy. See id.

67 See *Dinolfo*, 351 N.W.2d at 842. The case involved two couples who each lived in single-family homes with their children and six unrelated single adults. All of the members of these households belonged to the same religious community (The Work of Christ Community) and had adopted this lifestyle "as a means of living out [their] Christian commitment." Id. at 834. The court found that each household functioned as a family and that members intended to reside there permanently. See id. The arrangement violated the town's zoning ordinance, which limited those allowed to live in a single-family home to any number of related persons, and not more than one other unrelated person. See id. at 833.

The town of Delta, supported by amicus curiae Michigan Townships Association, argued that the purposes of the regulation were to "prohibit the influx of informal residential groups of people whose primary inclination is toward the enjoyment of a licentious style of living" and to keep out "unrelated and *unruly* individuals who view regular late night parties as a common bond and a proper function of child rearing." Id. at 840-41. The town further argued that the next group who moved in may have as a common bond not the Work of Christ, but the Work of Satan. See id. at 841. The court found the statute unconstitutional because the exclusion of such groups was not supportive of "family values" and was not rationally related to health and safety concerns. See id. at 843-44. The ordinance therefore violated the Michigan Constitution's due process clause. See id. at 844.

ordinance "fatally overinclusive" in prohibiting a young unmarried couple from living in a four-bedroom house and underinclusive in failing to prohibit occupancy of a two-bedroom home by ten to twelve persons who were distantly related and might have presented serious overcrowding and traffic problems.[68]

Second, the New Jersey and Michigan courts gave less deference to local governments' decisionmaking even though they applied rational basis scrutiny. The New Jersey Supreme Court explained that while a municipality could act to preserve a family style of living, it must strike a balance between preserving family life and prohibiting social diversity.[69] Finding that the ordinance in question did not bear a "substantial relationship" to a legitimate municipal goal, the court therefore struck it down as violating due process under the New Jersey Constitution.[70] Similarly, the Michigan Supreme Court applied a rational basis test but refused to apply traditional levels of deference, noting that the "extraordinary deference given . . . in traditional zoning matters" was not appropriate because the ordinance was capricious and arbitrary in its assumptions about families.[71]

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[68] See *McMinn*, 488 N.E.2d at 1243. In *McMinn*, the court rejected a definition of family that prevented unrelated persons under age 62 from living together in a single-family home. See id. at 1241. The plaintiffs, who had leased a house to four unrelated men between the ages of 22 and 25, were criminally charged with violating the zoning ordinance. They brought due process and equal protection claims under the New York Constitution. See id. at 1242. The court found no reasonable relationship between restricting occupancy based on the biological and legal relationship of occupants and the goals of reducing parking and traffic problems, controlling population density, and preventing noise and disturbance. See id. at 1243. Because the definition of family restricted both the relationships among the occupants and their ages, the ordinance was even more restrictive than the one at issue in *Belle Terre*. The court therefore invalidated it on state due process grounds. See id. at 1244.

Four years later, the court in Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989), found unconstitutional a more typical zoning ordinance which prohibited more than four unrelated persons from living together but did not impose an age restriction. See id. at 619. Five unrelated elderly women who lived together challenged the ordinance under state due process grounds, and the court struck it down because it restricted the size of a functionally equivalent family but not the size of a traditional family. See id.

[69] See *Baker*, 405 A.2d at 371. The court noted that a municipality may not zone so as to exclude from its borders the poor or other unwanted minorities. See id. Regulations based on biological traits or legal relationships are problematic in that they prohibit many uses which pose no threat to the locality's legitimate goal. See id.

[70] See id. at 369-70.

[71] *Dinolfo*, 351 N.W.2d at 840, 844. Justice Williams argued in dissent that the majority did not accord sufficient deference to local zoning: "[T]he majority has overstepped its bounds as a judicial body and has intruded into the legislative sphere by acting as a superzoning commission . . . ." Id. at 847-48. Williams criticized the majority for going so far as to give examples of ordinances from other states which offer innovative approaches to preserve the family character of a neighborhood in a more rational manner than the ordinance in this case. As in *Belle Terre*, Williams argued that the task of line drawing is

In contrast to the New Jersey, Michigan, and New York courts, which emphasized the over and underinclusiveness of the ordinances, the California Supreme Court focused on the right of privacy[72] and asked whether that right comprehends the right to live in an alternative family arrangement with unrelated persons. In *City of Santa Barbara v. Adamson*,[73] the court struck down a zoning ordinance that permitted no more than five unrelated persons to live together in a single-family home.[74] The city found that a group of twelve unrelated adults living together in a twenty-four-room, ten-bedroom, six-bathroom house violated the ordinance.[75]

Because of its determination that the ordinance implicated a fundamental right, the court rejected rational basis scrutiny in favor of a less deferential standard. Applying strict scrutiny, the court said that an incursion into individual privacy must be justified by a compelling public interest in order to be constitutional.[76] The court analyzed the ends and means of the ordinance and concluded that a residential environment does not depend on a blood, marriage, or adoption relationship among the residents of the house, and the goal of density control is achieved indirectly, if at all, by regulating the size of only unrelated households.[77] Noting that zoning ordinances are much less suspect when they focus on the use of residential property rather than

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solely a legislative one, and the court should not interfere in this legislative function. See id. at 848.

72 California's Constitution contains an explicit right to privacy: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const. art. I, § 1. The Federal Constitution, in contrast, does not explicitly recognize a right to privacy.

73 610 P.2d 436 (Cal. 1980).

74 See id. at 437-38, 444. The ordinance defined family as: "1. An individual, or two (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit in a dwelling unit. . . . 2. A group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit." Id. at 437-38.

75 See id. at 438. The occupants of the house, owned by Adamson, were in their late 20s or early 30s and included a businesswoman, a graduate biochemistry student, a tractor-business operator, a real estate broker, and a lawyer. See id. Although the 12 persons were unrelated, they provided each other with emotional support and stability. See id. The group chose to live together when Adamson made it known she was looking for congenial people with whom to share her house. See id. The occupants said that they had become a close group with social, economic, and psychological commitments to each other. See id. They shared expenses, rotated chores, ate meals together, and contributed money to make improvements on the house. See id. Because the house occupied more than 6000 square feet of space and had parking for at least 12 cars, the court found no evidence of overcrowding. See id.

76 See id. at 440-42.

77 See id. at 441. The court found illegitimate the ordinance's assumptions that (1) unrelated persons are noisier and less stable than a related group of the same size, and (2)

on the characteristics of the individual occupants, the court ruled that the five-person limit was not closely related to the goal of fostering a residential community character and therefore invalidated the ordinance.[78] In reaching this conclusion, the California court rejected the *Belle Terre* Court's analysis of the fundamental rights issue.

Based either on state due process or privacy rights theories, these four state courts held that ordinances restricting the number of unrelated persons who live together lack a sufficient relationship to legitimate zoning goals of preventing congestion, noise, and traffic. In doing so, they refused to follow the trend of deference to local governments established by *Belle Terre* and its progeny.

II

JUDICIAL PERCEPTIONS OF LOCAL GOVERNMENT

The divergence between state court decisions since *Belle Terre* and in the degrees of deference accorded to local government decisionmaking can be explained by examining the courts' conflicting models of the proper role of local government. Most of the state courts that have addressed single-family home ordinances have followed the *Belle Terre* decision in upholding the ordinances as constitutional.[79] The four states that have declined to follow the Supreme Court's decision did so in part because they take a different view of the proper relationship between courts and local government. This Part argues that the Supreme Court and the state courts that follow its

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groups of unrelated people hazard an immoral environment for families with children. See id.

[78] See id. at 441-42. The court suggested other ways that the city could achieve its goals of preserving the residential character of a neighborhood and regulating population and traffic. The city could preserve residential character by restricting transient and institutional uses, such as hotels, boarding houses, and clubs. See id. at 441. The city could control population density with ordinances referring to floor space and facilities. Police power ordinances and criminal statutes could deal with noise and morality. Finally, limitations on the number of cars and off-street parking requirements could control traffic and parking. See id.

One year later, another California court faced the question left open in *Adamson* of how many people should be allowed to live in one house. Chula Vista v. Pagard, 171 Cal. Rptr. 738 (Ct. App. 1981), involved an ordinance that limited to three the number of unrelated persons who could live together. Aside from the more restrictive nature of the ordinance, the situation in *Pagard* differed from the facts of *Adamson* because in *Adamson* there was no question of overcrowding. In *Pagard*, members of a religious congregation claimed that their religion required a communal living arrangement. See id. at 739. The case involved 12 households whose occupancy ranged from four to 24 unrelated persons who had a total of 41 cars. See id. at 740. Despite the obvious overcrowding, the court struck down the "rule of three" ordinance because it had "at most a tenuous relationship to the alleviation of the problems" of overcrowding and traffic congestion. Id. at 743.

[79] A total of 17 states have found these zoning ordinances constitutional. See supra note 39-41.

reasoning implicitly subscribe to a suburban model of local government that associates local government with the values of home and family.[80]

According to Richard Briffault, some courts view suburbs as idyllic residential communities. These courts see the function of local government as protecting the home and family, enabling residents to raise their children in "decent" surroundings, and buffering the community from unwanted land uses.[81] Briffault argues that these courts view local government not as an agent of the state, but as an agent of local families, acting to "defend the private sphere surrounding home and family."[82] According to Briffault, this linkage of local government to family needs leads courts to defer to local government decisions.[83]

This Part will apply Briffault's suburban model of local government as a way to explain why courts use different levels of deference in evaluating single-family home ordinances.[84] It argues that courts endorsing a suburban view of local government tend to uphold zoning ordinances designed to protect neighborhoods from undesirable groups. As part of their overall deference to local government on zoning matters, these courts grant single-family home ordinances a presumption of validity and require challengers to bear the burden of proof.

The state courts that have rejected *Belle Terre*, in contrast, appear to view local government with greater suspicion. These state courts appear to recognize that suburbanization can lead to racial and class inequality. They hold a less romanticized view of suburbia and conceive of local government as merely a branch of the state, rather than as an agent of local families. Under this view, local government must act in line with the state's interests. Because the state should have no interest in local exclusion, these courts have stepped in to invalidate restrictive zoning ordinances. These state courts appear to believe

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[80] See Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346, 382 (1990) (explaining suburban model of local government).

[81] See id.

[82] Id.

[83] See id. Briffault argues that the value of local autonomy is uncertain when local boundaries divide communities along racial and class lines. By enabling wealthy residents to separate themselves from their poorer neighbors, localism empowers the already powerful and further disempowers the weak. Briffault argues that in order to reduce inequality and improve race and class relations, we must abandon our view of the superiority of local power. See id. at 453.

[84] Because Briffault's suburban model does not deal explicitly with the presumption of validity, which results in deference to localities, this Note uses the model only in Part II and moves beyond it in Part III to discuss how state courts that have not decided the issue should approach these ordinances.

that suburbs, as political arms of the state, should use their zoning power to allow people of different backgrounds to live in their communities in order to achieve social and economic integration.[85] Their less deferential approach to local government consists of shifting the presumption of validity and thus requiring the localities to justify their actions.

A. The Supreme Court's Suburban Model of Local Government Leads to Deference Toward Local Power

The Supreme Court in *Belle Terre* seems to follow Briffault's suburban model in viewing suburbs as guardians of families and neighborhood character. The Court's view of local government as an agent of local families evolved as the suburban ideal developed and zoning emerged as a way to control social ills. The first building zone resolution, passed in New York City in 1916,[86] was concerned with controlling the negative externalities associated with various urban land uses, such as fire hazards, crowding, and disease.[87] Early city planners also used zoning to stabilize neighborhoods and protect property values by separating incompatible land uses.[88] Following the passage of the New York City ordinance, zoning laws became extremely popular in the United States. By the time *Euclid* was decided in 1926, seventy-six municipalities had passed ordinances separating commercial and residential areas, and by 1936, 1,322 cities had adopted zoning plans.[89]

As American suburbs flourished, local zoning enabled people to preserve the homogeneous character of their neighborhoods and to control who entered their communities.[90] Emerging suburbs in the

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[85] See generally id. at 388-89.

[86] See Richards, supra note 2, at 762.

[87] See id. Richards notes that the skyscraper was singled out in particular as an "architectural villain" that could create fire hazards, foster crowding and panic, and threaten public health by shutting out light and contributing to tuberculosis and eyestrain. See id.

[88] See id. See generally Robert H. Nelson, Zoning Myth and Practice—From *Euclid* into the Future, in Zoning and the American Dream, supra note 26, at 299-317 (describing development of zoning as reflection of social and economic forces, political ideologies, social philosophies, and other intellectual influences).

[89] See Martha A. Lees, Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-*Euclid* Debate over Zoning for Exclusively Private Residential Areas, 1916-1926, 56 U. Pitt. L. Rev. 367, 372 (1994) (providing statistics detailing increased popularity of zoning in early part of century).

[90] Although local governments passed zoning ordinances with exclusionary effects, they were not solely responsible for the creation of homogeneous suburban neighborhoods. Federal housing policies also affected where and how Americans lived. See Jackson, supra note 8, at 191 (discussing federal government's role in housing policies and questioning whether federal government used its resources and power to control ethnic and racial minorities). The Home Owners Loan Corporation (HOLC), signed into law in 1933, was designed to protect the small homeowner from foreclosure, relieve him of part of the bur-

postwar period excluded not only commercial uses, but also apartment houses, other multifamily dwellings, and publicly subsidized housing.[91] The developing suburban ideal consisted of individual homes surrounded by large amounts of privately owned land, low population density, and lack of city noise and congestion.[92] The pastoral vision of the suburbs as a good place to raise a family away from the evils of the city is directly connected to exclusionary local zoning ordinances.[93] Some scholars argue that local zoning is widely used to

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den of excessive interest and principal payments, and declare a national policy of protecting home ownership. See id. at 195-96. By introducing the long-term, self-amortizing mortgage with uniform payments spread over the entire life of the debt, the HOLC made it affordable for many Americans to become homeowners and increased movement to the suburbs. See id. at 196-97. But HOLC also initiated the practice of "red lining," which refers to the decisions of government and private financial institutions not to lend in certain neighborhoods because of general characteristics of the neighborhood. See id. at 197 & n.26. As a result of the lack of financing, houses could not be sold in the area and property values dropped.

The Federal Housing Administration (FHA) also contributed to homogeneity in the suburbs through programs designed to increase building and home ownership. See id. at 204-06. By insuring mortgages only in exclusively white areas, the FHA tended to encourage the expansion of all-white suburban enclaves. See id. at 208-09. For an in-depth discussion of how the national government put its seal of approval on ethnic and racial discrimination and implemented policies that developed the suburbs and neglected the more racially and ethnically diverse cities, see id. at 203-18.

[91] See Briffault, supra note 80, at 369-72 (describing municipalities' efforts to use zoning to preserve "country" aspects of local life and prevent their transformation into "cities").

[92] See id. at 372. Zoning supporters "pictured the ideal home as surrounded by lawns, trees and gardens, a vision that was grounded in the American tradition of idealizing the natural environment." Lees, supra note 89, at 421. According to Leo Marx, Americans possessed a romanticized view of nature, a "pastoral ideal," which involved the desire to withdraw from civilization's power and complexity in order to obtain an existence closer to nature. See id (citing Leo Marx, The Machine in the Garden: Technology and the Pastoral Ideal in America 3 (1964). Lees argues that "[t]he persistence of the pastoral ideal in the American psyche has . . . been the product both of a positive attraction to natural surroundings and a negative reaction against the complications of city life." Id. at 422. For a description of the emergence of the suburbs and the pastoral ideal, see generally Jackson, supra note 8, at 47-61 (describing development of suburban ideal of house and yard).

[93] Euclidean zoning promotes class segregation because the ability to afford different types of housing varies with income. Because many ordinances excluded all but single-family homes from certain neighborhoods, few working-class people could afford to live there. See Lees, supra note 89, at 375-76 (explaining that many working-class people in first quarter of twentieth century could not afford to buy or rent single-family homes); see also Jerry Frug, The Geography of Community, 48 Stan. L. Rev. 1047, 1082 (1996) ("Noise, traffic congestion, contagion, and disorder are associated not just with apartment houses and commerce but with 'the wrong kind of people'—those who have to be excluded in order to make a residential neighborhood seem desirable.").

Because America's poor historically have been disproportionately African American and Latino, zoning ordinances that exclude low-income people tend to perpetuate residential segregation. See Janai S. Nelson, Residential Zoning Regulations and the Perpetuation of Apartheid, 43 UCLA L. Rev. 1689, 1695 (1996) (arguing that zoning is rooted in intentional racial segregation). In addition, because African Americans are more likely than

protect people from a feared flood of lower class persons and racial and ethnic minorities, as well as to prevent a decline in property values.[94] Zoning provides insurance that property values in a neighborhood will not drop as a result of "the wrong kind of people" moving into the community.[95]

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other racial groups to live in nontraditional families, they are disproportionately affected by single-family home ordinances. See id. at 1700-01; see also Moore v. City of East Cleveland, 431 U.S. 494, 508-10 (1977) (Brennan, J., concurring) (noting that African-American families tend to live with extended relatives).

Zoning has indeed led to exclusion of racial minorities in the suburbs. In 1980, the largest percentage of African Americans living in the suburbs was 16.7% near Washington, D.C. In Boston suburbs, the African American population was 1.6%. See Jackson, supra note 8, at 301-02 (listing percentages of African Americans living in suburbs). Research shows that African Americans continue to be highly residentially segregated, living in racially homogeneous neighborhoods near central business districts and away from suburban schools and jobs. See Nancy A. Denton, The Persistence of Segregation: Links Between Residential Segregation and School Segregation, 80 Minn. L. Rev. 795, 798-99 (1996) (discussing "hypersegregation" of African Americans and whites over last four decades).

Although African Americans' presence in some suburbs has increased tremendously in the past decades, see, e.g., Michael A. Fletcher, The Structure of Change, Wash. Post (Magazine), Feb. 1, 1998, at 11 (citing increase in African-American population in suburbs and decrease in Washington, D.C.); J. Linn Allen, Pace of Racial Transition Studied, Chi. Trib., Feb. 22, 1998, at C15 (stating that African-American households in Oak Park, Chicago suburb, increased to 18.2% in 1990 from 10.8% in 1980), reports indicate that segregation and discrimination remain prevalent. Most of the African Americans who moved to Washington, D.C. suburbs have headed to Prince George's County, Maryland because the county is 62% African American. See Jeremy Redmon, Blacks Leaving District for Middle-Class Suburbs, Wash. Times, Sept. 25, 1998, at A1 (explaining that Prince George's County's popularity among African Americans stems from area's already high African American population and affordable housing). In addition, many areas report that as the African American population rises in the suburbs, whites increasingly move away from those suburbs. See Fletcher, supra, at 12 (describing whites' move from Prince George's County to outer suburbs); Tamara Kerrill, Posh, Plain Towns Share: Luxurious Setting Offers No Barrier Against Racism, Chi. Sun-Times, Feb. 9, 1997, at 16, available in 1997 WL 6335918 (explaining that growth of African American population in Olympia Fields, a Chicago suburb, likely will continue until town is 100% African-American because of "white flight"); J. Linn Allen, Race Remains Housing's Main Dividing Line; Limited Options Still a Reality for Many, Chi. Trib., Feb. 22, 1998, at C14 (citing study showing that suburban Chicago remains split along racial lines, partly because of zoning ordinances excluding low-priced housing).

[94] See Frug, supra note 93, at 1082-83 (discussing intentional exclusionary aspects of zoning); see also Lees, supra note 89, at 409. Lees argues that class, ethnic, and racial bias influenced zoning proponents who passed the first zoning ordinances. Between 1916 and 1926, middle-class Americans were reacting "strongly against the acceleration of immigration that had begun at the turn of the century." Id. Lees theorizes that the acceptance of private residential zoning was "most likely influenced by the same bias against the poor and the foreign-born that led to immigration restrictions." Id. at 411.

[95] See Frug, supra note 93, at 1083-84 (explaining link between racial diversity in neighborhoods and perceived lowering of property values, causing city officials to zone out "wrong kind of people" from suburban areas); see also Vicki Been, Comment on Professor Jerry Frug's The Geography of Community, 48 Stan. L. Rev. 1109, 1110-11 (1996) (arguing that economics, not just fear of others, drives people to move to suburbs).

The Supreme Court's opinion in *Belle Terre* reflects a pastoral view of the suburbs as a place to raise a family. Justice Douglas painted an idyllic picture of suburbia in arguing that the state may use its police power to ensure that some zones are well suited to family needs:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . . The police power . . . [may] lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[96]

Justice Douglas's invocation of local government as a moat protecting home and family from crime, congestion, and the pollution of the outside world suggests that the Court at that time viewed local government as an extension of the home and a defender of "family values," rather than as an arm of the state.

The state courts that followed *Belle Terre* in upholding restrictive ordinances shared the Supreme Court's view of local government as a protector of "family values." Many of these state court opinions mirrored the reasoning in *Belle Terre*, and nearly all quoted Justice Douglas's lyrical passage invoking "[a] quiet place where yards are wide."[97] The state courts' acceptance of the suburban ideal proposed in *Belle Terre* suggests that they adopted not only the Supreme Court's language of family needs, but also its view of local government as a protector of the family.[98]

The idealization of local government helps explain judicial support for local autonomy in zoning, as localities can effectively protect

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[96] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[97] See, e.g., Dinan v. Board of Zoning Appeals, 595 A.2d 864, 868 (Conn. 1991) (quoting Justice Douglas's language in *Belle Terre*); Kirsch v. Prince George's County, 610 A.2d 343, 347 (Md. Ct. Spec. App. 1992) (same); State v. Champoux, 555 N.W.2d 69, 72 (Neb. Ct. App. 1996) (same); Carroll v. Washington Township Zoning Comm'n, 408 N.E.2d 191, 193 (Ohio 1980) (same); City of Brookings v. Winker, 554 N.W.2d 827, 830 (S.D. 1996) (same).

[98] While the Supreme Court's view of local government may have changed since *Belle Terre*, see infra Part III.A, the state courts that follow its reasoning even today seem to continue to adopt the suburban model implicitly. Although the Supreme Court has applied varying levels of deference to zoning ordinances since *Belle Terre* was decided, state courts that adopt the reasoning of *Belle Terre* continue to give deference to local government based on the rationale of family needs. For a discussion of why state courts evaluating single-family home ordinances for the first time should grant less deference to local governments by shifting the presumption of validity, see infra Part III.

family and home values through land-use regulations that exclude undesirable persons from the community.[99] The Supreme Court's view of local government as an agent of the family and a protector of family values helps explain its deference in zoning matters, as the Court appeared to believe that local government was acting in the best interest of the suburbs and the family. Because the Court harbored a romanticized view of the suburbs as sanctuaries for families and because it gave no indication that localities could use zoning to exclude certain types of people,[100] it saw no reason to subject local government to more probing judicial review.

B. States Rejecting Idealization of Suburbs Show Less Deference Toward Local Zoning Power

The four states that declined to follow the Supreme Court's holding in *Belle Terre* recognize the problems inherent in localism and reject the Supreme Court's idealization of the suburbs. Viewing local government as an agent of the state, which must act in line with the state's interests, these courts have struck down zoning ordinances used for exclusionary purposes.

Rather than adopting the suburban model of local government, these state courts lean more toward a statewide approach in land-use decisions, which leads to a breakdown in restrictive zoning of all kinds. Under this view of local government, the locality is a microcosm of society at large, and zoning is not only a local issue. These courts' recognition that zoning power can lead to racial and class divisions along community lines has resulted in a greater willingness to reduce the local power to impose exclusionary zoning restrictions.

Because courts with a statewide view of local government seem to believe that zoning must serve the general state interest, they are less deferential toward local government zoning decisions. The courts striking down *Belle Terre*-type ordinances are actively involved in a wide range of the state's zoning matters, including various exclusionary zoning measures, minimum lot-size requirements, and mobile-home restrictions. Aside from the constitutional issues involved, these courts' tradition of probing inquiry into local government zoning deci-

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[99] See Briffault, supra note 80, at 383 (arguing that of all government activities, land-use regulation and education have greatest implications for home and family).

[100] See Norman Williams, Jr. & Tatyana Doughty, Studies in Legal Realism: Mount Laurel, Belle Terre and Berman, 29 Rutgers L. Rev. 73, 82 (1975) (arguing that "sense of sin" is missing from Court's majority opinion). But see David D. Haddock & Daniel D. Polsby, Family as a Rational Classification, 74 Wash. U. L.Q. 15, 23 (1996) (claiming that majority was groping for theory that would allow it to uphold ordinance which discriminated on basis of personal lifestyle choice as to household companions).

sions helps explain the divergence from the Supreme Court's decision in *Belle Terre*, since the Supreme Court's view of local government as protector of the family and home precludes strong judicial intervention in zoning matters.

New Jersey, for example, has been called the most progressive state in the country in analyzing the issues raised by exclusionary zoning ordinances.[101] In early cases, the New Jersey courts upheld various kinds of restrictive devices. For example, minimum interior floor space,[102] minimum lot sizes of five acres,[103] and prohibitions on mobile-home parks were all found valid during the 1950s and 1960s.[104] Despite this history, though, New Jersey courts took a strong stance against all types of exclusionary zoning beginning with *Southern Burlington County NAACP v. Township of Mount Laurel*[105] and continuing through *State v. Baker*,[106] where, as discussed above, the court struck down a restrictive single-family ordinance similar to the one in *Belle Terre*.

The widely publicized and controversial *Mount Laurel* opinion documents the emergence of New Jersey's statewide view of local government. The court held that a developing municipality may not make it physically and economically impossible to provide low- and moderate-income housing in the municipality for various categories of people who need and want it, and every such municipality must provide at least its fair share of low- and moderate-income housing.[107] Instead of focusing on suburban ideals, as a court following the suburban model would, the trial court's opinion focused on the real, decrepit conditions of the town's low-income housing stock.[108] The trial court also announced that courts should consider the nature of the entire region in determining appropriate land uses: "The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries."[109] The court's focus on the nature of the region, rather than on particular suburbs,

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101 See David H. Moskowitz, Exclusionary Zoning Litigation 225 (1977) (discussing treatment of exclusionary zoning by New Jersey courts).

102 See Lionshead Lake, Inc. v. Wayne Township, 80 A.2d 650 (N.J. Super. Ct. Law Div. 1951).

103 See Fischer v. Township of Bedminster, 11 N.J. 194 (1952).

104 See Vickers v. Township Comm., 181 A.2d 129 (N.J. 1962).

105 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*].

106 405 A.2d 368 (N.J. 1979).

107 See *Mount Laurel I*, 336 A.2d at 724-25.

108 See Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 167 (Law Div. 1972) (describing couple who had been living in converted chicken coop, where cesspool malfunctioned and quarters were infested with vermin).

109 Id. at 176-77.

underscores its rejection of the Supreme Court's suburban model of local government.

In affirming the trial court's decision to invalidate Mount Laurel's zoning ordinance, the New Jersey Supreme Court rested its decision on a theory that considers general welfare on a *regional* basis, rather than from the viewpoint of each individual municipality. The opinion emphasized that this was logical because the zoning power was derived from the state and because housing decisions within a municipality have a substantial external impact on the rest of the state.[110] The court's language explicitly reveals its perception of local government as a branch of the state rather than as a protector of family values:

> [T]he zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when a regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the municipality cannot be disregarded and must be recognized and served.[111]

In addition, the court reversed the presumption of validity of zoning ordinances in cases where the ordinance does not provide for a range of housing choices and emphasized that if the effect of an ordinance was exclusionary, there was no need to prove intent.[112]

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110 See *Mount Laurel I*, 336 A.2d at 726-27.

111 Id. at 726.

112 See id. at 724-25. The New Jersey Supreme Court's attempt in *Mount Laurel I* to increase the amount of housing available to low-income persons met with resistance from New Jersey municipalities. Finding that the township of Mount Laurel ignored the court's order not to erect barriers to low-income housing, the court held in Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*], that every municipality, not just developing ones, must provide a realistic opportunity for decent housing for its poor, except where the poor represent a disproportionately large percentage of the population as compared to the rest of the region. The court said that good faith attempts would be insufficient and that each community must provide its fair share, expressed in terms of numbers of units needed immediately and in the future. See id.

Despite the court's decisions, the battle over exclusionary zoning in Mount Laurel and other New Jersey municipalities continues, but reports indicate that low-income housing is on the rise. Years after *Mount Laurel II*, newspapers were still reporting the lack of affordable housing in New Jersey suburbs. See, e.g., David L. Kirp, Editorial, Welcome to Mt. Laurel, Nation, May 12, 1997, at 5 (reporting continuing opposition to low-income housing by Mount Laurel residents); Alan Sipress, Despite Ruling, Affordable Homes Still Scarce in N.J., Philadelphia Inquirer, Nov. 25, 1990, at A1 (reporting that state fell 246,000 homes short of goal of constructing 254,000 affordable homes statewide); Affordable Housing Hit a Wall Despite Mount Laurel Ruling, Opponents Limit Construction, Record (N.J.), Feb. 19, 1996, at A4, available in 1996 WL 6075974 (reporting that only 14% of 86,000 affordable houses needed in New Jersey by 1999 have been built). Recently, however, Mount Laurel has approved a housing complex that will include 140 townhouses for low- and moderate-income people. See Wealthy N.J. Town Approves Housing for Poor Named in Honor of Late Activist Who Fought for It, Jet, June 30, 1997, at 33 ("After years of several

Against the background of the New Jersey courts' willingness to scrutinize zoning decisions closely and their view of local government as an agent of the state, the New Jersey Supreme Court's decision to strike down a restrictive single-family home ordinance in *State v. Baker*[113] comes as no surprise. The decision reflects the same statewide view of local government articulated in *Mount Laurel*. In marked contrast to the *Belle Terre* Court's focus on the suburban ideal, the New Jersey court recognized that a municipality must draw a "careful balance"[114] between preserving family life and prohibiting social diversity. This recognition underscores the court's understanding of zoning's exclusionary effects. In addition, the court's recommendations of appropriate alternative methods for preventing overcrowding and congestion[115] further demonstrate its familiarity with exclusionary zoning practices and its willingness to cooperate with, rather than defer to, local government.

New York courts seem to share the New Jersey judiciary's view of zoning as a statewide issue. As in New Jersey, the New York courts' decision to strike down *Belle Terre*-type ordinances can be understood as part of the courts' broader tradition of involvement in local zoning matters. In *Berenson v. Town of New Castle*,[116] for example, the court struck down a zoning ordinance that prohibited multifamily housing. Citing to New Jersey and Michigan exclusionary zoning cases, the court set forth a two-part test to determine the validity of an ordinance prohibiting multifamily housing. First, the court must consider whether the zoning board has provided a properly balanced and well-ordered plan for the community.[117] Second, in enacting the zoning ordinance, the municipality must have considered the region's needs.[118] Like the New Jersey court, the New York court emphasized

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other legal hurdles, the town's planning board unanimously approved the housing complex, which will be built on 63 acres of farmland.").

Two years after deciding *Mount Laurel I*, the New Jersey Supreme Court applied *Mount Laurel I* principles to invalidate a municipality's zoning ordinances. See Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192 (N.J. 1977). In *Oakwood*, the court once again focused on the regional welfare and defined the appropriate region for Madison as "the area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning." Id. at 1219. In rejecting the concept of a county as the appropriate region, the court noted that such a narrow focus was unrealistic.

113 405 A.2d 368 (N.J. 1979).

114 Id. at 371.

115 See id. at 373. The court suggested that zoning ordinances limit the number of occupants in reasonable relation to available sleeping and bathroom facilities or require a minimum amount of habitable floor area per occupant.

116 341 N.E.2d 236 (N.Y. 1975).

117 See id. at 242.

118 See id.

that courts should consider not only the general welfare of the residents of the zoning township, but also the effect of the ordinance on the neighboring communities.[119] The *Berenson* decision underscores the New York courts' perception that the judiciary must take affirmative steps to prevent exclusionary zoning. Neither court refers to local government as a protector of family values. Rather, both courts explicitly recognize that, until statewide governmental units step in to perform the tasks of a statewide planner, the judiciary has a duty to assess the reasonableness of local government zoning decisions.[120] This attitude toward local government is reflected in the courts' decisions to strike down restrictive single-family ordinances in *Baer v. Brookhaven*[121] and *McMinn v. Town of Oyster Bay*.[122]

Michigan courts have also taken strict views on restrictive and exclusionary zoning in general and have not hesitated to strike down a variety of ordinances they consider discriminatory or overly beneficial to upper-middle-class areas. Michigan courts have struck down ordinances prohibiting mobile homes, overruled large-lot zoning, and permitted multifamily housing.[123] Early case law invalidating single-family zoning in favor of mobile homes established that where certain favored uses are involved, the pro-municipal presumption of validity no longer holds.[124] Similarly, Michigan courts have not favored large-lot zoning and have approved breaking down single-family zones to build apartments.[125]

Thus, it is no surprise that when the Michigan Supreme Court confronted a restrictive single-family home ordinance in *Charter Township of Delta v. Dinolfo*,[126] the court gave the ordinance presumptive validity but refused to give the "extraordinary deference" traditionally given to legislative decisions in zoning matters.[127] The court's suspicion of the local government's definition of family in *Dinolfo* signals the court's view of local government as an entity to be reviewed strictly in order to ensure that the state's interests are observed.

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119 See id.

120 See id. at 243.

121 537 N.E.2d 619 (N.Y. 1989).

122 488 N.E.2d 1240 (N.Y. 1985).

123 See Don T. Allensworth, Land Planning Law 105-18 (1981) (discussing Michigan courts' dislike of restrictive zoning measures).

124 See, e.g., Smookler v. Township of Wheatfield, 232 N.W.2d 616 (Mich. 1975); Nickola v. Township of Grand Blanc, 232 N.W.2d 604 (Mich. 1975).

125 See, e.g., Simmons v. Royal Oak, 38 Mich. App. 496 (1972).

126 351 N.W.2d 831 (Mich. 1984).

127 See id. at 840.

Meanwhile, California, which focused on the privacy right in evaluating a *Belle Terre*-type ordinance, has been called the strongest supporter of citizen interests among all the states.[128] Developers rarely win major lawsuits in court.[129] In the 1970s, the California courts tended to uphold zoning ordinances, such as those imposing minimum-lot requirements.[130] Nevertheless, the court in *City of Santa Barbara v. Adamson*[131] clearly rejected the Supreme Court's reasoning in *Belle Terre* and adopted a fundamental rights approach. This approach enabled the court to apply strict scrutiny and therefore sidestep the issue of how much deference to local government was appropriate. The court's references to local government assumptions that groups of unrelated persons "hazard an immoral environment for families with children"[132] may reflect the court's suspicion of local government motives, an attitude similar to the skepticism displayed by New York, New Jersey, and Michigan courts.

While other factors may play a role in these states' divergence from the *Belle Terre* model, the cases suggest that differing views of local government are the key to understanding this split. The state courts that struck down restrictive definitions of family relied on their state constitutions, raising the question of whether their divergence from *Belle Terre* stems from differences between the state and federal constitutional provisions. New York and Michigan's constitutions, however, use the same language in their due process clauses as the United States Constitution.[133] New Jersey's comparable provision varies from the Federal Due Process Clause,[134] but the New Jersey courts did not focus on constitutional language and stated explicitly that the New Jersey guarantees of due process may be more demanding and are to be more broadly construed than those of the Federal Constitution.[135] The lack of focus on the language itself as the source

128 See Allensworth, supra note 123, at 200 (describing California's extensive zoning regulations as indicative of its strong support of citizens' interest).

129 See id. ("Sometimes, developers do well in the trial court but rarely above that . . . .").

130 See id. at 201-15 (citing early California zoning cases).

131 610 P.2d 436 (Cal. 1980).

132 Id. at 441.

133 The U.S., Michigan, and New York Constitutions all state that no person shall be "deprived of life, liberty, or property without due process of law." See U.S. Const. amend. XIV; Mich. Const. art. I, § 17; N.Y. Const. art. I, § 6.

134 The New Jersey courts rested on the part of the state constitution which states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. 1, para. 1.

135 See Holy Name Hosp. v. Montroy, 379 A.2d 299, 301 (N.J. Super. Ct. Law Div. 1977).

of the protection shows that the difference in result does not emerge from differences in language among the constitutions, but rather from the courts' decisions to construe their constitutions to offer more protection than the Federal Constitution. Finally, California's decision rested on a constitutional right of privacy,[136] which the Supreme Court did not consider applicable in this context in *Belle Terre*. This suggests that the divergence in results stems not from differences in language, but rather from the state courts' greater protection of individual rights.

Each court's perception of the proper role of local government in zoning matters determines the level of deference the court grants to localities enacting zoning ordinances. Generally using the same level of scrutiny, the *Belle Terre* Court (and its followers) and those state courts more protective of individual rights reach different results regarding the ordinances' constitutionality because of their application of the presumption of validity. The next Part suggests that courts evaluating single-family home ordinances should shift the usual presumption of validity granted to local government zoning decisions to require localities to justify their zoning regulations.

III

SHIFTING THE PRESUMPTION OF VALIDITY

Many state courts have yet to confront a constitutional challenge to a single-family home ordinance restricting the number of unrelated adults who may live together.[137] A court facing such a challenge today has the choice of following *Belle Terre* and upholding the ordinance, or following in the steps of the four state courts that have scrutinized these ordinances more closely and found them unconstitutional. The difference in the two approaches rests on the degree of deference granted to zoning ordinances. Courts give deference to local government in part by granting ordinances a presumption of validity, and placing the burden on the homeowner to prove that the ordinances are not sufficiently related to legitimate goals. While the *Belle Terre* approach grants zoning ordinances the traditional presumption of validity, the courts offering greater protection shift the presumption, which often results in a finding of unconstitutionality.

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136 The court in City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980), relied on a unique privacy clause in the California Constitution. See supra note 72 (containing language from California Constitution). The Federal Constitution does not explicitly recognize a right of privacy.

137 See supra note 39 (listing states that have not ruled on constitutionality of single-family home ordinances).

Because a shift has begun to occur in Supreme Court zoning jurisprudence since the tradition of deference was established in *Euclid*, granting single-family home ordinances a presumption of validity is no longer warranted. In evaluating traditional family ordinances, state courts should reverse the presumption of validity and require the government to provide reasons why the ordinance is constitutional. Stricter review of traditional family ordinances will enable state courts that have not yet ruled on single-family home ordinances to attack exclusionary zoning and to approach housing shortage and homogeneity problems in the suburbs.[138]

Section A traces the origins of the presumption of validity, studies how the Supreme Court has backed away from Euclidean deference in favor of heightened scrutiny in other kinds of land-use decisions, and examines land-use contexts other than single-family home ordinances in which state courts have shifted the presumption of validity. Section B shows that changes in local government have rendered deference in zoning matters unworkable and discusses the benefits of shifting the presumption of validity of single-family home ordinances.

A. The Origins of the Presumption of Validity and the Retreat from Euclid

The term "presumption of validity" means that the court assumes the prima facie validity of an ordinance until the challenging party introduces contradictory evidence.[139] The presumption of validity is a rule to allocate the burden of proof, under which a party challenging an ordinance bears the burden of producing evidence as well as the burden of persuasion.[140] If the challenging party produces evidence and persuades the trier of fact that a zoning ordinance lacks a substan-

138 For a discussion of the exclusionary effects of single-family home ordinances, see supra notes 90-95 and accompanying text.

139 See Stanley D. Abrams, Overcoming the Presumption of Validity and Shifting the Evidentiary Burden—A Practitioner's Perspective, at 39, 41 (ALI-ABA Course of Study Materials: Planning, Regulation, Litigation, Eminent Domain, and Compensation No. C851, 1993) (discussing challenges practitioners face in getting courts to realize they can shift burden to government to justify its actions).

140 See id.; see also Marshall S. Sprung, Note, Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard, 71 N.Y.U. L. Rev. 1301, 1304-06 (1996) (explaining difference between burden of production and burden of persuasion). The burden of production asks "whether a party has proved the existence or nonexistence of a fact sufficient to bring the dispute before the trier of fact." Id. at 1305. The burden of persuasion "addresses how the trier of fact should treat the case once it is placed in its hands." Id. The party bearing the burden of persuasion must convince the jury that the facts warrant a finding in his favor. See id.

tial public purpose, the burden shifts to the municipality to show that the legitimacy of the ordinance is at least debatable.[141]

The presumption of validity emerged in 1926 in *Euclid*, where the Supreme Court validated the concept of zoning as a proper exercise of the state's police power.[142] The Court explained that "it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[143] The Court also articulated the "fairly debatable" rule: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[144] The Court's holding effectively places the burden of proof on the party challenging the ordinance to show that there can be no debate over the invalidity of the ordinance. Based on separation of powers considerations and the virtues of local autonomy, the *Euclid* opinion established the model for a deferential standard of judicial review in land-use decisions.

The Court temporarily departed from its Euclidean approach of relaxed judicial review in *Nectow v. City of Cambridge*,[145] where it held that a zoning ordinance violated due process under the Fourteenth Amendment. The Court invalidated a Cambridge regulation that created a buffer zone between single-family residential land and other land zoned for industrial purposes. The Supreme Court reversed Massachusetts's highest court and reinstated a master's conclusion that the zoning ordinance did not promote the health, safety, convenience, and general welfare of city residents.[146] The decision was significant because although the Supreme Court cited the *Euclid* language of "substantial relation" to public welfare, it reversed the state court's decision following this standard.[147] The *Nectow* decision

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141 See Sprung, supra note 140, at 1306 (noting that although burden of production may shift, burden of persuasion does not shift).

142 See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). For a detailed discussion of the case, see supra Part I.A.

143 Id. at 395.

144 Id. at 388.

145 277 U.S. 183 (1928).

146 See id. at 188.

147 See Nectow v. City of Cambridge, 157 N.E. 618, 620 (Mass. 1927). The Massachusetts Supreme Court adhered to the *Euclid* standards:

> Courts cannot set aside the decision of public officers in such a matter unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense.

Id.

generally has been understood to diverge from the *Euclid* approach and to introduce a heightened level of judicial review.[148] The uncertainty about the appropriate judicial review standard and the presumption of validity continued without clarification for fifty years, as the Supreme Court did not review any land-use regulations until *Belle Terre*.[149]

After *Belle Terre*, which followed the Euclidean presumption-of-validity approach, the Supreme Court once again moved toward heightened scrutiny of zoning ordinances in *City of Cleburne v. Cleburne Living Center, Inc.*[150] The move is significant for state courts facing challenges to single-family home ordinances because it signals the beginning of an erosion of the deference tradition and suggests that the presumption of validity may no longer be warranted. In *Cleburne*, the plaintiff was denied a special-use permit to operate a group home for the mentally retarded in an "Apartment House District."[151] This district permitted hospitals, sanitariums, nursing homes, or homes for the aged, other than for the "insane or feeble-minded or alcoholics or drug addicts."[152] In denying plaintiff a special-use permit, the city cited as its reasons "the negative attitude of the majority of property owners located within 200 feet" of the center and "the fears of elderly residents of the neighborhood."[153]

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148 See Robert J. Hopperton, Majoritarian and Counter-Majoritarian Difficulties: Democracy, Distrust, and Disclosure in American Land-Use Jurisprudence—A Response to Professors Mandelker and Tarlock's Reply, 24 B.C. Envtl. Aff. L. Rev. 541, 554 (1997) (arguing that Supreme Court appeared to retreat from *Euclid* in *Nectow* but did not articulate new standard); Douglas W. Kmiec, The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse, 88 Colum. L. Rev. 1630, 1649 n.104 (1988) (citations omitted):

> The Supreme Court reversed by taking the extraordinary step of looking past the lower court to a determination of a master that the existing ordinance did not advance the general welfare. This type of searching scrutiny of police power exercises did not resurface in any meaningful way in the Supreme Court until *Nollan*.

But see Jerold S. Kayden, Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the *Nollan* Invitation (Part I), 23 Urb. Law. 301, 307 (1991) (suggesting that Supreme Court did not deviate from rational basis standard).

149 See Hopperton, supra note 148, at 554.

150 473 U.S. 432 (1985). In addition, the Supreme Court in *Moore* in 1977 applied heightened scrutiny in striking down a single-family home ordinance that the Court believed sliced deeply into the family itself. See Moore v. City of East Cleveland, 431 U.S. 494 (1977). In doing so, the Court set a limit on the way family could be defined in terms of related individuals. However, the Court noted that it applied heightened scrutiny because the ordinance intruded on aspects of family life and was therefore not an ordinary zoning case. See id. at 499.

151 *Cleburne*, 473 U.S. at 436-37.

152 Id. at 436 n.3.

153 Id. at 448.

The Supreme Court claimed it was applying rational basis review in analyzing the equal protection claim brought by the plaintiff.[154] But in reality, the Court performed a searching analysis of the city's refusal to grant the plaintiff his special-use permit and declared the city's ordinance invalid as applied to the plaintiff's group home.[155] Despite the Court's announcement that it was applying a deferential standard of review, commentators, and several Justices in *Cleburne*, have argued that the Court was not as deferential as rational basis review requires.[156] Justice Marshall, concurring in part and dissenting in part, argued that Cleburne's ordinance would surely be valid under the traditional rational basis test and that the majority was actually applying heightened scrutiny: "[I]t is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation."[157] According to Justice Marshall, the majority essentially shifted the presumption of validity by requiring the legislature to convince the Court that its decision to pass the ordinance was sensible.[158] In light of the Supreme Court's move toward heightened scrutiny in *Cleburne*, state courts evaluating single-family home ordinances should not feel constrained to follow the Euclidian standards that the Court applied in *Belle Terre* almost twenty-five years ago.

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154 The Supreme Court reversed the Fifth Circuit's application of intermediate level scrutiny and announced it would use deferential review: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." Id. at 446.

155 See id. at 448.

156 See Robert J. Hopperton, Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis, 51 Wash. U. J. Urb. & Contemp. L. 1, 46 (1997) (classifying *Cleburne* as case using heightened judicial review or intermediate scrutiny); Daniel R. Mandelker & A. Dan Tarlock, Shifting the Presumption of Constitutionality in Land-Use Law, 24 Urb. Law. 1, 14 (1992) (describing Supreme Court's standard as "rational relationship review 'with a bite'"); Harold A. Ellis, Comment, Neighborhood Opposition and the Permissible Purposes of Zoning, 7 J. Land Use & Envtl. L. 275, 287-88 (1992) (arguing that Supreme Court's standard of review was ambiguous because it inquired not only into presence or absence of rational basis for challenged zoning restriction, but also into presence or absence of permissible motive for it); Randall T. Perdue, Note, The Countermajoritarian "Ideal": The Role of Judicial Review Under Regulatory Takings Analysis, 2 Geo. Mason L. Rev. 333, 346 (1995) (classifying Supreme Court's analysis in *Cleburne* as "second order" rational basis or "covertly heightened scrutiny").

157 *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in part and dissenting in part). Marshall chastised the Court for failing to articulate the factors that justified "second order" rational basis review and leaving lower courts in the dark. See id. at 460 (Marshall, J., concurring in part and dissenting in part). Marshall then acknowledged the factors that justified heightened scrutiny of the ordinance. See id. at 461 (Marshall, J., concurring in part and dissenting in part).

158 See id. at 459 (Marshall, J., concurring in part and dissenting in part).

State courts have also shifted the presumption of validity and applied heightened scrutiny in a variety of land-use contexts. New Jersey, New York, Michigan, and California have rejected traditional deference in favor of heightened scrutiny when reviewing single-family home restrictions.[159] But even in areas other than the single-family home context, several state courts have reversed the presumption of validity, especially in cases where ordinances had the effect of excluding housing for low- and moderate-income persons.[160] In *Mount Laurel*, for example, the New Jersey Supreme Court shifted the burden of proof to the municipality to give reasons why it should not be required to provide its fair share of housing.[161] In *Chanhassen Estates Residents Association v. City of Chanhassen*,[162] the Minnesota Supreme Court shifted the presumption in a case where neighbors denied a special-use permit to a fast-food restaurant with a "drive-thru" window, holding that the neighbors had not proven that the restaurant would cause traffic hazards.[163] Courts have also shifted the presumption in decisions striking down minimum lot-size requirements. The Pennsylvania Supreme Court, for example, held that excessive large-lot zoning is unconstitutional unless the municipality can show an "extraordinary justification."[164] In addition, courts have shifted the presumption when they perceived defects in the zoning process, such as in "spot zoning" or "downzoning" cases.[165]

The Supreme Court's and state courts' move away from the presumption of constitutionality in several land-use contexts underscores the increasing skepticism with which courts have regarded local gov-

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159 See supra Part II.B.

160 See Melinda Westbrook, Connecticut's New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions, 66 Conn. B.J. 169, 178-81 (1992) (discussing states' move toward heightened scrutiny).

161 See *Mount Laurel*, 336 A.2d 713, 728 (N.J. 1975) (explaining that burden shifts to municipality to establish valid basis for action or nonaction in cases where developing municipality has not made variety and choice of housing realistic possibility).

162 342 N.W.2d 335 (Minn. 1984).

163 See id. at 337, 340. The court stated that neighbors may oppose the granting of conditional-use permits, but it declared that the denial of a permit must be "based on something more concrete than neighborhood opposition and expressions of concern for public safety and welfare." Id. at 340.

164 See Appeal of Kit-Marr Builders, Inc., 268 A.2d 765, 767 (Pa. 1970).

165 See Mandelker & Tarlock, supra note 156, at 16 (explaining that courts shift presumption by requiring municipality to provide justification for zoning decision or by inquiring into its legislative purpose). "Spot zoning" cases involve situations where a landowner has received an upzoning for a more intensive use on a particular property. In downzoning cases, the municipality makes a zoning regulation more rather than less restrictive. See id. at 16-17.

For a discussion of state court decisions that have reversed the presumption of validity in the context of neighborhood opposition zoning cases, see generally Ellis, supra note 156, at 281-98 (surveying state courts' application of *Cleburne* and *Chanhassen* paradigms).

ernment decisions. This signals a move away from the suburban model of local government. As courts began to realize the problems created by exclusionary zoning, the romanticized notion of the suburbs began to dissipate. As a result, state courts confronted with a constitutional challenge to traditional family ordinances are no longer in the same position as the Justices in *Belle Terre*. With increased awareness of the harmful effects of exclusionary zoning ordinances, state courts are equipped to battle exclusion and housing shortages by shifting the presumption of validity.

B. Shifting the Presumption of Validity of Single-Family Home Ordinances

For too many years, courts have shown exceeding deference to zoning regulations, and as a result, zoning has become adversarial and divisive.[166] Since the 1960s, the public has become increasingly wary of local government zoning regulations, attacking the use of fiscal zoning to create wealthy and homogeneous suburbs as exclusionary.[167] In addition, courts' interpretation of *Euclid*'s "fairly debatable" rule as "anything goes" has undermined the integrity of zoning and contributed to the erosion of well-planned growth and development.[168] Zoning regulations have caused serious shortages of affordable housing in many states, creating situations where employees cannot afford to live in the suburban towns where they work.[169]

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166 See Charles L. Siemon & Julie P. Kendig, Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil," 20 Nova L. Rev. 707, 740-41 (1996) (arguing that judges need to review zoning ordinances more stringently).

167 See Mandelker & Tarlock, supra note 156, at 5 (describing decline in land-use control's popularity after World War II). Nevertheless, residents in some towns have actively supported exclusionary zoning and resisted courts' attempts to erode it. See supra note 112.

168 See Siemon & Kendig, supra note 166, at 713.

169 See Westbrook, supra note 160, at 169-71 (describing Connecticut's affordable housing crisis); see also Dan Morse, Low-Paying Jobs Begging for Workers, Baltimore Sun, Mar. 30, 1997, at 1B, available in 1997 WL 5504726 (reporting that bagel restaurant in Baltimore suburb is offering to give entry-level employees health insurance, tuition reimbursement, and paid vacation in order to attract workers who cannot afford to live in wealthy suburb); Susan S. Richardson, Editorial, NIMBY Bug Has Struck City's Affordable Housing, Austin American-Statesman, Dec. 18, 1997, at A23 (describing Austin's housing shortage and urging city to attract employers who want available and affordable housing for their employees); Dennis Royalty, Businesses Say Need for Diverse Housing in Fishers Is Clear, Indianapolis News, Mar. 26, 1997, at 2, available in 1997 WL 2873920 (describing businesses' problems in finding employees to fill entry-level positions in suburbs because towns do not offer affordable housing); Hollis R. Towns, Bad Housing Beyond City: Suburbs Worse than Atlanta, Atlanta J. & Const., Apr. 29, 1998, at B1 (quoting Andrew M. Cuomo, Secretary of HUD, describing housing shortage crisis in suburbs: "[G]rowing numbers of men and women who serve the fast food we eat, who clean the offices where we work, who watch our children in day care centers, and who perform many

Suburban residents have isolated themselves through zoning ordinances that forbid multifamily housing and require single-family housing to have minimum-floor areas and large lots.[170] Single-family home ordinances also keep out less affluent people who cannot afford to live without roommates. By enacting such ordinances, localities can in effect zone out housing affordable to low- and moderate-income families by raising construction costs.[171]

Against this background, granting zoning ordinances a presumption of validity no longer seems appropriate. Granting ordinances a presumption of validity leaves too many persons at risk of local government preferences. Instead, state courts examining single-family home ordinances[172] can and should apply heightened scrutiny, or "second order" rational basis review, which requires the government to establish that the classification is substantially related to important and legitimate objectives, so that valid and sufficiently weighty policies actually justify the ordinance.[173] This standard of review essentially increases scrutiny by reversing the presumption of validity and requiring governments to meet the burden of proving that the ordinances are legitimate. This heightened standard would preclude governments from arguing merely that the ordinances are good for the "general welfare" because courts would likely require governments to show specifically how ordinances promote legitimate state interests. The presumption shift would help courts focus on a locality's reasons

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other low-wage jobs aren't paid enough to house their families in safe and decent conditions.").

170 See Note, State-Sponsored Growth Management as a Remedy for Exclusionary Zoning, 108 Harv. L. Rev. 1127, 1127-28 (1995) (arguing that opening up suburbs to low-income housing is essential to revitalize urban neighborhoods); see also Michele Derus, Dream of Affordable Housing Is Slipping Away, Milwaukee J. Sentinel (Real Estate), Mar. 30, 1997, at 1, available in 1997 WL 4783910 (quoting Robert E. Koenig, former chief of HUD loan management branch in Michigan, who blames housing crisis in Milwaukee on "laws and ordinances that keep low- and moderate-income people out of suburban communities," such as minimum lot-size requirements); Randi Feigenbaum, Making Room for Renters, Newsday, June 26, 1998, at C6 (reporting that senior citizens and young adults have left Long Island because of lack of rental apartments and describing zoning laws precluding creation of rental housing stock).

171 See Westbrook, supra note 160, at 169-71 (describing disproportionate impact of Connecticut housing shortage on low- to moderate-income families).

172 It may be beneficial for state courts reviewing any land-use cases to shift the presumption of validity. Many courts already have. See supra notes 159-65. Because other land-use contexts may involve additional issues not considered here, however, whether state courts in other land-use contexts should shift the presumption is beyond the scope of this Note.

173 See Laurence H. Tribe, American Constitutional Law § 16-33, at 1612 (2d ed. 1988) (noting that "unusual importance of the interest in suitable housing at least arguably played a role in triggering intermediate review in City of Cleburne v. Cleburne Living Center").

for the zoning ordinance, especially because the government would bear a greater burden of justifying its ordinances. As a result, presumption shifting provides a way for parties to challenge a local decision when local government cannot provide adequate justifications.

One concern with applying this form of scrutiny is that it grants state court judges greater power to review local government decisions and perhaps to trump locally elected representatives and officials. Because judges generally are not elected and therefore are not publicly accountable, a critic might assert, it is problematic for them to overrule decisions made by democratically elected legislators. However, this countermajoritarian argument assumes that ordinances are passed by a large majority of elected officials. In reality, zoning decisions are generally made by small boards that may not even be elected and are therefore not necessarily accountable to the city residents.[174] In addition, shifting the burden to the government is not necessarily stricter scrutiny because it merely requires the government to come up with a more focused and empirically based justification than is required by the rational basis standard. The shift in presumption means that a court will be less willing to accept the outcome of the political process when it is challenged in court, not that the court will trump legitimate majority choices.[175]

Shifting the presumption of validity is also beneficial because it allows courts to review zoning ordinances more carefully, which is especially important in cases where the political process of zoning has malfunctioned and distorted the distribution of benefits and bur-

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[174] In almost all states, a State Zoning Enabling Act (SZEA) grants a local legislative body the power to pass or amend a zoning ordinance. See Ellickson & Been, supra note 8, at 4-3. This legislative body can be the city council, board of aldermen, board of county supervisors, or township board. See id. In most jurisdictions, however, the legislative body or an executive body appoints two bodies of unelected lay persons to administer zoning changes. See id. The planning commission, which holds public hearings on proposed zoning amendments and reports its recommendations to the legislative body, often consists of laypersons, such as attorneys, real estate brokers, civic activists, university professors, and others without formal training in planning. See id. The other lay body, often called the board of zoning appeals, makes final decisions on matters such as variances and appeals from building permit denials by another agency. See id. A growing number of states are moving away from this structure and professionalizing the zoning administration. See id. In some cities, for example, a zoning administrator may be hired to make decisions in simpler cases within the jurisdiction of the board of zoning appeals. See id. at 4-4. Local governments are also hiring hearing examiners to take evidence at hearings and make recommendations. See id. The combination of unelected laypersons serving on the boards and the growing trend toward empowering a hired administrator to make decisions indicates that zoning decisions are not made by accountable city officials.

[175] See Mandelker & Tarlock, supra note 156, at 24 (explaining that allocation of burden of proof to government need not require heightened judicial review).

dens.[176] When the zoning process has excluded land-use interests and decisions have been made without taking into account those interests, shifting the presumption protects the excluded parties by requiring the group that reached the decision to explain why neglecting this excluded interest is appropriate. Finally, requiring judges to disclose explicitly their standards of review will enhance the clarity, consistency, and integrity of land-use decisions and ensure that their decisions are within the proper role of a judiciary. By articulating clearly the standard of review, rather than claiming to use rational basis when actually applying a different standard, state courts can avoid the confusion that the Supreme Court's garbled standards have introduced into land-use jurisprudence. The standards can provide clear guidance to the government as to what government interests the courts consider legitimate.

CONCLUSION

The varying approaches of state courts toward *Belle Terre*-type ordinances underscores the differing views of the judiciary's proper role in reviewing local zoning laws. Since *Belle Terre*, increasing skepticism of local government's zoning powers and accusations of exclusionary zoning have detracted from the ideal of the suburbs as a "sanctuary for people." For state courts confronting constitutional challenges to single-family home ordinances, the presumption-shifting approach of the few state courts which have struck down such ordinances presents a viable option for evaluating zoning regulations and a starting point for battling exclusionary zoning.

[176] See id. at 18-50 (examining Supreme Court's footnote four in *United States v. Carolene Products Co.* and arguing that its basis for heightened review applies to land-use decisions).