

Exclusionary Zoning of Group Homes in Ohio

In three cases,¹ each decided on July 30, 1980, the Ohio Supreme Court denied challenges to the validity of local zoning ordinances that excluded family and group rehabilitative homes from single family residential districts. By upholding these local zoning restrictions, the court granted local communities the power to override the state's professed goal of establishing community based rehabilitation centers and effectively curtailed the integration and deinstitutionalization of the mentally ill, the mentally retarded, and other disadvantaged citizens.² Although the Ohio Supreme Court has acknowledged the validity of using zoning in Ohio to create a "sanctuary for people,"³ such a sanctuary is seemingly open only to the "normal" members of society. Those stigmatized by labels of mental or social disability have no sanctuary but the institution.

This Comment will examine the decisions in *Brownfield v. State*,⁴ *Garcia v. Siffrin Residential Association*,⁵ and *Carroll v. Washington Township Zoning Commission*,⁶ in which the Ohio Supreme Court established new policies and legal theories that effectively disarmed both private efforts and statewide legislative attempts to nullify local restrictive zoning schemes. According to these cases, municipalities may disregard the mandates of the General Assembly with impunity and rely upon the courts to uphold highly restrictive and parochial zoning schemes. This Comment will also examine the Ohio Supreme Court's decision in *Saunders v. Clark County Zoning Department*,⁷ which was rendered nine months after *Brownfield*, *Garcia*, and *Carroll*. A decision more commendable for its result than its legal reasoning, *Saunders* impliedly overrules *Carroll*. Despite the promise of *Saunders*, however, the Ohio Supreme Court has yet to erase the shadow cast by *Brownfield*,

1. *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980); *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980); *Carroll v. Washington Township Zoning Comm'n*, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980).

2. *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), dealt with placement of residents of the Western Reserve Psychiatric Habilitation Center into a halfway house in Akron, Ohio. *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), involved the establishment of a residential facility for mentally retarded persons in Stark County, Ohio. *Carroll v. Washington Township Zoning Comm'n*, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980), concerned the location and operation of a foster home placed out of the Richland County Childrens Services.

3. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). This landmark case concerned a zoning ordinance restricting occupancy of homes in a single-family residential district to those related by blood, marriage, or adoption, or to no more than two unrelated persons. The ordinance was declared to be a constitutional exercise of zoning laws in order to protect the quality of life by eliminating uses that might contribute to increased noise, traffic congestion, and the deterioration of a family-type environment.

4. 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980). See the discussion of *Brownfield* in text accompanying notes 30-51 *infra*. *

5. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980). See the discussion of *Garcia* in text accompanying notes 51-111 *infra*.

6. 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980). See the discussion of *Carroll* in text accompanying notes 112-36 *infra*.

7. 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981). See the discussion of *Saunders* in text accompanying notes 137-55 *infra*.

Garcia, and *Carroll*, and one may still confidently predict that certain "undesirables" will not soon be moving into "the house next door."

I. BACKGROUND

A. Zoning

Zoning is a systematic regulation of land use and development employed to restrict or direct the uses to which an owner may employ his property.⁸ It is a valid exercise of the local government's police power to regulate land use for the promotion of public health, safety, morals, and general welfare.⁹ The zoning laws passed in the early twentieth century were designed to regulate height, use, structure, and location of buildings within classified districts of a municipality or other local political subdivisions.¹⁰

Since deciding the landmark case of *Village of Euclid v. Ambler Realty Co.*,¹¹ which established that zoning may be validly employed to control land use and may diminish the value of private property without constituting a "taking" in violation of the due process guarantee, the United States Supreme Court has heard few cases that have raised constitutional challenges to zoning schemes.¹² Nevertheless, the Court has made significant pronouncements regarding the use of zoning. The power to zone "is not confined to elimination of filth, stench, and unhealthy places," but can be employed to establish a quiet sanctuary in which to raise families.¹³ The Court has held that zoning has its limits: "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities."¹⁴ A zoning restriction that lacks a substantial relation to public health or general welfare will generally not be upheld as a valid or reasonable exercise of the police power.¹⁵ These concerns are echoed in the lower federal courts and the state courts, where there has been considerable zoning law activity.¹⁶

Zoning, a tool capable of producing much that is beneficial to the quality of community life, is, like all social and political strategies, capable also of producing much that is harmful and malignant. Zoning laws designed to ex-

8. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 1.13 (2d ed. 1976).

9. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

10. *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925). See also Comment, *Constitutional Law—Municipal Ordinance Limiting Occupancy of Homeowner's Dwelling to Certain Family Members Violative of Fourteenth Amendment Due Process Clause*: Moore v. City of East Cleveland, 21 HOW. L.J. 645 (1978) [hereinafter cited as Comment, *Constitutional Law*].

11. 272 U.S. 365 (1926). The Court held that classification of land to allow certain uses only in certain areas was constitutional and that any consequent diminution of property value due to the prohibition of a certain use did not constitute a taking of property without just compensation. *Id.* at 396.

12. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Berman v. Parker*, 348 U.S. 26 (1954); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

13. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

14. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

15. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N.E. 212 (1919).

16. Comment, *Constitutional Law*, *supra* note 10, at 645.

clude people on the basis of racial or economic prejudice have been attempted and have failed.¹⁷ Courts have emphatically disapproved the invidious use of zoning laws to deny fundamental rights, particularly to many "discrete and insular minorities"¹⁸ susceptible to discrimination by a politically powerful majority.¹⁹ The mentally ill, the developmentally disabled, and juvenile wards of the court, classified by certain immutable characteristics beyond their power to control or correct, however, have not yet received the uniform protection from exclusionary zoning schemes afforded to racial minorities. This is especially evident in Ohio after the decisions in *Brownfield*, *Garcia*, and *Carroll*.

B. Treatment of the Mentally Retarded and Mentally Ill

Custodial institutionalization was the predominant method of treating mentally, physically, and socially disadvantaged persons throughout much of the first half of this century.²⁰ The belief that these "afflicted" persons should be removed from society and locked up in secure facilities arose for a variety of reasons: fear, ignorance, disgust, and guilt, among others.²¹ New interest and research into the causes and treatment of mental retardation in the beginning of the second half of this century, however, provoked social reform in the mental health professions.²²

The failure of traditional treatment, along with overcrowding of institutions and rising costs associated with institutional treatment, has prompted consideration of alternative care programs, generally labeled habilitation or normalization.²³ Habilitation involves placing institutionalized persons under

17. For a thorough analysis of exclusionary zoning schemes, see Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 J.L. REF. 625 (1973).

18. See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), where the Court stated that the review applied to governmental restrictions upon fundamental rights will be upon an independent examination of the facts purporting to provide the rational basis for the law. Fundamental rights, while not defined with any specificity, represent those values essential to individual liberty. When laws impinge upon these clearly identifiable liberties, against the politically powerless minorities, the Court will make a substantive review of the law. See J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 416-19 (1978).

19. *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970), *aff'g* 296 F. Supp. 266 (W.D. Okla. 1969); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (9th Cir. 1970), *aff'g* 314 F. Supp. 967 (N.D. Cal. 1970) (low income housing); *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971) (low income housing); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972) (low income housing); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (low income housing); *Duffcon Concrete Products v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949) (commercial enterprise); *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (1971) (low income housing); *Molino v. Borough of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (1971) (apartment housing); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970) (apartment housing).

20. See D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971), for a discussion of the development of the institution in the United States.

21. A thorough analysis of the treatment of the mentally retarded can be found in W. WOLFENBERGER, *The Origin and Nature of Our Institutional Models*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED I* (R. Kugel and W. Wolfensberger eds. 1969). See also P. FRIEDMAN, *THE RIGHTS OF MENTALLY RETARDED PERSONS* 15 (1976).

22. Mason and Menaloscino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 U. CREIGHTON L. REV. 124 (1976).

23. *Id.* at 139.

supervisory care within small family-style homes in a community. The group functions as a family, sharing chores, cooking, eating, and recreational past-times, approximating the activities of a normal biological family.²⁴

Legislatures and courts have followed the trend towards deinstitutionalization led by social service reformers. Numerous judicial decisions demonstrate approval of the legislative demands that the state seek out the least restrictive means of treatment and that the treatment itself must be forthcoming upon institutionalization.²⁵

In spite of reforms in both laws and social services, local attitudes have resisted change. Willing to support community rehabilitation homes in the abstract, many communities are reluctant to put into practice the theory of family or group home treatment.²⁶ Misconceptions and fears still present a formidable barrier to the achievement of habilitation goals. Community resistance is often evidenced through restrictive zoning laws that narrowly define the "family" in single family zones or impose limits on the numbers of people living together as a single housekeeping unit if unrelated by blood, marriage, or adoption.²⁷ Some state court cases have shown, through broadly inclusive interpretations of zoning restrictions,²⁸ resistance to the exclusion of group homes. After the decision by the United States Supreme Court in *Village of Belle Terre v. Boraas*,²⁹ these cases have seldom served as precedent to strike down exclusionary zoning laws.

Against this background, the Ohio Supreme Court has responded to the conflicting interests of communities who resist neighborhood habilitation and of the state, whose duties include providing the most effective social and mental health care. The court's message in *Brownfield*, *Garcia*, and *Carroll* seemed clear: habilitation homes were not to be located in the single family residential community.

24. Comment, *Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single Family Dwellings*, 24 KAN. L. REV. 677, 680 (1976).

25. O'Connor v. Donaldson, 422 U.S. 563 (1975); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); 344 F. Supp. 387 (M.D. Ala. 1972).

26. See Sigelman, Spanhel and Lorenzen, *Community Reactions to Community Deinstitutionalization: Crime, Property Values and Other Bugbears*, 45 J. REHABILITATION 52 (1979).

27. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Planning and Zoning Comm'n v. Synanon Foundation, Inc.*, 153 Conn. 305, 216 A.2d 442 (1966). See also Comment, *Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single Family Dwellings*, 24 KAN. L. REV. 677 (1976); Comment, *Exclusion of the Mentally Handicapped: Housing the Non-Traditional Family*, 7 U. CAL. DAVIS L. REV. 150 (1974).

28. *Timberlake v. Kenkel*, 369 F. Supp. 456 (E.D. Wis. 1974); *Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974); *Carroll v. City of Miami Beach*, 198 So. 2d 643 (Fla. Ct. App. 1967); *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. Ct. App. 1975); *Kirsh Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Gabe Collins Realty, Inc. v. Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970); *Application of LaPorte*, 2 A.D.2d 710, 152 N.Y.S.2d 916 (1956); *Group Home of Port Washington, Inc. v. Board of Zoning and Appeals*, 82 Misc. 2d 753, 370 N.Y.S.2d 433 (Sup. Ct. 1975) (mem.); *People v. Nolan*, 78 Misc. 2d 607, 359 N.Y.S.2d 376 (App. Term 1973) (per curiam); (mem.); *Nowack v. Department of Audit and Control*, 72 Misc. 2d 518, 338 N.Y.S.2d 52 (Sup. Ct. 1973); *Missionaries of Our Lady of La Salette v. Village of Whitefish Bay*, 267 Wis. 609, 66 N.W.2d 627 (1954).

29. 416 U.S. 1 (1974). See note 3 *supra*.

II. *Brownfield v. State*

In *Brownfield v. State*,³⁰ the state of Ohio purchased a single family residence in Akron for use as a halfway house for patients discharged from the Western Reserve Psychiatric Habilitation Center. The state leased the residence to Western Reserve Human Services, Inc., a nonprofit corporation, which arranged for the care and supervision of the five residents of the facility. Zoning approval had not been sought prior to locating the rehabilitation family home in the neighborhood. Adjacent property owners brought suit, requesting a declaration that the use of the residence as a habilitation center violated the zoning laws and seeking to enjoin further operation of the residence as such.³¹

The trial and appellate courts found in favor of the defendant.³² The Ohio Supreme Court referred to the failure to apply for a conditional use permit for the facility and suggested that procuring a permit not only would be possible under the zoning laws, but would both satisfy the local zoning requirements and promote the state's goal of operating the halfway house at the present location.³³ The case was remanded for the lower court to consider whether the state could obtain a conditional use permit. If the permit were to be obtained, the case would be rendered moot.³⁴

The central issue in *Brownfield* was "whether a privately-operated, state-owned facility is automatically exempt from municipal zoning restrictions" based on the theory of government immunity through an exercise of eminent domain.³⁵ The Ohio Supreme Court declared that the prior rule of law that "zoning restrictions do not apply to state agencies vested with the power of eminent domain"³⁶ was erroneously applied to the type of intergovernmental conflict present in *Brownfield*, and proposed the adoption of a new resolution of the conflict.

The court in *Brownfield* rejected the use of the governmental-proprietary test to resolve intergovernmental conflicts, but it failed to define a sufficient alternate standard.³⁷ Under the rejected test, the state's "governmental" actions would be immune from local zoning laws while "proprietary" actions of

30. 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980).

31. *Id.* at 283, 407 N.E.2d at 1365.

32. *Brownfield v. State of Ohio*, No. CV77-12-2995 (C.P. Summit County, Ohio, July 10, 1978); Nos. C.A. 8991-8992 (C.A. Summit Co. May 2, 1979). The original defendants were the State of Ohio, the City of Akron, the Akron Superintendent of Building Inspection and Regulation, and the Western Reserve Human Services, Inc. The State of Ohio was dismissed as a party because it had not waived its immunity to suit, and the City of Akron and the Superintendent of Building Inspection and Regulation were realigned by the trial court as parties plaintiffs. 63 Ohio St. 2d 282, 283, 407 N.E.2d 1365, 1366 (1980).

33. 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980).

34. *Id.* at 287, 407 N.E.2d at 1368.

35. *Id.* at 284, 407 N.E.2d at 1367.

36. *Id.*

37. *Id.* at 286, 407 N.E.2d at 1368. For an analysis and defense of the balancing test adopted in *Brownfield*, see Case Comment, *Government Immunity from Local Zoning Restrictions: The Balancing Test of Brownfield v. State*, 43 OHIO ST. L.J. 229 (1982).

the state would not be so protected. The distinction between governmental and proprietary actions is perhaps a difficult one, but attempts have been made to distinguish these functions on a mandatory or permissive basis.³⁸ A political unit is acting "governmentally" if its actions are pursuant to a legislative mandate to perform a duty. If the unit is granted a mere power to act but is under no duty to do so, the act is proprietary and, under the rejected test, subject to compliance with zoning restrictions.³⁹ These definitions, however, fail to explain satisfactorily the distinction between public and private acts that seems to form the basis of the test.⁴⁰ One possible explanation of the basis for the governmental-proprietary test is that the public purpose and social utility of the state law are weighed against its interference with private interests protected by the conflicting local law.⁴¹ Under this analysis, the governmental-proprietary test is, in essence, a balancing test. This test has been criticized, however, for producing inconsistent and irrational decisions due to the inherent difficulty of defining the two different types of governmental acts with any precision.⁴²

The Ohio Supreme Court proposed that instead of the governmental-proprietary test, a new balancing test be employed.⁴³ The court, in using this new test, must first determine the "general public purposes to be served by the exercise of each power" and then resolve the conflict in favor of the power that serves the needs of the greatest number of citizens.⁴⁴ The state government will no longer be given absolute immunity from local laws. Instead, use of the new *Brownfield* balancing test will result in a compromise of state and local interests.

Upon first examination, the court's analysis is unobjectionable: "Whenever possible, the divergent interests of governmental entities should be harmonized rather than placed in opposition," and when "compliance with zoning regulations would frustrate"⁴⁵ the state's purposes, a balance of interests may result in granting a qualified immunity to the state to resolve any conflict.⁴⁶ In both the governmental-proprietary test and the *Brownfield* balancing test, the court should examine the competing interests and, depending upon the critical need, value, or reasonableness of either the state or local law, decide whether the state is to be given a qualified immunity or whether the local law will be granted supremacy over the state law.⁴⁷ Since both tests

38. Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

39. *Id.* at 937.

40. *Id.* at 939.

41. *Id.* at 911.

42. *Id.* at 910.

43. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

44. *Id.* at 285, 407 N.E.2d at 1368.

45. *Id.* at 286, 407 N.E.2d at 1368.

46. *Id.* at 287, 407 N.E.2d at 1368.

47. Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

seek to strike a balance between competing governmental objectives, there is a contradiction in the adoption of the *Brownfield* test and the court's summary rejection of the governmental-proprietary test.⁴⁸

The state delegates extensive zoning power to municipalities.⁴⁹ By using a balancing test, the courts have given to the political bodies most susceptible to purely local pressures the power to defeat state-wide interests through exclusionary laws. Unless a change is forthcoming from the courts or legislatures, exclusionary zoning laws can force the clustering of habilitation facilities in high density residential or commercial districts, defeating the intent of the state program for locating habilitation homes in the family-type neighborhoods most conducive to successful normalization.⁵⁰

The Ohio Supreme Court in *Brownfield* declared that absolute immunity from local zoning laws no longer will be granted to state government agencies that take private property for public purposes under the power of eminent domain. *Brownfield* has thus set the stage in Ohio for resolution of inter-governmental conflicts: legitimate state policies may be overcome by local political interests.

III. *Garcia v. Siffrin Residential Association*

The deleterious results of using *Brownfield's* new balancing test are particularly apparent in *Garcia v. Siffrin Residential Association*.⁵¹ The Siffrin Residential Association is a nonprofit corporation organized under the provisions of chapter 5123 of the Ohio Revised Code to provide for the operation of a residential living facility for mentally retarded persons.⁵² The Siffrin

48. 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

49. OHIO CONST. art. XVIII, § 3, which reads: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

50. See Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: PARENS PATRIAE Meets Police Power*, 25 VILL. L. REV. 273 (1980).

51. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980).

52. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980). OHIO REV. CODE ANN. § 5123.19 (Page Supp. 1979), which provides for the licensing of individuals to operate family or group home facilities, states:

(A) As used in this section and section 5123.19 of the Revised Code:

(1) 'Residential facility' means a home or facility in which a person with a developmental disability resides, except a home subject to Chapter 3721 of the Revised Code or the home of a relative or legal guardian in which a person with a developmental disability resides.

....

(3) 'Family home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for not more than eight persons with developmental disabilities.

....

(B) Every person desiring to operate a residential facility shall apply for licensure of the facility to the chief of the division of mental retardation and developmental disabilities.

....

(D) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are uniformly imposed upon all single-family residences within the district or zone.

(E) Any person may operate a licensed group home as a permitted use in any multiple-family residential district or zone of any political subdivision, except that a political subdivision that has enacted a zoning

Association purchased a single family residence in Canton to be used as a home for providing habilitation treatment for up to eight mentally retarded adults. The home was located in a district zoned for one- and two-family dwellings under the Canton city zoning ordinances.⁵³ Siffrin applied to the Department of Mental Health for a license to operate the home. The Garcias and other adjacent property owners opposed the application, claiming that the facility would violate the Canton zoning restrictions and lower the value of their property. The Department of Mental Health found that the Canton zoning ordinance was superceded by Revised Code section 5123.18 (D)⁵⁴ and awarded the license to Siffrin. The Garcias instituted this action to enjoin operation of the facility and to declare subsections (D) and (E) of section 5123.18 unconstitutional.

The trial court made the following findings: (1) the occupants of the Siffrin facility did not satisfy the definition of "family" in chapter 1123 of the Canton City Zoning Ordinances; (2) section 5123.18 (D) and (E) were not "general laws" within the scope of the conflict provisions of article XVIII, section 3, of the Ohio Constitution, but were "special laws," and as such were prohibited by article II, section 26, of the Ohio Constitution; and (3) section 5123.18 (D) and (E) were arbitrary and capricious, violating both article I of the Ohio Constitution and the fourteenth amendment of the United

ordinance or resolution establishing planned unit development districts may exclude group homes from such districts, and a political subdivision that has enacted a zoning ordinance or resolution may regulate group homes in multiple-family residential districts or zones as a conditionally permitted use or special exception, in either case, under reasonable and specific standards and conditions set out in the zoning ordinance or resolution to: (1) Require the architectural design and site layout of the home and the "location, nature, and height of any walls, screens, and fences to be compatible with adjoining land uses and the residential character of the neighborhood; (2) Require compliance with yard, parking, and sign regulations; (3) Limit excessive concentration of homes.

....
(G) Divisions (D) and (E) of this section are not applicable to municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed residential facilities by means of permitted uses, conditional uses, or special exception, so long as such ordinance remains in effect without any substantive modifications.

53. 63 Ohio St. 2d 259, 260, 407 N.E.2d 1369 (1980). Canton City Code Chapter 1123 reads in part as follows: "Dwelling Unit" means a group of rooms arranged, maintained or designed to be occupied by a single-family (see definition of family), and consists of a complete bathroom, complete kitchen or kitchenette; and facilities for living, sleeping and eating. All of the facilities are to be located in contiguous rooms and used exclusively by such family and by any authorized persons occupying such dwelling unit with the family.

... "Family" means one or more persons occupying a dwelling unit and living as a single house-keeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, lodging house, motel, hotel, fraternity or sorority house.

54. 63 Ohio St. 2d 259, 262, 407 N.E.2d 1369, 1372 (1980). See note 52 *supra* for the text of the statute. Sixteen state legislatures, including Ohio, have passed laws that curtail the enactment of municipal zoning laws designed to circumvent placement of group and family homes in single family residential districts. The decision in *Garcia* has nullified the Ohio statute contained in chapter 5123 of the Revised Code, but the fifteen statutes still in effect are: ARIZ. REV. STAT. ANN. §§ 36-581 to -582 (West Supp. 1980); CAL. WELF. & INST. CODE §§ 5115-5116 (West 1972 & Supp. 1981); COLO. REV. STAT. §§ 27-10.5-133, 30-28-115 (1977 & Supp. 1980); MD. ANN. CODE art. 59A, § 20C (1979); MICH. STAT. ANN. § 5.2963(16a) (Supp. 1978); MINN. STAT. ANN. §§ 252.28, 462.357(7)-(8) (West Supp. 1981); MONT. REV. CODES ANN. §§ 11-2702.1 to .2 (Supp. 1977); N.J. STAT. ANN. § 30:4C-2(m)-26 (West 1981); N.M. STAT. ANN. § 14-20-1 (Supp. 1977); R.I. GEN. LAWS § 45-24-23 (Supp. 1981); TENN. CODE ANN. § 13-24-102-3 (1980); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1981); VA. CODE § 15.1-486.2 (Supp. 1980); WIS. STAT. ANN. § 59.97(15) (West Supp. 1981).

States Constitution.⁵⁵ The Court of Appeals for Stark County reversed the trial court on each finding,⁵⁶ but was in turn reversed by the Ohio Supreme Court.⁵⁷

The Ohio Supreme Court made a two-pronged inquiry into the issues presented. First, as discussed below, it made a summary inquiry into the meaning of "family" as expressed in the Canton zoning ordinance. This is the weaker prong of the analysis. The second inquiry began by analyzing the nature of the intergovernmental conflict on lines similar to the governmental interest "balancing" test adopted in *Brownfield*.⁵⁸ This proved something of a false start. The court then abandoned this line of analysis and instead attacked the constitutionality of the statute itself. Thus, the second prong concerned the distinction between the validity of general laws and special laws under the state constitution.⁵⁹

A. Definition of Family

Defining the word "family" is important in determining whether a local zoning ordinance for single family dwellings will be construed to avoid an exclusionary result. The Ohio Supreme Court in *Garcia* did not, however, interpret the Canton zoning ordinance as the plain meaning of the ordinance⁶⁰ would warrant, but rather inferred a requirement that a "family" must demonstrate a "primary purpose" of sharing living facilities in order to qualify as a family for purposes of the ordinance relating to a single family residential district.⁶¹ This interpretation narrowed the scope of the zoning ordinance to include only certain types of families.

Unlike courts in other jurisdictions, the Ohio Supreme Court has not presented a satisfactory analysis of "family." The definition of "family"⁶² as requiring a "primary purpose" to share living facilities is a spontaneous and unexplained standard asserted by the court.

55. *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 265-67, 407 N.E.2d 1369, 1374 (1980).

56. *Garcia v. Siffrin Residential Ass'n*, Nos. 4969, 4971, 4972 (Ct. App. Stark County, Ohio, March 7, 1979).

57. 63 OHIO ST. 2d at 267, 407 N.E.2d at 1374.

58. See text accompanying notes 44-48 *supra*.

59. See discussion at text accompanying notes 80-82 *infra*.

60. See note 53 *supra*.

61. 63 Ohio St. 2d 259, 268, 407 N.E.2d 1369, 1376 (1980).

62. It is important to note that the interpretation of "family" in *Garcia* is not adversely affected by the United States Supreme Court decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The ordinance of the Village of Belle Terre defined "family" as follows:

[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.

Id. at 2. The zoning ordinance in that case was much more restrictive than the Canton ordinance because it specifically described the relationships between occupants that would support a finding of "family" occupancy. The United States Supreme Court's analysis of the ordinance in *Belle Terre* is thus not analogous to the *Garcia* case, nor does it justify the highly restrictive interpretation of the zoning ordinance in *Garcia*, although the Ohio Supreme Court implied that the *Belle Terre* decision supported its reasoning. 63 Ohio St. 2d 259, 274, 407 N.E.2d 1369, 1379 (1980).

A Florida case dealing with an issue analogous to that of *Garcia* is *Carroll v. City of Miami Beach*.⁶³ The zoning ordinance in that case defined "family" as a single housekeeping unit, similar to the Canton zoning ordinance. The city of Miami Beach, in denying an application by the Bishop of the Diocese of Miami to use the property located in a single family residential district as a home for a small group of novices to a religious order, said that the word "family" was to be given the meaning commonly ascribed to it by the public in general.⁶⁴ This common meaning was the traditional biological family. The trial court affirmed this reasoning, but the Florida Court of Appeals reversed⁶⁵ and held, "[T]he question before us is not what the word 'family' means in common parlance, but what the City of Miami Beach zoning ordinance says it means."⁶⁶ The Court of Appeals declared that the words of the zoning ordinance must be strictly construed, and absent an indication from the legislature demanding a greater degree of consanguinity, none could be implied by the courts. Although the Florida case is analogous to *Garcia*, the Ohio Supreme Court has acted in the exact manner condemned by the Florida court. It has required a nonstatutory "primary purpose" in dwelling together as a single housekeeping unit: "We do not perceive this facility, and its statutorily mandated purposes and duties, to be likened to what is reasonably thought of to be a single housekeeping unit."⁶⁷ Rather than strictly construe the Canton zoning ordinance in keeping with the plain meaning of its words, the court has inferred restrictions where none exist on the statute's face. The Ohio Supreme Court's freewheeling interpretation of the word "family" is an example of judicial interference with legislation. Such interference has not been employed by courts in other jurisdictions faced with similar ordinances.⁶⁸

The Ohio Supreme Court stated that the residents of the Siffrin facility would not, as their primary purpose, be dwelling together as a single housekeeping unit.⁶⁹ The court failed, however, to support this conclusion with any evidence. No characteristic is described that distinguishes between the Siffrin housekeeping unit and one that would satisfy the definition of family espoused by the court. The court refused to admit that the only difference between the Siffrin unit and an acceptable family unit under the zoning ordinance is that

63. 198 So. 2d 643 (Fla. Ct. App. 1967).

64. *Id.* at 644.

65. *Id.* at 645.

66. *Id.*

67. 63 Ohio St. 2d 259, 268, 407 N.E.2d 1369, 1376 (1980).

68. *Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974); *Little Neck Community Ass'n v. Working Organization for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); *Application of LaPorte*, 2 A.D.2d 710, 152 N.Y.S.2d 916 (1956); *Incorporated Village of Freeport v. Ass'n For the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (1977); *Missionaries of Our Lady of La Salette v. Village of Whitefish Bay*, 267 Wis. 609, 66 N.W.2d 627 (1954).

69. 63 Ohio St. 2d 259, 268, 407 N.E.2d 1369, 1376 (1980): "[T]he facts show that these clients of Siffrin would not be residing in this dwelling unit as a single housekeeping unit in the same sense as would a group of individuals who had joined together in these premises in order to primarily share the rooming, dining and other facilities."

the former consisted of mentally retarded persons, while the latter would consist solely of persons of normal intelligence and abilities. The court could urge only that the fundamental difference lay in the primary purpose of occupying the premises.⁷⁰ According to the court, the Siffrin facility had as its "primary purpose" the tendering of habilitation training in life skills,⁷¹ which is inherently different from merely sharing living facilities.

There is no support in the language of the statute for the court's interpretation of Siffrin's primary purpose.⁷² The statute instead indicates that provision of habilitation services was but one of many other purposes, and it could not be read as requiring the essential purpose to be only habilitation. Indeed, living, cooking, and pursuing other activities within the community is, in and of itself, a training and learning experience for developmentally disabled persons. But such a narrow analysis of the purposes of a family habilitation home ignores the fact that the traditional "biological" family also uses and benefits from community living to socialize and train children to develop necessary life skills. It is plausible to argue that the primary purpose of even a typical family could be the tendering of training in life skills. For these reasons, the court's analysis of the meaning of "family" is eminently unsatisfactory.

B. Intergovernmental Conflict

Quite possibly the Ohio Supreme Court was aware of the weakness of its definition of "family" and recognized the need for another basis for denying the Siffrin Residential Association the status of a single housekeeping unit. The second prong of the decision was designed to weigh the analysis in favor of upholding the zoning ordinance over the state's attempt to locate habilitation facilities in residential communities.

The court first classified the intergovernmental conflict presented in *Garcia*. It conceded that the state law mandated the establishment of residential habilitation centers in the manner of a governmental, not proprietary, function.⁷³ In other words, the statute expressed the affirmative intent of the Ohio legislature to promote and support deinstitutionalization by removing barriers in the form of restrictive zoning laws that prevent the state, or private citizens, or nonprofit corporations from operating facilities in communities throughout the state. The court also found, in accord with well-established

70. *Id.*

71. *Id.* at 268, 407 N.E.2d at 1376: "[T]he Siffrin facility would be established . . . primarily for the purpose of bringing together a group of developmentally disabled persons for their training and education in life skills. . . ."

72. OHIO REV. CODE ANN. § 5123.19(B)(3) (Page 1981), which reads: "'Family home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting. . . ."

73. 63 Ohio St. 2d 259, 268, 407 N.E.2d 1369, 1376 (1980). The court admitted that each facility has "statutorily mandated purposes and duties" under chapter 5123 to locate residential treatment facilities to promote the deinstitutionalization of mentally retarded citizens.

principles,⁷⁴ that the municipal zoning ordinance was a proper exercise of the police power granted to local government under article XVIII, section 3, of the Ohio Constitution.⁷⁵ Therefore, the conflict was between the state and local government entities exercising "governmental-type" functions of the police power to promote public health, safety, and general welfare.

The balancing test suggested in *Brownfield* requires the court to examine the two competing interests and grant immunity to the interest that reasonably effects the most good to the greatest number of citizens.⁷⁶ The court in *Garcia* began but did not pursue this line of analysis.⁷⁷ Indeed, under the *Brownfield* test the court would have difficulty justifying a finding that sustained the validity of a purely local zoning ordinance when confronted with the manifest intent of the General Assembly⁷⁸ to improve treatment facilities for developmentally disabled persons state-wide.⁷⁹ Instead, the Ohio Supreme Court, striking off on a new line of reasoning, focused its attention on the distinction between general and special laws. This distinction is crucial because the conflict provisions of article XVIII, section 3, of the Ohio Constitution require that local laws not conflict with general laws.⁸⁰ Accordingly, the zoning ordinance, a municipal law, would be overruled upon a finding that section 5123.18(D) and (E)⁸¹ regarding deinstitutionalization were conflicting "general" laws. However, if sections (D) and (E) were found to be "special" laws operating nonuniformly and arbitrarily, they would be void under article I, section 26, of the Ohio Constitution,⁸² and the zoning ordinance would retain its power to exclude the habilitation facility from the single-family residential district.

The Ohio Supreme Court had held that when a municipality has been granted the power to regulate for the public health, safety, morals, and general welfare and when a state has passed a general law of uniform application throughout the state, the local law, if in conflict, is invalid.⁸³ A local law that

74. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Beachwood v. Board of Elections*, 167 Ohio St. 369, 148 N.E.2d 921 (1958); *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925); *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923); *Leis v. Cleveland Railway Co.*, 101 Ohio St. 162, 128 N.E. 73 (1920); *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N.E. 212 (1919).

75. 63 Ohio St. 2d 259, 270, 407 N.E.2d 1369, 1377 (1980).

76. See text accompanying note 34 *supra*.

77. 63 Ohio St. 2d 259, 270, 407 N.E.2d 1369, 1377 (1980).

78. See OHIO REV. CODE ANN. § 5123.67 (Page Supp. 1979), which expresses the state's goal of deinstitutionalization, quoted at note 99 *infra*.

79. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926), the Court stated, "It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."

80. See note 49 *supra*.

81. See note 52 *supra*.

82. OHIO CONST. art. II, § 26 reads: "All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution." Special laws are laws that operate upon a nonuniform classification in an arbitrary and capricious manner. See *Miller v. Korns*, 107 Ohio St. 287, 140 N.E. 773 (1923).

83. *Schneiderman v. Sisanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929); *City of Bucyrus v. State Department of Health*, 120 Ohio St. 426, 166 N.E. 370 (1929).

affects not only the municipality but also the territory around and beyond its borders is outside the sphere of purely local concerns and must be controlled by general state law.⁸⁴ It has likewise been held in other jurisdictions that a local ordinance that thwarts state policy is void⁸⁵ and that zoning ordinances that fail to consider regional needs, in addition to purely local needs, are void.⁸⁶ Chapter 5123 reveals that providing care and treatment for the state's mentally ill and retarded citizens can be administered and accomplished only on a state-wide scale. The Department of Mental Health is charged with dividing the state into districts and providing for hospital or other care for disabled citizens in those districts.⁸⁷ Providing effective health care for its disabled citizens must necessarily be done on a larger scale than that encompassed by local governments and therefore requires that state law on the subject supercede local laws that prevent or inhibit its purposes.⁸⁸ Therefore, to uphold the validity of the Canton zoning ordinance over the Ohio deinstitutionalization statute, and particularly over section 5123.18 (D) and (E),⁸⁹ the court had to find subsections (D) and (E) not to be general laws. In *Village of West Jefferson v. Robinson*,⁹⁰ the Ohio Supreme Court defined general laws as statutes setting forth general police power regulations applied uniformly throughout the state.⁹¹ Statutes that merely grant or limit the exercise of police powers by municipalities are not general laws and not subject to the conflict provisions of article XVIII, section 3, of the Ohio Constitution.⁹² The court has stated that "[i]n determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."⁹³ It is under this test, then, that the Canton zoning ordinance must be compared with Chapter 5123 of the Revised Code.

The court conceded in *Garcia* that "[i]n the main, the provisions of R.C. Chapter 5123 fall within the definition of a 'general law' providing a method

84. *Village of Beachwood v. Board of Elections*, 167 Ohio St. 369, 148 N.E.2d 921 (1958).

85. *Abbott House v. Village of Tarrytown*, 34 A.D.2d 821, 822, 312 N.Y.S.2d 841, 843 (1970) (mem.). The court held, "[T]he Zoning Ordinance has the effect of totally thwarting the State's policy . . . of providing for neglected children [I]nsofar as it conflicts and hinders an overriding State law and policy favoring the care of neglected and abandoned children, [it] is void as exceeding the authority vested in the Village of Tarrytown"

86. *See, e.g., Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); *Duffcon Concrete Products v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949); *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (1971); *Molino v. Borough of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (1971).

87. OHIO REV. CODE ANN. §§ 5123.12, 5123.15 (Page Supp. 1979).

88. *See note 54 supra*. The Department of Mental Health evidently understood that the provisions of chapter 5123, and § 5123.18(D) in particular, superceded local law, since it ruled favorably on the application by Siffrin Residential Ass'n for a license to operate its facility in Akron. In fact, it is likely that the State of Ohio in *Brownfield* did not seek prior zoning approval because it assumed that chapter 5123 superceded local law. *See* discussion in text accompanying notes 31-34 *supra*.

89. *See note 52 supra*.

90. 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

91. *Id.* at 117, 205 N.E.2d at 384.

92. *Id.* at 118, 205 N.E.2d at 386. *See also* *Leis v. Cleveland Railway Co.*, 101 Ohio St. 162, 128 N.E. 73 (1920).

93. *Village of Struthers v. Sokol*, 108 Ohio St. 263, 263, 140 N.E. 519, 519-20 (1923).

by which the mentally retarded may hopefully be acclimated to a useful place in society through the licensure of 'residential facilities' and the deinstitutionalization of these mentally retarded individuals.'⁹⁴ The court did not, however, extend the definition of a "general" law to section 5123.18 (D) and (E), which the court found to be not reasonably related to the regulatory and licensing portions of the Chapter.⁹⁵ Instead, the court found subsections (D) and (E) to be limitations upon the exercise of local police power, and, under the holding of *Village of West Jefferson*, not "general" laws. The court stated that, therefore, the conflict provisions of article XVIII, section 3, of the Ohio Constitution⁹⁶ could not be applied to resolve the intergovernmental conflict presented in *Garcia*.

Separating subsections (D) and (E) from the other provisions of section 5123.18 and the other sections of the chapter violates the purpose and effect of the chapter to improve the method of treatment and care for the state's mentally retarded citizens. It is not likely that because of a denial of the ability of the state to override restrictive local zoning ordinances, family or group homes will be located in the residential districts determined to be the most conducive to the habilitation of developmentally disabled persons.⁹⁷ The dissent by Justice Paul W. Brown in *Garcia* makes this result very clear by noting that the majority's approach will handcuff the General Assembly so that it may not create areas of statewide licensing that are exempt from local municipal control.⁹⁸ The general concerns of chapter 5123, as set out in section 5123.67,⁹⁹ indicate that to achieve the statutory purpose of deinstitutionalization, it is necessary that section 5123.18 (D) and (E) be read as integral parts of the entire section and chapter. By failing to acknowledge these specific subsections as central to the licensing goal of the statute, the majority in *Garcia* ignored a line of prior decisions holding that in the context of licensing the state alone may govern the carrying out of a particular use at a

94. 63 Ohio St. 2d 259, 271, 407 N.E.2d 1369, 1378 (1980).

95. *Id.*

96. *See* note 49 *supra*.

97. *See* text accompanying note 50 *supra*.

98. 63 Ohio St. 2d 259, 279, 407 N.E.2d 1369, 1383 (1980).

99. OHIO REV. CODE ANN. § 5123.67 (Page Supp. 1979):

Chapter 5123 of the Revised Code shall be liberally interpreted to accomplish the following purpose:

(A) To promote the human dignity and to protect the constitutional rights of mentally retarded persons in the state;

(B) To encourage the development of the ability and potential of each mentally retarded person in the state to the fullest possible extent, no matter how severe his degree of disability;

(C) To promote the economic security, standard of living, and meaningful employment of the mentally retarded;

(D) To maximize the assimilation of mentally retarded persons into the ordinary life of the communities in which they live;

(E) To recognize the need of mentally retarded persons, whenever care in a residential facility is absolutely necessary, to live in surroundings; and circumstances as close to normal as possible.

Section 5123.67 thus indicates that for promotion of human dignity and development of opportunities for retarded individuals, assimilation into ordinary community life is essential to the purposes of the Chapter as a whole.

specified location.¹⁰⁰ Thus when the state assumes responsibility for a certain matter, it may safeguard that concern from municipal interference.

Furthermore, as the dissent in *Garcia* pointed out,¹⁰¹ the court failed to address the fact that subsections (D) and (E) of section 5123.18 were not directed toward limiting the exercise of municipal police powers, but rather were directed toward licensing individuals seeking to operate a family home in a single-family residential district. Under the test of *Village of West Jefferson*,¹⁰² then, since subsections (D) and (E) were not designed to limit municipal laws, they did satisfy the test of a general law. Thus, the court's analysis of the effect of subsections (D) and (E) is erroneous on two points: first, the statute as a whole and subsections (D) and (E) in particular are general laws due to both the statewide effect and the purpose of the legislation, and second, the statute does not limit municipal actions but rather assists individuals who seek a license to operate a family or group home.

The court did not stop at concluding that subsections (D) and (E) of section 5123.18 were not "general" laws. The court also found that those subsections were void under the prohibition against "special laws" contained in article II, section 26, of the Ohio Constitution.¹⁰³ The basis for this finding is that the provisions of (D) and (E) do not operate uniformly throughout the state due to the provisions of subsection (G) of section 5123.18.¹⁰⁴

Section 5123.18 (G) creates two classes of municipalities with respect to the applicability of section 5123.18 (D) and (E). The provisions of subsections (D) and (E) did not apply to municipalities that had voluntarily passed, prior to June 15, 1977, zoning laws similar in purpose to section 5123.18 to allow location of rehabilitation homes in single family residential districts. The court found that subsection (G) rendered subsections (D) and (E) void for not operating uniformly upon every city in the state.¹⁰⁵ The court did not attempt to provide any explanation for the conclusion that because of the operation of subsection (G), subsections (D) and (E) were arbitrary and unrelated to the purposes of the statute as a whole.¹⁰⁶

Not only does this conclusion offend all sense of reason, but it is contrary to the plain meaning of the statute itself and contrary to precedent laid down in prior decisions of the Ohio Supreme Court. The mandate of chapter 5123 is clearly expressed in section 5123.67:¹⁰⁷ the welfare of the mentally retarded citizens throughout the state is to be promoted and improved by the establish-

100. *Lorain v. Tomic*, 59 Ohio St. 2d 1, 391 N.E.2d 726 (1979); *Auxter v. Toledo*, 173 Ohio St. 444, 183 N.E.2d 920 (1962); *State ex rel. McElroy v. Akron*, 173 Ohio St. 189, 181 N.E.2d 26 (1962); *Neil House Hotel Co. v. Columbus*, 144 Ohio St. 248, 58 N.E.2d 665 (1944).

101. 63 Ohio St. 2d 259, 278, 407 N.E.2d 1369, 1382 (1980).

102. See text accompanying notes 90-93 *supra*.

103. See note 82 *supra*.

104. See note 52 *supra*.

105. 63 Ohio St. 2d 259, 273, 407 N.E.2d 1369, 1379 (1980).

106. *Id.* at 273, 407 N.E.2d at 1379.

107. See text accompanying note 99 *supra*.

ment of family habilitation facilities regardless of the restrictions in local zoning ordinances.

There would be no purpose served in employing the provisions of subsections (D) and (E) to allow for the location of family home facilities in single family residential districts where the city ordinances currently in effect provided for their operation through permitted or conditional uses or special exceptions. There is nothing arbitrary or unreasonable in exempting from the state mandate those cities already providing for deinstitutionalization.

Furthermore, the discretion to enact legislation subject to local options is part of the power of the General Assembly, and a local option provision does not violate the requirements of article II, section 26, of the Ohio Constitution that all laws operate in a uniform manner throughout the state.¹⁰⁸ The presence of a provision exempting some municipalities from the effect of a state law is not, as a matter of law, unconstitutional: "Section 26, Art. II of the Constitution, was not intended to render invalid every law which does not operate upon all . . . political subdivisions within the state . . . [T]he law is equally valid if it contains provisions which permit it to operate upon every locality where certain specified conditions prevail."¹⁰⁹

The Ohio Supreme Court has patently ignored the plain meaning of the statute and forestalled the intent of the General Assembly both in interpretation of "family" in the zoning ordinance and in the interpretation of "general" and "special" laws applied to subsections (D) and (E) of section 5123.18. The court has manifested a willingness to subvert the intent of the General Assembly and to reverse or disregard precedent of Ohio law and law of other jurisdictions to uphold the supremacy of local zoning laws over state legislation. This willingness belies the court's sincerity in its expressions of sympathy with the purposes of the state statute.¹¹⁰ The court prefaced its opinion with an apology:

We hasten to add at the outset of our discussion of the legal issues presented here that we are fully in sympathy with, and support of, the purposes of R.C. Chapter 5123. . . . It may not be reasonably questioned that there is considerable merit in a law which seeks to maximize the assimilation of mentally retarded persons into the ordinary life of the community in which they live, and to provide places for them to live in surroundings and circumstances as close to normal as possible.¹¹¹

In spite of the court's ostensible deference to the spirit of the law, it is unwilling to enforce the letter of the law.

Garcia's holding that subsections (D) and (E) were unconstitutional has crippled the effectiveness of chapter 5123 and has rendered the promise of deinstitutionalization a lame one. It is clear that advocates of mental health and legal reform will be met with a less than friendly reception by the Supreme Court of Ohio.

108. *City of Canton v. Whitman*, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975).

109. *State ex rel. Stanton v. Powell*, 109 Ohio St. 383, 385, 142 N.E. 401, 401 (1924).

110. 63 Ohio St. 2d 259, 267, 407 N.E.2d 1369, 1375 (1980).

111. *Id.*

IV. *Carroll v. Washington Township*

In the third of the series of cases dealing with exclusionary zoning, the Ohio Supreme Court continued its trend and upheld the exclusion of yet another socially and politically disadvantaged group: foster children.

The Carroll family had been licensed to care for foster children from the Richland County Children Services for several years prior to their purchase of a home in Washington Township, in a district zoned both single-family residential and agricultural. The Carrolls were notified that their use of the premises to accommodate foster children constituted a violation of the local zoning laws, and after their application for a variance or a rezoning was denied, the Carrolls instituted suit. They sought to have their use of the property declared to be in compliance with the zoning ordinance or, alternatively, to have the zoning ordinance as applied to their situation declared confiscatory and in violation of due process. Affirming the lower courts, the Ohio Supreme Court found against the Carrolls.¹¹²

In the *Carroll* case the Ohio Supreme Court addressed the interpretation of "family" as it affects the application of a zoning ordinance limiting uses to single-family residences.¹¹³ To interpret this ordinance, the court accepted a new doctrine, devised by the Court of Appeals for Richland County,¹¹⁴ that enables the ordinance to be interpreted to achieve a highly restrictive result.

Townships have been granted the power to adopt comprehensive zoning resolutions by the General Assembly under chapter 519 of the Revised Code.¹¹⁵ Washington Township adopted a zoning resolution providing for various classifications of uses. The Carrolls' home was located in an "R-1" residential district, which permitted only single-family residential dwelling units.¹¹⁶ The resolution contained no accompanying definition of any of the terms in the ordinance. The court declared that in the absence of legislative definition of the word "family," its meaning must be determined from the interpretation of the intended zoning objectives.¹¹⁷ Relying on the United States Supreme Court's approval in *Belle Terre*¹¹⁸ of zoning objectives to provide quiet sanctuaries for families, the court found that the provision of fire and police protection, decrease of noise and regulation of traffic, and the protection of a stable residential neighborhood are reasonable zoning objectives.¹¹⁹ The court, however, did not take the logical step that followed and discuss whether the presence in the neighborhood of a foster home providing living facilities for up to seven foster children who remain in the home from six months to one year or more will negatively affect any of these objec-

112. *Carroll v. Washington Township Zoning Comm'n*, 63 Ohio St. 2d 249, 250, 408 N.E.2d 191, 192 (1980).

113. *Id.* at 251, 408 N.E.2d at 192.

114. No. 1698, (Ct. App. Richland County, Ohio, May 10, 1979).

115. OHIO REV. CODE ANN. §§ 519.01-.99 (Page 1953).

116. 63 Ohio St. 2d 249, 250, 408 N.E.2d 191, 192 (1980).

117. *Id.* at 252, 408 N.E.2d at 193.

118. 416 U.S. 1, 9 (1974).

119. 63 Ohio St. 2d 249, 252, 408 N.E.2d 191, 193 (1980).

tives.¹²⁰ The court failed to explain how the presence of foster children destroyed the stability of the neighborhood or made noise and disturbance sufficient to inconvenience other families.

Instead, without any support from prior cases or guidance from case law in other jurisdictions, the court adopted the reasoning of the appellate court and found that this particular foster home failed to qualify as a single-family home because the foster children were not sufficiently "integrated" so as to constitute one family.¹²¹ The court did not offer any criteria by which a satisfactory degree of "integration" can be determined. The court simply stated that "[a]lthough the line may seem infinitesimally narrow as to what may be considered a single family unit, we hold . . . that the Carrolls and the foster children were not functioning as a single family unit"¹²² The court emphasized two facts concerning the operation of the foster home that destroyed the family character sought to be protected by the zoning ordinance. These were, first, that the Carrolls must accept each child under the terms of a contract with the state regarding their placement and, second, that the Carrolls promulgated house rules concerning chores, school attendance, and curfews for the foster children, as well as their own children.¹²³ For these two reasons, the Ohio Supreme Court found the character of the Carrolls' foster home inimical to that of traditional "biological" family life.

In making this decision the *Carroll* court produced a decision offensive to the public's moral sensibilities as evidenced by state legislation designed to provide foster care for juvenile wards of the state.¹²⁴ While the decision in *Carroll* is exceptionally vulnerable to attack on moral grounds, there are equally egregious and potent flaws in the decision's legal reasoning. First, citing to only two United States Supreme Court decisions¹²⁵ for elementary rules of law that have no particular bearing upon the issue presented in *Carroll*, the Ohio Supreme Court affirmed a decision based on unsupported conclusory statements of law.

Second, the court failed to follow the rule of strict statutory construction in interpreting the meaning of a zoning resolution that imposes restrictions upon the use of private property.¹²⁶ The language of the zoning resolution makes no requirement of "integration" in order to qualify as a family, nor is there any rational basis for including "integration" in the definition of "family."¹²⁷

120. *Id.* at 258, 408 N.E.2d at 197 (P. Brown, J., dissenting).

121. *Id.* at 252, 408 N.E.2d at 193.

122. *Id.*

123. Transcript of Oral Argument at 59, *Carroll v. Washington Township Zoning Comm'n*, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980).

124. OHIO REV. CODE ANN. §§ 5153.01-.53 (Page 1953).

125. 63 Ohio St. 2d 249, 251-52, 408 N.E.2d 191, 192-93 (1980) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 395 (1926)). The other case relied upon is *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974), which does not present an ordinance analogous to the zoning ordinance interpreted in the *Carroll* decision and is of little value in reaching the decision in that case.

126. *State ex rel. Ice & Fuel Co. v. Kreizweiser*, 120 Ohio St. 352, 166 N.E. 228 (1929).

127. See text accompanying notes 67-71 *supra* concerning the interpretation of the statute according to its plain meaning rather than as connoting a quality of family life not clearly expressed in the statutory language.

Third, the facts of the Carroll's family life demonstrate that in sharing family outings, meals, and vacations with their own and their foster children, their family was in every respect of the word, "integrated."¹²⁸ The emphasis placed on the lack of permanency in the foster relationship would mean that no foster family arrangement could satisfy the zoning requirements because it would always be possible to declare that the transiency of the care was the sole measure of the nature of the care. The very essence of foster family care is impermanence.¹²⁹ Other jurisdictions have addressed the question of the nature of foster homes and have concluded that while the residents are not permanently living in the foster home, there is no loss of the sense of family in the quality of the relationship established:

Any foster care program, . . . is in a very real way "temporary," since foster care by its very nature is simply a method for caring for children until they can either be returned to their natural parents or until an adoptive home can be found for them. . . . Petitioner's very purpose is to create a stable, family type environment for children whose natural families unfortunately cannot provide such a home. . . . The surrogate family which petitioner hopes to create is in fact a permanent family structure, and not a temporary residence for transients. . . . [T]he family unit itself will continue.¹³⁰

The Ohio Supreme Court in *Carroll* has approved the application of exclusionary zoning laws for much more than the regulation of land use; the court has approved the use of zoning laws to intrude into the internal composition of the family unit itself.¹³¹ Cases in other jurisdictions have found that family living is not dependent upon the biological or legal relationship of the residents, but rather the use and occupancy of the residence as a single housekeeping unit.¹³² The California case of *Brady v. Superior Court*¹³³ stated, "Single family dwelling' designates the joint occupancy and use of the dwelling by all of those who live there. The word 'single' precludes the segregation of certain portions or rooms for rental. . . . 'Family' signifies living as a family, it inhibits the breaking up of the premises into segregated units." The generic character of the family is the quality sought to be maintained by the zoning ordinance or resolution, not the biological relationships.¹³⁴

As Justice Paul W. Brown's dissent points out in *Carroll*, the public policy weighs in favor of the placement of foster children into residential neighborhoods.¹³⁵ The General Assembly, in passing chapter 5153 for the

128. Transcript of Oral Argument at 36-50, *Carroll v. Washington Township Zoning Comm'n*, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980).

129. 63 Ohio St. 2d 249, 254, 408 N.E.2d 191, 195 (1980) (P. Brown, J., dissenting).

130. *Group House of Port Washington Inc. v. Board of Zoning*, 45 N.Y.2d 266, 273, 380 N.E.2d 207, 210-11, 408 N.Y.S.2d 377, 380-81 (1978).

131. 63 Ohio St. 2d 249, 256, 408 N.E.2d 191, 195 (1980) (P. Brown, J., dissenting). See also *White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974), which found that a zoning restriction based on a definition of "family" similar to the ordinance in *Belle Terre*, see note 59 *supra*, was invalid because it did not regulate land use, but rather interfered with intimate family relationships.

132. See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

133. 200 Cal. App. 2d 69, 77, 19 Cal. Rptr. 242, 247 (1962).

134. See note 28 *supra*.

135. 63 Ohio St. 2d 249, 258, 408 N.E.2d 191, 196-97 (1980) (P. Brown, J., dissenting).

licensing of foster homes, has set out an underlying purpose to establish homes where foster children can receive care and nurture in an environment as similar to that of a traditional "biological" family as is feasible. Accordingly, the result reached in *Carroll* is both morally and legally reprehensible.

Fortunately, the effect of *Carroll* was short-lived in Ohio. The "integration" doctrine, which could have proved a formidable barrier to the establishment of foster homes in single family residential districts, was not drawn upon by the Ohio Supreme Court to resolve a subsequent zoning dispute¹³⁶ with respect to a foster child facility. The fact that the Ohio Supreme Court agreed to hear a case almost identical to *Carroll* a brief nine months after that decision indicates that the court itself had qualms about the future application of the "integration doctrine."

V. *Sanders v. Clark County Zoning Department*

In *Saunders v. Clark County Zoning Department*¹³⁷ the Ohio Supreme Court was faced with another confrontation between local zoning authorities who urged a narrow interpretation of the word "family" in a zoning ordinance and private individuals who sought to operate a foster child care facility in a single-family residential district.

The issue in *Saunders* was whether a foster care facility for delinquent boys was a "family" in compliance with the requirements imposed by the zoning resolution for an R-1 suburban residence district in Enon, Ohio. Reverend William Saunders and his wife operated a group home, Horizon House, in a large house in Enon, Ohio, and provided foster care for as many as nine delinquent youths, as well as their own five children.¹³⁸ Local zoning officials claimed that Reverend Saunders was operating a "boarding house" in violation of the zoning resolution that designated that the neighborhood be made up exclusively of single-family detached dwellings.¹³⁹

After receiving a notice to cease the operation of the home, plaintiffs Saunders filed a complaint for declaratory and injunctive relief in order to continue operating Horizon House. The trial court found Horizon House to be a boarding house and rendered judgment in favor of the Clark County Zoning Department.¹⁴⁰ On appeal, the Clark County Court of Appeals re-

136. *Saunders v. Clark County Zoning Dep't*, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981).

137. *Id.*

138. *Id.*

139. The relevant definitional portions of the Clark County zoning resolution are as follows:

4.08: Boarding or Lodging House. A building or part thereof, other than a hotel or restaurant, where meals and/or lodging are provided, for compensation, for five (5) or more persons not transients.

4.171: Dwelling, Single Family. A building designed for or used exclusively by one family or housekeeping units.

4.18: Family. A person living alone, or two or more persons living together as a single housekeeping unit, in a dwelling unit, as distinguished from a group occupying a boarding house, lodging house, motel or hotel, fraternity or sorority house.

140. 66 Ohio St. 2d 259, 260, 421 N.E.2d 152, 154 (1981).

versed the lower court and held that a foster child and his foster parents constituted a "family" and that no violation of the zoning resolution had occurred.¹⁴¹

The majority opinion delivered by Justice Clifford Brown affirmed the decision of the Court of Appeals, but, disappointingly, failed to base that affirmance on more than the barest of legal precedent. Therefore, the implicit rejection of the "integration" doctrine of *Carroll* and the "primary purpose" doctrine of *Garcia* is not sufficiently buttressed by case law authority. Rather, the rejection of those exclusionary doctrines appears to be more of an emotional decision than a conclusion following inevitably from sound legal principles. Consequently, the decision in *Saunders* has less value as a weapon to defeat other exclusionary zoning schemes and is limited to its facts.

Relying upon only one basic tenet of property law, the court stated that zoning resolutions, being in derogation of the common law by depriving a property owner of certain uses, must be narrowly construed.¹⁴² The court stated that the trial court failed to heed this principle in upholding the zoning officials' characterization of the foster home as a "boarding house."¹⁴³

Without further analysis of how the zoning department had failed to construe narrowly the zoning resolution defining "family" with respect to the foster home, the court turned to the constitutional ramifications of a narrow definition of "family." The court stated, with only cursory recognition of several United States Supreme Court decisions on the rights of privacy with respect to marriage and family life, that "any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones. . . . A state or local government cannot constitutionally invade the private realm of family life."¹⁴⁴

While the facts of *Saunders* most clearly parallel those in the *Carroll* case,¹⁴⁵ the Ohio Supreme Court did not resort to the "integration" test of *Carroll*¹⁴⁶ to determine whether the foster parent and child relationship conformed with the notion of the traditional biological family. Relying on a basic principle of property law and the constitutionally guaranteed right of privacy the court repudiated the restrictive definition of "family" established in both

141. *Id.*

142. *Id.* at 261, 421 N.E.2d at 154. The court cited several decisions setting forth the basic proposition that legislation passed in derogation of common law principles must be construed narrowly. See *In re University Circle, Inc.*, 56 Ohio St. 2d 180, 383 N.E.2d 139 (1978); *State ex rel. Ice & Fuel Co. v. Kreuzweiser*, 120 Ohio St. 352, 166 N.E. 228 (1929).

143. 66 Ohio St. 2d 259, 261, 421 N.E.2d 152, 154 (1981).

144. *Id.* at 263, 421 N.E.2d at 155. The opinion refers to the decision in *Moore v. East Cleveland*, 431 U.S. 494 (1977), which concerned an attempt by zoning authorities to prevent an elderly woman from living in a single family residential district while making a home for her two grandchildren, who were cousins. The zoning officials unsuccessfully argued that this family living arrangement was not sufficiently close by blood ties to constitute a "family" within the meaning of the zoning ordinance. Also cited was *Prince v. Massachusetts*, 321 U.S. 158 (1944), which concerned the right to privacy in marriage for choosing methods of family planning.

145. See text accompanying note 112 *supra*.

146. See text accompanying note 122 *supra*.

previous cases. Curiously, the majority decision makes no reference to those precedents in holding: "The definition of 'family' in this resolution is a broad one. . . . A family unit, which performs the social function of childrearing, regardless of its relationship or composition or whether it includes foster children as well as natural children, is constitutionally protected against government intrusion not supported by a compelling governmental interest."¹⁴⁷ While the court could have expanded this analysis to embrace the concept of a family of retarded persons receiving supervisory and rehabilitative care, or even further, to include any group, regardless of composition, whose function is to operate as a single unit, it failed to do so. What could have been a sweeping condemnation of all restrictive zoning schemes designed to exclude nontraditional family living arrangements instead is diminished to produce a very narrow holding that "a family based group foster home for delinquent boys, who are unrelated by affinity or consanguinity to the foster parents, is a permitted use in an 'R-1 suburban residence district' where the zoning resolution defines the term 'family' as 'two or more persons living together as a single family housekeeping unit'"¹⁴⁸

The decision in *Saunders* had no effect upon *Brownfield's* new balancing test. *Saunders*, however, has affected the law of the *Carroll* decision. Because both *Saunders* and *Carroll* concern foster care facilities and because *Saunders* squarely asserts that a foster care family approximates the social function of child rearing performed by a biological family,¹⁴⁹ the *Saunders* case implicitly overrules *Carroll*.

Similarly, although to a more limited extent, *Saunders* has affected the primary purpose definition of family in *Garcia*. The decision in *Garcia*, is, however, distinguishable from *Saunders* because it concerns the state's efforts to establish group homes for the mentally retarded, rather than efforts by individuals receiving state funds to provide foster child care. For even more important reasons, though, *Garcia* still poses a problem for those antagonistic to exclusionary zoning. Subsections (D) and (E) of section 5123.18 are still declared unconstitutional, and chapter 5123 is still without legal authority to effectuate the goals of habilitation.¹⁵⁰

Presented with an opportunity to expressly overrule the narrow interpretations of "family" endorsed in *Garcia* and *Carroll*, the court in *Saunders* rendered a decision that can easily be circumvented by presenting any material variation from the factual pattern of *Saunders* or by inserting specific, restrictive language in the zoning resolution, held constitutional in *Belle Terre*.¹⁵¹

The *Saunders* decision has limited value as precedent in eliminating exclusionary zoning schemes. While it is arguable that the *Carroll* "integration"

147. 66 Ohio St. 2d 259, 263, 421 N.E.2d 152, 155-56 (1981).

148. *Id.*

149. *Id.*

150. See text accompanying note 122 *supra*.

151. See text accompanying notes 61-70 *supra*.

test¹⁵² is overruled by implication in *Saunders*, the "primary purpose" test of *Garcia*,¹⁵³ which is directed toward habilitation homes, is possibly unaffected. The gratuitous reference in Justice Holmes' dissenting opinion that *Garcia* was overruled is acknowledged in neither the syllabus nor the majority opinion.¹⁵⁴

Saunders is but one candle dispelling the shadow of exclusionary zoning. The spectre envisioned by the zoning authorities of Clark County that barracks-like facilities housing eighty or more delinquent youths would proliferate and turn nice family neighborhoods into slums has been revealed, in light of *Saunders*, to be nothing more than an alarmist absurdity.¹⁵⁵ However, the court did not render a decision easily applied beyond the narrow facts and circumstances of the case, and the promise of homes for the retarded, the handicapped, or the mentally ill remains shrouded in the prejudice latent in exclusionary zoning schemes.

VI. STRATEGIES TO AVOID RESTRICTIVE ZONING

The trend toward exclusionary and restrictive zoning in Ohio as a result of the cases discussed herein is not in accord with the general trend of the law in other jurisdictions, most notably New York and New Jersey.¹⁵⁶ Scholarly writing is also replete with strategies designed to circumvent the harsh results that exclusionary zoning imposes on homes for the mentally ill or retarded, foster children, and others.¹⁵⁷

A. Constitutional Attacks

Local zoning laws excluding foster children, mentally ill, or the mentally retarded are subject to an equal protection attack. Classifying the retarded or mentally ill on the basis of an immutable characteristic present at birth appears to treat these people as a separate class of citizens. The need to protect the politically impotent from a stigma of inferiority may demand that laws affecting this "discrete and insular minority" receive strict scrutiny¹⁵⁸ by the court. Even if the claim of suspect classification fails, the interference

152. 66 Ohio St. 2d 259, 265, 421 N.E.2d 152, 156 (1981).

153. See text accompanying notes 105-11 *supra*.

154. 66 Ohio St. 2d 259, 263, 421 N.E.2d 152, 155 (1981).

155. *Id.*

156. See note 28 *supra* for citation to cases evidencing this general trend to defeat exclusionary zoning laws.

157. Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: PARENS PATRIAE Meets Police Power*, 25 VILL. L. REV. 273 (1980); Friedman, *Analysis of the Principal Issues and Strategies in Zoning Exclusion Cases*, in 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 1093 (1973); Lippincott, "A Sanctuary for People": *Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767 (1979); Mason and Menaloscino, *The Right to Treatment for the Mentally Retarded: An Evolving Legal and Scientific Interface*, 10 U. CREIGHTON L. REV. 124 (1976); Rubinstein, *Exclusionary Zoning: A Wrong In Search of a Remedy*, 6 J.L. REF. 625 (1973); Comment, *Exclusion of the Mentally Handicapped: Housing the Non-Traditional Family*, 7 U. CAL. DAVIS L. REV. 150 (1974).

158. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See also note 18 *supra* concerning "strict scrutiny."

with fundamental rights may warrant strict scrutiny of laws diminishing the exercise of those rights.¹⁵⁹

The Supreme Court in *Village of Belle Terre v. Boraas*¹⁶⁰ gave examples of instances that would represent possible interference by zoning laws with equal protection or due process. The first would occur if persons were excluded on the basis of race.¹⁶¹ The second would arise as a result of an ordinance requiring two-thirds consent of other property owners before allowing the operation of a home for the elderly or for children: "A proposed home for the aged poor was not shown by its maintenance and construction 'to work any injury, inconvenience, or annoyance to the community, the district or any person.'"¹⁶²

While the Supreme Court's approval of an exclusionary zoning ordinance in *Belle Terre* seemed at first to have dealt a fatal blow to many avenues of attack on the constitutionality of restrictively worded zoning ordinances, the facts¹⁶³ allow for some distinctions that limit its applicability. First, the language of the *Belle Terre* ordinance was highly restrictive and qualified its definition of "family" to those members related by blood, marriage, or adoption.¹⁶⁴ Second, the stability and permanence of a unit comprised of college students, a central issue in *Belle Terre*, is less obvious than the stability of the type of unit contemplated in family homes for the retarded or foster children.¹⁶⁵ Finally, the Court was able to demonstrate a relationship between the goals of the zoning ordinance to promote a quiet, stable neighborhood and limitation of occupancy to traditional family residents.

In the three Ohio cases considered, *Brownfield*, *Garcia*, and *Carroll*, none of these distinguishing features exists to warrant comparison with the decision reached in *Belle Terre* to exclude foster homes or group homes. Restrictive zoning laws may still be challenged in light of other court cases: The *Belle Terre* decision has not foreclosed the question of the validity of restrictive zoning laws.¹⁶⁶ For example, in *White Plains v. Ferraioli*,¹⁶⁷ the

159. J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 384 (1978).

160. 416 U.S. 1 (1974). See note 3 *supra*.

161. 416 U.S. 1, 6 (1974).

162. *Id.* at 6-7 (citing *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928)).

163. In *Belle Terre* a group of college students had taken up residence together in a house located in the village of Belle Terre on Long Island, New York. The owners of the house received a notice to remedy the violation of a local zoning ordinance that prohibited occupation of any house in the area by other than a family. Family was narrowly defined to mean persons related by blood, adoption, or marriage. The owners and tenants sought injunctive relief and a declaration that the ordinance was unconstitutional under 42 U.S.C. § 1983. The District Court held the ordinance constitutional, but was reversed by the Court of Appeals. *Id.* at 3. The Supreme Court of the United States found no violation of any constitutional guarantees of fundamental rights such as freedom of travel, association, or privacy. *Id.* By giving undue deference to the exercise of legislative discretion to protect the sanctity of a family neighborhood, the Court upheld the constitutionality of the exclusionary zoning ordinance.

164. See note 62 *supra*.

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

166. *Mason and Menaloscino, The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 U. CREIGHTON L. REV. 124 (1976).

167. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

New York Court of Appeals struck down an ordinance that defined the family as those people related by blood, marriage, or adoption¹⁶⁸ because valid zoning laws regulate the use and development of land, but are not permitted to regulate intimate family relationships. The court in *White Plains* distinguished *Belle Terre* on the basis that the group home in White Plains was a permanent, not temporary, living arrangement.¹⁶⁹ Furthermore, there is an argument that establishing group homes enhanced the achievement of the very family values sought to be protected under the zoning ordinance.¹⁷⁰

In addition to arguments founded upon equal protection, interference with certain fundamental rights, such as privacy, marriage, or freedom of travel have been suggested as potential grounds for attacking zoning laws.¹⁷¹ The Ohio Supreme Court in *Saunders* hinted that the basis for its decision was the constitutional protection extended to the "privacy of family life,"¹⁷² a hybrid right combining the fundamental rights of privacy and marriage, one that may serve as a basis for a constitutional challenge to exclusionary zoning.

B. Eminent Domain

Another approach to evade the effect of restrictive zoning laws was used in *Boyd v. Gateways to Better Living, Inc.*,¹⁷³ a 1975 Ohio Common Pleas case. In that case, the court held that the state, through the exercise of its power of eminent domain, can acquire private land for a public use. When this is done, local zoning ordinances do not apply to the property held by the state. In *Brownfield*, however, this method of evading local zoning laws was rendered ineffective.¹⁷⁴ The "balancing test" is less likely to insure the fulfillment of the state's goals rather than local government's interests,¹⁷⁵ unless it can be demonstrated that the zoning ordinance totally thwarts state policy.¹⁷⁶

168. See note 62 *supra* for the ordinance of the Village of Belle Terre, which employed a highly restrictive definition of "family."

169. 34 N.Y.2d 300, 303-04, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974).

170. These arguments have been successfully used to evade the holding of *Belle Terre* in *City of Des Plaines v. Trotter*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. Ct. App. 1975); *Group Home of Port Washington, Inc. v. Board of Zoning and Appeals*, 370 N.Y.S.2d 433 (Sup. Ct. 1975) (mem.).

171. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974).

172. 66 Ohio St. 2d 259, 263, 20 Ohio Op. 3d 244, 247, 421 N.E.2d 152, 155 (1981). The court supported its argument that family life is a fundamental right guaranteed protection by the United States Constitution by citing two United States Supreme Court decisions: *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

173. No. 73C1531 (C.P. Mahoning County, Ohio, filed April 18, 1973).

174. See text accompanying notes 44-46 *supra*.

175. *Id.* See also *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So. 2d 571 (Fla. Ct. App. 1975).

176. *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. Ct. App. 1975); *Abbott House v. Village of Tarrytown*, 34 A.D.2d 821, 312 N.Y.S.2d 841 (1970) (mem.); *Nowack v. Department of Audit and Control*, 338 N.Y.S.2d 52 (Sup. Ct. 1973); *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 142 N.E.2d 655 (1957).

C. State Supremacy - Legislative Attack

The final method of attack upon restrictive zoning laws is a legislative one.¹⁷⁷ New Jersey has passed a statute invalidating any zoning ordinance that discriminates between biological children and children placed under a foster care arrangement.¹⁷⁸ Chapter 5123 of the Ohio Revised Code had attempted to achieve roughly the same result for mentally retarded and mentally ill persons by allowing the location of habilitation homes in single family residential districts regardless of exclusionary provisions in local zoning codes.¹⁷⁹ While *Garcia* has nullified the effectiveness of chapter 5123, the legislature may still overcome the infirmity of unconstitutionality by removing subsection (G) of section 5123.18¹⁸⁰ and thereby allowing subsections (D) and (E) to operate uniformly across the state. In addition, by restating the intent that the law is to be a general law, the conflict provisions of article XVIII, section 3, of the Ohio Constitution could operate to resolve the conflict between the state and the municipality in a manner favorable to the state.¹⁸¹

VII. CONCLUSION

It is clear that the legal community cannot let the progress of the last several decades in mental health and social reform collapse or stagnate merely because legal sophistry has defeated deinstitutionalization in Ohio. Habilitation treatment is recognized as the most humane and effective, and the least costly, method of serving the needs of the mentally ill and retarded,¹⁸² as well as socially disadvantaged persons such as foster children, alcoholics, and drug abusers.

In *Brownfield*, *Garcia*, and *Carroll*, the Ohio Supreme Court established an effective continuum of policy and law that supports exclusionary zoning and makes it relatively invulnerable to attack. The seemingly new direction given to the "balancing test" for intergovernmental conflicts in *Brownfield* allows the possibility of upholding local interests over those of the state. The Ohio Supreme Court has laid the groundwork for local frustration of statewide statutory schemes designed for the welfare of minority citizens. The newly created "integration doctrine" of *Carroll* imposed a standard of family life impossible to achieve by all but traditional biological families, while intruding into the private internal functioning of the family itself. While *Saunders* has

177. Prior attempts to have municipalities reform zoning laws met with little success in Ohio. See R. HOPPERTON, ZONING FOR COMMUNITY HOMES: TECHNICAL ASSISTANCE HANDBOOK FOR MUNICIPAL OFFICIALS (1975). Only five municipalities in Ohio made voluntary reforms in their zoning laws to allow rehabilitative family and group homes to operate in single family residential districts. R. HOPPERTON, ZONING FOR COMMUNITY HOMES: HANDBOOK FOR LOCAL LEGISLATIVE CHANGE 60 (1975).

178. N.J. STAT. ANN. § 40:55-33.2 (Supp. 1975-76).

179. OHIO REV. CODE ANN. § 5123.18 (D) & (E) (Page Supp. 1979). See also note 48 *supra* for other statutory schemes similar to the scheme intended in the Ohio Revised Code.

180. See note 52 *supra*.

181. See text accompanying notes 81-82 *supra*.

182. See text accompanying notes 22-24 *supra*.

impliedly ended the brief, but nevertheless invidious, life of the "integration doctrine" espoused in *Carroll*, it does not necessarily correct the equally noxious "primary purpose" doctrine developed in *Garcia*. The private internal functioning of the nontraditional family, such as family living in an habitative group home, can still expect little protection from courts in future zoning conflicts. And it is in *Garcia* that the results anticipated in the cases of *Brownfield* and *Carroll* realize the full negative potential to exclude habilitation homes from single family residential districts. Further, the new definition of "general laws" in *Garcia* is a difficult barrier to those attempting to challenge exclusionary local zoning laws since a strict requirement for uniform operation of state statutes must be shown in order to take advantage of the conflict provisions of article II, section 26, of the Ohio Constitution.

The Ohio Supreme Court has accomplished a most dubious goal. The power to determine where, when, and how mentally, physically, or socially disadvantaged persons shall receive rehabilitative services has been placed within the control of local government, as opposed to the control of the state's General Assembly. Local government bodies, with their bias towards insular concerns, are the least likely to implement uniform and effective rehabilitation programs to help these citizens. While most would agree that the mentally ill or mentally retarded deserve treatment, care, and a decent environment in which to live, fewer than five communities in the entire state of Ohio have voluntarily sought to provide the opportunity to obtain treatment in their communities.¹⁸³

While *Saunders* represents the first, tentative step toward condemning the exclusion of foster children facilities from single-family residential districts, it does not provide invincible protection from exclusionary zoning. State and local interests are still juggled under *Brownfield*. The deinstitutionalization statutes are still impaired by the *Garcia* decision. Furthermore, by drafting a zoning ordinance similar to that found in *Belle Terre*, local interests may circumvent any constitutional problems despite the fragile bulwark of *Saunders*. While *Saunders* raises the hope of constitutionally guaranteed rights that might prohibit exclusionary zoning, the core of its opinion does not specifically apply legal precedent, and therefore may be dismissed as a decision influenced by compassion rather than one compelled by legal right.

It is of paramount importance that the decisions of *Brownfield*, *Garcia*, and *Carroll* be rendered impotent and that such a repudiation be done in a stronger and more explicit manner than that attempted in *Saunders*. If the Ohio courts are hesitant to abolish exclusionary zoning as other jurisdictions have done, then the state legislature must respond with unequivocal remedial legislation.

Judith Dippel Trail

183. See note 177 *supra*.

