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Retirement Communities: The Nature and Enforceability of Residential Segregation by Age

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RETIREMENT COMMUNITIES: THE NATURE AND ENFORCEABILITY OF RESIDENTIAL SEGREGATION BY AGE

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I. INTRODUCTION

In the past two decades, the retirement community has become an increasingly important element in the national housing picture, and demographic and sociological factors indicate that this trend will continue in the years ahead. The sunbelt states of Florida, Arizona, and California, which have been traditionally attractive to mobile retirees and thus have been the setting for the first of the retirement communities, have seen a net increase in their older populations of well over one-half million persons between 1960 and 1970.[1] Although housing developments of this type were virtually unknown in California twenty years ago, by 1966 the state had thirty-five retirement communities housing approximately 54,000 persons.[2] Arizona's famous Sun City, located fifteen miles northwest of Phoenix, has grown from a population of 7,300 in 1965 to 40,000 today, with a population of more than 55,000 projected for 1980.[3] Green Valley, near Tucson, is expected to grow from 6,000 to 30,000 persons in the next decade.[4] The retirement-community concept has taken hold in other areas of the country as well, most notably in the metropolitan states of the northeast. In New Jersey, for example, there are 30,000 retirement community dwelling units, with an increase of 15,000 units anticipated in Ocean County alone.[5]

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1. K. HEINTZ, RETIREMENT COMMUNITIES 26 (1976).

2. M. BARKER, CALIFORNIA RETIREMENT COMMUNITIES ix (1966).

3. Interview with Don Tuffs, Assistant Director, Public Relations, Del E. Webb Development Corporation, in Phoenix, Ariz., July 28, 1977.

4. Arizona Daily Star, June 1, 1975, at 6A, col. 1.

5. K. HEINTZ, *supra* note 1, at 16.

Part of the explanation for the rise of the retirement community is demographic. Life expectancy in the United States has soared from 49 years at the turn of the century to 71.9 years in 1974, U.S. BUREAU OF CENSUS, DEMOGRAPHIC ASPECTS OF AGING AND THE OLDER POPULATION IN THE UNITED STATES 25 (1976), and the percentage of the population over 60 years of age has more than doubled in that period,

As used here, the term "retirement community" describes a planned, age-segregated residential development designed for active older adults, often with provision for recreational and other appropriate services.[6] Within the rather broad scope of this definition, retirement communities vary widely in appearance, affluence, organization, and atmosphere. Sun City, for example, is located in an outlying unincorporated area, with housing that consists entirely of detached single-family dwellings designed for the relatively affluent retiree. Elaborate recreational facilities and opportunities are available,[7] reflecting the developer's plan to provide a way of life rather than just a place to live. In contrast to that design, but still within the definition of "retirement community," are smaller age-restricted developments located within towns and cities that provide their residents fewer amenities and lower-cost housing. A moderately priced development might offer mobile-home living,[8] relatively high-density housing, or a housing mix, and recreational facilities might be limited to a single swimming pool or clubhouse.

Similar variety may be found in the means by which age segregation is established and in the degree to which age exclusivity is maintained. Many retirement communities have developed only

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from 6.4% in 1900 to 14.8% in 1975, *id.* at 6. In absolute numbers, the over-60 population is expected to climb from the present 31.6 million to 42 million by the year 2000, a one-third increase. *Id.* at 3. Although the Bureau of the Census labels as "unfounded" reports that within 50 years one-third of the population will be over 65, *id.* at 10, its prediction is that the proportion of those over 65 will continue to increase over the next five decades.

A second factor contributing to the growth of the pool of candidates for retirement community living is the concomitant increase in the percentage of older persons who are retired. About 80% of men over 65 are retired today, a figure made more dramatic when compared with the 1950 retirement rate of only 50%. *See id.* at 49. Additionally, the age for retirement in the United States is steadily falling. Although age 65 traditionally has marked the career's end and the onset of retirement, census figures show a marked rise over the past 10 years in the percentage of retirees among men aged 55 to 64, *id.* at 50-51. The percentage of retired women in this group has remained essentially unchanged. *Id.*

6. The use of the word "retirement" might be misleading. The type of residential development contemplated here is segregated by age but not by employment status, so persons of the requisite age are eligible for residence even though they still work.

7. These include six large "recreation centers" containing auditoriums, swimming pools, arts and crafts rooms, club and meeting facilities, libraries, and large social halls. The centers provide an extensive social life for residents that is organized around a panoply of clubs and organizations. Among the more unlikely offerings are the Handbell Ringers Club, the Sun City Twirlers, and the Sun City Power Riders, the latter being a group of motorcycle enthusiasts. Other amenities include medical and shopping facilities, a boarding stable for horses, and nine 18-hole golf courses.

8. For a description of a typical trailer park for retirees, see Hoyt, *The Life of the Retired in a Trailer Park*, 59 AM. J. Soc. 361 (1954).

after the adoption of a zoning ordinance limiting occupancy to persons over a certain age, typically fifty-two or fifty-five, with exceptions frequently provided for a younger spouse and one child beyond high-school age.[9] Other communities have achieved the same ends through reciprocal private covenants imposing residential age restrictions. Yet another method of effecting residential age segregation operates without benefit of zoning ordinances or restrictive covenants, relying instead on restrictions that are informally established and privately maintained. An example of this approach is Sun City, where residence by younger persons or families with children is discouraged by exclusionary marketing policies and by such planned disincentives as an absence of parks and nearby schools.

As retirement communities have become popular housing alternatives for elderly persons, they have also increasingly gained the attention of the courts. More specifically, several state court cases have arisen in which age-restrictive zoning ordinances have been challenged on constitutional and statutory grounds. Although the earliest of those challenges were by and large successful, the most recent decisions have sustained age-restrictive zoning. Indicative of the trend is the fact that within the past several years two of the most respected state tribunals, the highest courts of New Jersey and New York, have upheld zoning ordinances that provided for the creation of retirement communities.[10]

There is cause, however, for questioning whether these most recent cases represent the final judicial verdict on the constitutional validity of age-restrictive zoning ordinances. First, no federal court has had occasion to review such an ordinance. Second, and perhaps more important, the significant state court decisions in this area were delivered before the Supreme Court's decision in *Moore v. City of*

9. For example, the court in Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 237 n.4, 364 A.2d 1005, 1009 n.4 (1976), noted that 12 senior citizen communities in New Jersey had been developed pursuant to age-restrictive zoning ordinances. Such ordinances may also allow quite limited zoning adjustments—most commonly relaxation of parking requirements—for senior citizen housing developments. Others go further by allowing significant density concessions for special age-restricted zones.

Although as a formal matter it is often the developer filing the rezoning application who requires inclusion of a residential age restriction, the impetus for the age limitation generally comes from local government. The political realities are frequently such that without a minimum age requirement, the density or other concessions crucial to the economic feasibility of such projects would not be granted. This bargaining is particularly apt to occur in communities that have little or no high-density development and are fearful of the fiscal impact of this ratable were it to increase the cost of municipal services by permitting residence by school-age children.

10. *See* text at notes 20-26 & 63-90 *infra*.

East Cleveland,[11] where the Court found unconstitutional a zoning ordinance that restricted the manner in which members of the same family could live together. Although the zoning ordinance in *Moore* did not impose age restrictions on occupancy, the decision articulates new limitations on state action that restricts the freedom of members of the same family to live with one another. Since many retirement communities forbid otherwise eligible residents from living in the community with younger members of their families, the decision in *Moore* suggests that the constitutionality of such age segregation and the means employed to enforce it must be comprehensively examined.

This Article offers a first contribution to that process of examination. Although age segregation in retirement communities can be established in a variety of ways, the Article focuses primarily on age-restrictive zoning ordinances, the method most directly involving governmental action. The Article first considers those persons adversely affected by age-restrictive retirement communities and suggests that potential plaintiffs may be divided into three classes—neighboring property owners whose land values are affected by the establishment of a retirement community, those excluded from such a community solely by virtue of their age, and those excluded or potentially excluded because of the age of persons with whom they choose to live. Next, the constitutional arguments available to each class of plaintiffs are explored. As a product of that analysis, the Article contends that age-restrictive zoning ordinances warrant strict judicial scrutiny, not because of their economic impact or because they establish age segregation per se, but rather because they intrude on the elderly individual's fundamental right to freedom of choice regarding family living arrangements. In line with that conclusion, the Article then suggests that the justifications that a community might offer in support of age-restrictive zoning do not withstand such scrutiny. Next, the Article considers possible arguments that the establishment of age segregation in retirement communities by means of restrictive covenants involves state action and thus is subject to constitutional attack under the fourteenth amendment. Concluding that these arguments are highly unlikely to prevail, the Article suggests that the use of restrictive covenants by retirement communities is immune from constitutional attack.

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

II. Constitutional Validity of Age Restrictions in Zoning Ordinances

Three different types of plaintiffs might challenge the constitutional validity[12] of age restrictions in zoning ordinances. First, residents and taxpayers who own property near an area designated by the ordinance as a retirement district might object to the zoning because their property values have been adversely affected.[13] The second group of potential plaintiffs, who might be labeled "young excludees," are those that the ordinance bars from residing in the retirement district solely on the basis of their young age. Included in this group are young singles, young couples, and those families in which all the members are too young to be eligible for residence. The third group, which might be called "age-heterogeneous families," share with the second the characteristic of being excluded under the terms of the ordinance's age restriction. Although one or more of such a family's members are old enough to qualify for occupancy, the family as a whole is nevertheless excluded because of the presence of a young child, or depending on the terms of the ordinance, because one spouse is too young to be eligible for occupancy.[14] Included in this group of excludees are, for example, the 55-year-old man who is married to a younger wife and senior citizens who have assumed the care and custody of their grandchildren.

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12. The validity of age-restrictive zoning depends not only upon constitutional considerations but also upon the local government's authority under state zoning-enabling legislation. The cases in this area have dealt with both the statutory and constitutional questions. The statutory issues raised have included whether the challenged zoning was adopted in accordance with a comprehensive plan, *see, e.g.*, Taxpayers Assn. v. Weymouth Township, 71 N.J. 249, 261-62, 364 A.2d 1016, 1022-23 (1976), whether the enabling act permits the regulation of land users, as opposed to land uses, *see, e.g.*, 71 N.J. at 275-80, 364 A.2d at 1030-33, and whether the exclusion of young people violates the statutory mandate to zone for the "general welfare," *see, e.g.*, 71 N.J. at 265-75, 364 A.2d at 1024-30, a claim that replicates the constitutional due process claim. Since questions of statutory interpretation vary in their particulars from state to state, they are only generally noted here.

13. *See, e.g.*, Campbell v. Barraud, 58 App. Div. 2d 570, 571, 394 N.Y.S.2d 909, 911 (1977); Maldini v. Ambro, 36 N.Y.2d 481, 486, 330 N.E.2d 403, 406, 369 N.Y.S.2d 385, 390, *appeal dismissed*, 423 U.S. 993 (1975).

14. *See, e.g.*, the ordinance at issue in Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 364 A.2d 1005 (1976); Taxpayers Assn. v. Weymouth Township, 125 N.J. Super. 376, 311 A.2d 187 (Super. Ct. App. Div. 1973), *revd.*, 71 N.J. 249, 364 A.2d 1016 (1976). The Woodland Township ordinance restricted residency "to persons who are 52 years of age or over except that one child who is 19 years of age or over may be permitted to reside." 71 N.J. at 234, 364 A.2d at 1008. Under this formulation, a 52-year-old with a younger spouse would be ineligible to live in the restricted district. The Weymouth ordinance similarly limited residency to elderly persons (52 years of age or over) or elderly families (that could include, however, a younger spouse 45 years of age or over, and all their children over 18). 125 N.J. Super. at 379, 311 A.2d at 188.

Although the cases in this area do not distinguish between younger and older excludees, the distinction is offered here as a means of comprehensively ordering and addressing the constitutional issues raised by age-restrictive zoning ordinances. More particularly, the category of older excludees is formulated to emphasize that age-restrictive zoning provisions can operate to exclude people not only on the basis of their age but also because of their family arrangements. As will be shown later, this fact has constitutional significance.[15]

A. *Constitutional Claims of Neighbor-Taxpayers*

The first reported opinion involving the validity of an age-restrictive zoning ordinance was a 1965 Connecticut case, *Hinman v. Planning and Zoning Commission*.[16] In that case, the town had amended its zoning ordinance to create a retirement community district where higher density residential development was permitted and occupancy was restricted to persons aged over fifty, with exceptions for younger spouses and children over eighteen years old. The court invalidated the ordinance on the statutory ground that the minimum age restriction went beyond the delegated zoning powers of the town.[17] In the next decade only a few cases, all from either New Jersey or New York, involved challenges to a local government's decision to grant permission—either by zoning or special permit—for development of an age-restricted community.[18] With one exception, these early cases, like *Hinman*, invalidated the age-restrictive zoning.[19]

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15. *See* text at notes 98-126 *infra*.

16. 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965).

17. The *Hinman* court suggested that the welfare of the developer who initiated the zoning amendment, rather than the town's welfare, was the object of the amendment, since the town had no demonstrated need for a retirement community. 26 Conn. Supp. at 129, 214 A.2d at 133. For an account of how the Town of Southbury neatly avoided the court's decision in *Hinman* and arranged for construction of the retirement community, see 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 50.16, at 301 n.111 (1974).

18. Shepard v. Woodland Township Comm. & Planning Bd., 128 N.J. Super. 379, 320 A.2d 191 (Super. Ct. Ch. Div. 1974), *affd. on other grounds*, 135 N.J. Super. 97, 342 A.2d 853 (Super. Ct. App. Div. 1975), *revd.*, 71 N.J. 230, 364 A.2d 1005 (1976); Taxpayers Assn. v. Weymouth Township, 125 N.J. Super. 376, 311 A.2d 187 (Super. Ct. App. Div. 1973), *revd.*, 71 N.J. 249, 364 A.2d 1016 (1976); Molino v. Mayor & Council of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (Super. Ct. Law Div. 1971); Maldini v. Ambro, 43 App. Div. 2d 664, 349 N.Y.S.2d 646 (1973), *affd.*, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *appeal dismissed*, 423 U.S. 993 (1975). *Cf.* Central Management Co. v. Town Bd., 47 Misc. 2d 385, 262 N.Y.S.2d 728 (Sup. Ct. 1965) (vacating town board decision finding location of proposed development unsuited for senior citizens).

19. The exception was Maldini v. Ambro, 43 App. Div. 2d 664, 349 N.Y.S.2d

Beginning in 1975, however, the authority of these cases was diminished by the decision of the New York Court of Appeals in *Maldini v. Ambro*,[20] which sustained a retirement community zoning ordinance. In 1976 the New Jersey Supreme Court followed, upholding zoning age restrictions by reversing the lower court decisions in the companion cases of *Taxpayers Association of Weymouth v. Weymouth Township*[21] and *Shepard v. Woodland Township Committee and Planning Board*.[22] Most recently, the New York Supreme Court, Appellate Division, reversed the trial court and ruled in favor of an age-restrictive zoning ordinance in *Campbell v. Barraud*.[23]

Interestingly, none of the age-restrictive zoning cases has resulted from a direct confrontation between the local government and those excluded from residency in the age-restricted zone. Rather, in every case the zoning has been challenged by plaintiffs who were neighboring property owners and taxpayers in the community, not excludees. Their constitutional claim is that density concessions granted in the retirement community zone will result in increased traffic, congestion, and pollution and will lead to a decline in surrounding property values in violation of the due process clause of the fourteenth amendment.[24] The plaintiffs in these cases, however, have not rested their challenge on this theory, apparently recognizing that the courts in zoning cases have generally been unpersuaded by the property-rights claims of neighbors.[25] In *Maldini*, for example, the

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646 (1973), *affd.*, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *appeal dismissed*, 423 U.S. 993 (1975), affirming the trial court's judgment sustaining the ordinance.

20. 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *appeal dismissed*, 423 U.S. 993 (1975).

21. 71 N.J. 249, 364 A.2d 1016 (1976).

22. 71 N.J. 230, 364 A.2d 1005 (1976).

23. 58 App. Div. 2d 570, 394 N.Y.S.2d 909 (1977).

24. *See* cases cited in note 13 *supra*. Aesthetic objections may also play a part in motivating neighbors to sue, though this claim has nowhere been expressly stated, probably because zoning to *exclude* older persons on aesthetic grounds has been held unreasonable and violative of the fourteenth amendment. In Women's Kansas City St. Andrew Socy. v. Kansas City, 58 F.2d 593 (8th Cir. 1932), the court stated:

> Certainly the fact that aged people may have a depressing effect on some people is not sufficient to exclude such people from a district. There is no limit to the causes that may depress people, but they do not furnish a basis for the support of a restriction as to use of one's property.

58 F.2d at 603. *See also* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

25. Professor Norman Williams has explained this phenomenon in zoning law as follows:

> Most of the serious legal work on the American land use control system has . . . operated on the assumption that the only important (or the really import-

New York Court of Appeals quickly rejected the plaintiffs' property claims on the ground that "a possible depreciation in value to particular property owners will not shield an existing zoning classification from adaption to changing community needs."[26]

The exclusionary aspects of age-restrictive zoning ordinances are more clearly vulnerable to constitutional attack, and consequently the neighbor-taxpayer plaintiffs have advanced constitutional claims not so much on their own behalf as on behalf of those excluded by the terms of the ordinance in question. These claims would likely not be heard in federal court because of the Supreme Court's strict interpretation of standing requirements.[27] In state courts, however, where all the age-restrictive zoning cases have been brought, the standing rules are generally much less stringent, and thus in most cases the neighbor-taxpayers have been able to assert the constitutional claims of excludees without challenge.[28] As a result, personal rights under the due process and equal protection clauses of the fourteenth amendment—and not property claims—have formed the

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ant) type of law suits in this field are those brought by developers to challenge restrictions on their rights . . . . In neighbors' cases the legal technology is relatively primitive, with no clearly established nationwide rules on the appropriate doctrine to deal with such suits. In the major zoning states, the courts have shown a good deal of ingenuity in invoking various doctrines to give the neighbors at least some standing to raise issues in court . . . . However, the only common denominator nationwide is that, except in a very few states, in fact the neighbors usually lose.

1 N. WILLIAMS, *supra* note 17, § 2.01, at 73-74.

26. 36 N.Y.2d at 486, 330 N.E.2d at 406, 369 N.Y.S.2d at 390.

27. *See* Warth v. Seldin, 422 U.S. 490 (1975). The following passage from the Court's opinion imposing restrictive standing requirements on plaintiffs in exclusionary zoning suits seems relevant to the standing of neighbor-taxpayer plaintiffs in age-restrictive zoning cases:

In several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights . . . . But the taxpayer-petitioners are not themselves subject to Penfield's zoning practices. Nor do they allege that the challenged zoning ordinance and practices preclude or otherwise adversely affect a relationship existing between them and the persons whose rights assertedly are violated . . . . Nor do the taxpayer-petitioners show that their prosecution of the suit is necessary to insure protection of the rights asserted, as there is no indication that persons who in fact have been excluded from Penfield are disabled from asserting their own right in a proper case. In sum, we discern no justification for recognizing in the Rochester taxpayers a right of action on the asserted claim.

422 U.S. at 510 (citations omitted). *See also* Construction Indus. Assn. v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

28. *See* Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. at 235 n.1, 364 A.2d at 1008 n.1; Taxpayers Assn. v. Weymouth Township, 71 N.J. at 263 n.5, 364 A.2d at 1023 n.5. In addition, consider *Campbell v. Barraud*, where the court labeled neighbor-plaintiffs' standing to challenge the age restrictions "highly questionable," but decided to reach the merits of the issue because of the state's "liberal policy of standing in zoning cases." 58 App. Div. 2d at 571, 394 N.Y.S.2d at 911.

basis for the constitutional challenge to residential age restrictions in zoning.

Although standing in its technical sense has not been an issue in the age-restrictive zoning cases, the absence of individual excludees has in some instances presented a problem for the neighbor-taxpayer plaintiffs. The neighbor-taxpayer plaintiffs object to higher density development out of concern for property values or aesthetics,[29] and thus the relief they seek is not a declaration of the invalidity of the minimum-age provisions in the ordinance, but prohibition of the rezoning itself. These plaintiffs are in a poor position to assert an exclusionary zoning claim, since the result they seek—precluding higher-density development in the challenged zone—is itself exclusionary.

B. *Constitutional Claims of Young Excludees*[30]

1. *Equal Protection*

To challenge the constitutionality of a statute or ordinance successfully, plaintiffs must overcome the courts' traditional reluctance to become involved, without explicit constitutional justification, in complexities and choices that are basically legislative in nature. Under the two-tiered system developed by the Supreme Court for treating challenges to legislative classifications under the equal protection clause, most cases are decided according to standards of reasonableness that are less than exacting.[31] First, the

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29. That plaintiffs' exclusionary motive is likely to be recognized is illustrated by an observation of the New Jersey Supreme Court in *Weymouth*: "In the present case, though, plaintiffs have not attacked the overall pattern of land use regulation adopted by Weymouth Township as improperly exclusionary. . . . Indeed, the trial testimony of several individual plaintiffs suggests that their true objection to the ordinances may be that they are not sufficiently exclusionary." 71 N.J. at 294, 364 A.2d at 1040-41.

30. To simplify the ensuing analysis, the claims of young excludees will be addressed as though the young persons were parties to the litigation and were asserting constitutional claims on their own behalf and seeking a nonexclusionary result limited to the removal of the age restriction from the ordinance.

31. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

Some commentators have observed that the courts in fact frequently abandon the two-tiered standard in favor of an unarticulated sliding scale approach, where the scope of judicial review is a function of the importance of the rights allegedly impaired. The chief virtue of that standard is, of course, its comparative flexibility. *See* Gunther, *The Supreme Court, 1971—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). For an example of such treatment in the area of sex-based classifications, see Reed v. Reed, 404 U.S. 71 (1971), in which the Court struck down a legislative

state's purpose in creating the challenged classification must be legitimate. Then, the classification must be found to be reasonably related to that purpose, both in terms of the need for any classification at all and in terms of the relationship of the particular classification to the objective: "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[32] Classifications having a reasonable basis do not violate the fourteenth amendment for lack of "mathematical nicety" or because they result in "some inequality."[33] Furthermore, "if any state of facts reasonably can be conceived that would sustain [the classification], the existence of that state of facts at the time the law was enacted must be assumed."[34] Judged under this relaxed standard, most legislative acts will readily withstand attack.

In certain circumstances, however, plaintiffs may be able to trigger significantly more rigorous judicial review. Under the two-tiered approach, that strict review will be applied when the court finds that the classification is based upon a constitutionally "suspect" class, or that the classification denies to a class the exercise of a "fundamental right" protected by the Constitution, or that it denies a benefit to members of a class on the basis of their exercise of a fundamental right.[35] If plaintiffs are successful in demonstrating the presence of a fundamental right or suspect class, the court will apply "the most rigid scrutiny" to the legislation.[36] By way of justification, the state must then demonstrate not just that the legislation furthers a legitimate state objective, but that it "promotes a *compelling* state

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classification that preferred men over equally qualified women in the appointment of administrators of decedents' estates. Sex has not been designated a suspect classification, so that gender-based legislative categories are, in theory, not subjected to strict scrutiny. But, though the Court purported to use the minimal rational basis standard, the classification at issue in *Reed* did not survive constitutional challenge. As Justice Marshall noted in his dissent in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 106 (1972), it appears that the Court in *Reed*, although not expressly deviating from the two-tiered analysis, in fact applied a test more stringent than the reasonableness standard because the classification operated to the detriment of women—a traditionally disadvantaged, but not "suspect," class. This observation, however, does nothing to advance plaintiffs' cause in the age-restrictive zoning cases, since the challenged ordinances operate to benefit, rather than penalize, the members of a traditionally disadvantaged group.

32. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1919).

33. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

34. 220 U.S. at 78.

35. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16 (1972).

36. Korematsu v. United States, 323 U.S. 214, 216 (1944).

interest."[37] Furthermore, under these circumstances, "the State must demonstrate that its [classifying legislation] has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives."[38] Subjected to this rigorous scrutiny, statutes that impinge upon suspect classes or fundamental rights rarely survive constitutional challenge.

From the point of view of the young excludee, the age-restrictive zoning classifies persons on the basis of age and then denies to young-agers the opportunity to reside in the retirement district set aside for older persons. Under the two-tiered equal protection analysis, then, the threshold issue is whether the age-based classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."[39]

In 1976 the Supreme Court decided that old age is not a suspect classification meriting strict scrutiny. In *Massachusetts Board of Retirement v. Murgia*,[40] the Court upheld, against a challenge on equal protection grounds, a Massachusetts statute imposing mandatory retirement on uniformed state police officers at age fifty. The Court held that police officers over fifty were not a suspect class and accordingly applied the rational basis standard.[41] The Court distinguished old age from "suspect" categories like race and nationality as follows:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[42]

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37. Shapiro v. Thompson, 394 U.S. 618, 638 (1968) (emphasis original).

38. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1972).

39. 411 U.S. at 17.

40. 427 U.S. 307 (1976).

41. 427 U.S. at 312-13. The Court then validated the statute as not "wholly unrelated" to the legitimate state purpose of protecting the public by assuring the physical preparedness of the uniformed police. 427 U.S. at 316.

42. 427 U.S. at 313. In this dissent, Justice Marshall called for a measure of judicial scrutiny somewhere between strict scrutiny and the loose rational basis standard:

> Of course, the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and "quasi-suspect" classes such as women or illegitimates. . . . The advantage of a flexible equal protection standard, however, is that it can readily

Noting that the classification at issue discriminated against middle-aged as well as elderly persons and that most members of the political majority will eventually become elderly, the Court added that "even old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' "[43]

Given the Court's conclusion that the elderly are not a suspect class worthy of special protection, *a fortiori*, young-agers do not constitute such a class. Obviously, young-agers—under the terms of the most typical ordinances, those under fifty-two or fifty-five years old—are not historically disadvantaged, are not socially isolated, are not without political power, and in most places are not a minority. Thus, age-restrictive zoning cannot be said to disadvantage a class of persons in need of special protection. To the contrary, it operates to benefit a minority, the traditionally less powerful group of older persons. For these reasons, a legislative classification that excludes young-agers from a designated residential district cannot be said to warrant strict judicial scrutiny on the ground that it works to the disadvantage of a suspect class.[44]

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accommodate such variables. The elderly are undoubtedly discriminated against, and when legislation denies them an important benefit—employment—I conclude that to sustain the legislation appellants must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest.

427 U.S. at 325 (Marshall, J., dissenting).

43. 427 U.S. at 313 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)). In effect, this analysis is based in part on the determination of whether age is a mutable or an immutable characteristic. In one sense, of course, age is mutable, since everyone who enjoys a normal lifespan will experience old age. But in other ways age is immutable. No one can, at any given moment, change his age. And no one who is old can become young again. In upholding legislative classifications based on age, courts have chosen to overlook the immutable aspects of aging in favor of the view that age is not an obstinate and unalterable characteristic like race. In *Maldini*, the New York Court of Appeals was faced with a zoning age restriction that allegedly discriminated against young people. Applying its view that age is not a fixed characteristic, the court concluded that the ordinance actually had no discriminatory effect:

> "Senior citizenship" may be more appropriately regarded as a stage in life within the normal expectancy of most people than as an unalterable or obstinate classification like race . . . religion or economic status. Therefore, providing for land use suitable for the elderly may, as here, be viewed as a nondiscriminatory exercise of the power to provide for the general welfare of all people . . . .

36 N.Y.2d at 488, 330 N.E.2d at 408, 369 N.Y.S.2d at 392 (citations omitted).

Murgia involved the reverse situation—a statute that allegedly discriminated against older persons. Clearly the *Maldini* reasoning could not justify the Massachusetts statute under review in *Murgia* since it would be impossible for those excluded ever to enjoy the benefit accorded to the young by the act. But the Supreme Court's conclusion that older persons are adequately represented in the political process and do not warrant designation as a suspect class nevertheless indicates that the mutability concept served as the basis for the holding.

44. This reasoning was employed by the New Jersey Supreme Court in Taxpayers

The next issue in determining the appropriate standard of judicial review is whether the legislation impinges upon a "fundamental" right. The Court has designated as "fundamental" those rights expressly guaranteed by the Constitution, such as the various first amendment freedoms,[45] and other rights necessarily implied by constitutional provisions, such as the right to travel[46] and the right to vote.[47]

In its 1972 decision in *Lindsey v. Normet*,[48] the Court held that access to housing is not a "fundamental" right, and thus it applied the rational basis test in rejecting a challenge to the constitutionality of Oregon's forcible entry and detainer statute. As the Court explained:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing [is a] legislative, not judicial, [function].[49]

In light of *Lindsey*, young excludees cannot assert, at least as a matter of federal constitutional law, that by denying them access to housing in a particular district the local government has abridged a "fundamental" right.[50]

Unlike access to housing, the right to travel, although nowhere expressly guaranteed by the Constitution, has been declared by the

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Assn. v. Weymouth Township, 71 N.J. 249, 281 n.15, 364 A.2d 1016, 1034 n.15 (1976).

45. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965).

46. Shapiro v. Thompson, 394 U.S. 618 (1968).

47. Dunn v. Blumstein, 405 U.S. 330 (1972).

48. 405 U.S. 56 (1972).

49. 405 U.S. at 74. As Justice Marshall observed in his dissent in *Murgia*, the Court "has apparently lost interest in recognizing further 'fundamental' rights and 'suspect' classes." 427 U.S. at 318-19. *But cf.* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (declaring the choice of family living arrangements to be a fundamental right).

50. Although the issue is thus apparently resolved as a matter of federal constitutional law, the result could be different if decided by a state court according to state constitutional principles. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1976). Justice Hall, in his widely noted opinion, stated that access to shelter is literally essential to a decent life and implied that housing will be treated as a "fundamental" right under state constitutional law. 67 N.J. at 175, 336 A.2d at 725. *See also* the differing approaches of federal and state courts to the issue of the constitutionality of public school financing in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1972); Serrano v. Priest, 5 Cal. 3d 597, 487 P.2d 1241, 96 Cal. Rptr. 601 (1977); and Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

Court to be a "fundamental" right. As developed in the case law, the right seemingly came to include not only movement from state to state but also the right to take up residence at the point of destination.[51] The clearest assertion of that dimension of the constitutionally protected right to travel came in the celebrated *Petaluma* case.[52] There the federal district court found that local land use regulations, aimed at controlling the rate and sequence of population growth in the city, infringed upon the freedom to travel of prospective residents thereby excluded. The court consequently required the city to show that its annual numerical limit on building permits and its greenbelt "urban expansion line" were justified by a compelling state interest. Since the court found that the reasons advanced by the city were not persuasive, much less compelling,[53] the "Petaluma Plan" was struck down.

Were the district court decision in *Petaluma* the last word on the nature and scope of the "fundamental" right to travel, young excludees could assert a persuasive claim that age-restrictive zoning ordinances by virtue of their exclusiveness impinge upon the right to travel and should therefore be subjected to strict scrutiny. The district court's ruling in *Petaluma*, however, was reversed on other grounds by the Ninth Circuit,[54] and its strength as a precedent is consequently diminished. With respect to the right to travel issue, the Ninth Circuit did not deal with the merits directly. Rather, it held that the plaintiffs—landowners and builders in the city—lacked standing to assert the claim on behalf of prospective residents and those excluded.[55] However, dictum in the opinion strongly suggests that the Petaluma scheme did not violate the right to travel: "Although due to appellees' lack of standing we do not reach today the right to travel issue, we note that the Petaluma Plan is not aimed at transients,

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51. Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (collecting cases). The Court has refused to consider whether a constitutional distinction exists between interstate and intrastate travel. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1973).

52. Construction Indus. Assn. v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *revd. on other grounds*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

53. The city claimed that its water supply and sewage treatment facilities could not accommodate a higher growth rate and, in addition, that its actions were justified by a desire to protect its small-town character. The district court ruled that the water supply, which had been artifically limited, and sewer system could be made available to meet growth needs, 375 F. Supp. at 577, and that a desire to preserve the town's character could not justify growth controls, 375 F. Supp. at 583.

54. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

55. 522 F.2d at 904.

nor does it penalize those who have recently exercised their right to travel . . . ."[56]

The assertion that age-restrictive zoning impermissibly infringes upon the excludees' right to travel is also undercut by the Supreme Court's treatment of a related challenge in *Village of Belle Terre v. Boraas*.[57] The Belle Terre ordinance prohibited residency by more than two unrelated persons in any one housekeeping unit. Plaintiffs, a property owner and several unrelated tenants,[58] challenged the ordinance on equal protection grounds, asserting *inter alia* that the ordinance impinged upon their fundamental right to travel and that the compelling state interest standard should accordingly apply. Implicit in the argument was the premise that the fundamental right to travel included the right to travel intrastate and to settle in residence at the point of destination. The plaintiff's claim, however, was summarily rejected by the Court.[59] Justice Douglas' majority opinion noted only that the ordinance "is not aimed at transients,"[60] a statement echoed by the Ninth Circuit in *Petaluma*. Since earlier cases that had indicated that the right to travel included not only the right to move from place to place but also the right to take up residence were not overruled or even distinguished, the Court's treatment of the issue is not particularly satisfying. Nevertheless, it seems that after *Belle Terre* excludees will find it difficult to claim that a zoning restriction impinges on a constitutionally protected right to travel.[61]

Finally, it is possible that the young-excludee plaintiffs can evoke strict scrutiny by asserting that age-restrictive zoning infringes upon a fundamental right of association. Essentially the same argument was advanced by the unrelated tenants in *Belle Terre* and was, like the right to travel claim, summarily rejected by the Court: "[The

56. 522 F.2d at 906 n.13.

57. 416 U.S. 1 (1974).

58. Named tenant plaintiffs had left the house before the case reached the Supreme Court, causing Justice Brennan to dissent on the ground that no case or controversy existed after their departure. 416 U.S. at 10 (Brennan, J., dissenting). The majority, however, held that the plaintiff landlord's assertion that the rental value of the property was affected by the ordinance was sufficient to state a justiciable claim, 416 U.S. at 9.

59. *Belle Terre* was decided before *Petaluma*, but was dismissed as "not relevant" by the *Petaluma* trial court in a footnote. The court apparently sought to distinguish *Belle Terre* by asserting that the right to travel was not involved in that case. 375 F. Supp. at 584 n.1.

60. 416 U.S. at 7.

61. Surely the fact that the young excludees may often seek to live in family groups while those excluded in *Belle Terre* were unmarried should not affect the travel issue.

ordinance] involves no "fundamental" right guaranteed by the Constitution, such as . . . the right of association, *NAACP v. Alabama* . . . or any rights of privacy, cf. *Griswold v. Connecticut* . . .; *Eisenstadt v. Baird* . . . ."[62] The cases cited by Justice Douglas suggest that the "fundamental" rights of association and privacy are limited to political and family affiliations and decisions involving procreation. Clearly the young excludees, like the unrelated tenants in *Belle Terre,* are not seeking to establish or participate in political associations. Nor can they assert any rights concerning privacy and association in the family. All members of the class of young-excludee plaintiffs—whether single people, couples, or families—are by definition below the minimum age for residency. Whatever their family arrangements, they would still be barred by the ordinance because of their age. Like the unsuccessful *Belle Terre* plaintiffs, the young excludees are asserting an associational right of a social rather than political nature that is unrelated to matters of procreation or the family and therefore is unlikely to invoke strict scrutiny.

Since the young-excludee plaintiffs can neither establish themselves as a suspect class nor demonstrate that any fundamental right is impaired by an age-restrictive zoning ordinance, a court would be required to apply the rational basis standard of equal protection analysis to determine the measure's constitutionality as it is applied to them. This standard of reasonableness focuses on the relationship between the government's chosen ends and means, asking first whether the locality's objective in creating the legislative classification is legitimate and, secondly, whether the classification is drawn in order to further that objective. Underlying that judicial evaluation is a theoretical presumption of legislative validity. Both the New York Court of Appeals in *Maldini v. Ambro*[63] and the New Jersey Supreme Court in the *Weymouth*[64] and *Shepard*[65] cases sustained age-restrictive zoning ordinances upon application of the rational basis standard.[66] An examination of these cases strongly

62. 416 U.S. at 7-8 (citations omitted). Justice Marshall dissented in *Belle Terre* on this point. In his view, the right to select one's living companions is a "personal lifestyle choice" included in the rights of association and privacy guaranteed by the first and fourteenth amendments. 416 U.S. at 15-16 (Marshall, J., dissenting).

63. 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *appeal dismissed,* 423 U.S. 993 (1975).

64. Taxpayers Assn. v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976).

65. Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 364 A. 2d 1005 (1976).

66. The courts' decisions were couched in terms of statutory, due process, and

suggests that other plaintiffs who challenge such zoning will fail unless they are somehow able to invoke a more stringent standard of judicial scrutiny.[67]

Maldini arose in the Town of Huntington in Suffolk County, New York. With no provision for multiple dwellings within its borders, the town adopted an amendment to its zoning ordinance creating a "Retirement Community District" classification. The amendment allowed subsidized housing for the elderly, which was defined as follows: "Multiple residence designed to provide living and dining accommodations, including social, health care, or other supportive services and facilities for aged persons to be owned and operated by a non-profit corporation organized for such purposes under the laws of the State of New York."[68] Having created the new zone, the Huntington Town Board approved the application of a qualified sponsor for reclassification of its twenty-acre parcel to permit construction of the type of facility described in the ordinance. Homeowners living near the site then sought declaratory and injunctive relief to bar the proposed development.

In *Weymouth*, the taxpayer plaintiffs challenged two ordinances. The first, though on its face a regulation of mobile-home parks, in fact operated as a zoning ordinance. It prohibited mobile-home parks unless they were located upon tracts of at least 140 acres and were recommended by the township planning board and approved by the town's legislative body. Only three such parks were to be licensed to operate at any one time. The second ordinance rezoned a defendant's property as a "Trailer and Mobile Home District." The plaintiffs' challenge focused on the residency restrictions contained in the first ordinance. One restriction required that at least eighty per cent of the mobile homes in any park contain no more than two bedrooms, clearly imposing a restriction, albeit indirect, on occupancy by families with children. A second was more specific, limiting occupancy to "elderly persons" or "elderly families," defined

equal protection questions. However, the analysis of each issue finally turned upon the same questions: did the government's objective serve the general welfare so as to bring it within the legitimate scope of the police power, and was the legislation sufficiently related to the objective?

67. Although the court in *Weymouth* held that "neither 'fundamental' rights nor 'suspect' criteria for classification [were] implicated," 71 N.J. at 283, 364 A.2d at 1034, so that strict scrutiny was not required, it recognized that the "right to decent housing" had preferred status under the New Jersey constitution requiring a "close judicial scrutiny" when governmental action threatened to impinge upon it. 71 N.J. at 287, 364 A.2d at 1037. Nevertheless, the court was "persuaded that the ordinances in question . . . satisfy the requirements of equal protection even when subjected to such scrutiny." 71 N.J. at 287, 364 A.2d at 1037.

68. 36 N.Y.2d at 483-84, 330 N.E.2d at 405, 369 N.Y.S.2d at 388.

to be persons aged fifty-two or older and families "the head of which, or his spouse is 52 years of age or over."[69] The obvious effect of the ordinance was to make mobile-home living in Weymouth available only to older people.

In contrast, the Woodland Township ordinance at issue in *Shepard* contemplated high amenity "senior citizen communities," authorized as a special use in a low-density residential-agricultural district. Permitted uses in these developments included single-family detached and one-story attached dwellings, limited commercial facilities, and shopping centers. The ordinance required developers to provide a clubhouse and recreational building, shuffleboard court, and swimming pool for residents and their guests. Detailed design and green-space specifications were imposed. The age restrictions contained in the ordinance were as follows:

> The permanent residents of a Senior Citizen Community shall be confined to persons who are 52 years of age or over except that one child who is 19 years of age or over may be permitted to reside in any senior citizen dwelling unit occupied by his or her parent(s) or guardian(s). Full time occupancy of any residential unit shall be limited to 3 individuals.[70]

As in *Weymouth*, plaintiff was a resident taxpayer of the town, not an excludee.

In all three of the cases, the defendants asserted that the primary purpose of the age limitations was to remedy an existing shortage of housing for the elderly, a goal warmly endorsed by both the New York and New Jersey courts.[71] In *Weymouth*, the defendant also admitted to a fiscal motive—its officials testified at trial that they had adopted the ordinance in part to obtain additional revenue for the town and to avoid additional burdens on overcrowded schools.[72] The New Jersey Supreme Court, however, was able to avoid the fiscal zoning issue in *Weymouth*,[73] and, like the New York Court

69. 71 N.J. at 259, 364 A.2d at 1021.

70. 71 N.J. at 234, 364 A.2d at 1008. Neither the New Jersey Supreme Court nor the courts below addressed the issue of how the restriction on number of residents promoted the welfare of elderly housing consumers.

71. In *Maldini*, the court of appeals described the provision of housing to the aged as "a matter of general public concern not only to the locality but to the State and Nation as well." 36 N.Y.2d at 485, 330 N.E.2d at 406, 369 N.Y.S.2d at 389. *See* Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 239-43, 364 A.2d 1005, 1010-13 (1976); Taxpayers Assn. v. Weymouth Township, 71 N.J. 249, 266-74, 364 A.2d 1016, 1025-30 (1976). The appellate division in *Campbell* refers to the goal as "this laudatory purpose." 58 App. Div. 2d at 572, 394 N.Y.S. 2d at 913.

72. 71 N.J. at 290, 364 A.2d at 1038-39.

73. The *Weymouth* court noted its previous invalidation of ordinances restricting new housing to categories of people who are net revenue producers or excluding

of Appeals in *Maldini*, upheld the restriction as a reasonable means of serving the housing needs of the elderly.[74]

In upholding the legitimacy of each community's declared objective, each court was forced to address the question whether the general welfare is served by legislation that responds to the needs of one group within the population to the exclusion of other significant elements.[75] The *Maldini* court supported its conclusion by

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families with children in order to reduce school expenditures, 71 N.J. at 289, 364 A.2d at 1038, but the court declined to apply the exclusionary test here on the ground that plaintiffs had failed to challenge the township's "overall pattern of land use regulation." 71 N.J. at 294, 364 A.2d at 1040. The opinion admonished, however, that "[t]he Court's failure to probe more deeply into the possible exclusionary effect of similar ordinances should not be understood to be the product of blindness to their potentially exclusionary character, but only the consequence of plaintiffs' decision not to try the case on that legal theory." 71 N.J. at 295-96, 364 A.2d at 1041. The *Maldini* court, citing the town's "unimpeachable good faith," found no exclusionary or fiscal motive in the enactment of that ordinance. 36 N.Y.2d at 487, 330 N.E.2d at 407, 369 N.Y.S.2d at 391. The implication is that the age restrictions would have been invalid if justified solely on fiscal grounds.

74. 71 N.J. at 288, 364 A.2d at 1037. Several years after adoption of the Weymouth and Woodland Township ordinances, New Jersey revised its zoning enabling legislation in an attempt to encourage and provide guidelines for senior citizen zoning that would not run afoul of exclusionary zoning charges. Municipal Land Use Law, 1975 N.J. Laws, ch. 291 (codified at N.J. STAT. ANN. §§ 40:55D-1 to :55D-92 (West Supp. 1977)). Section 65(g) allows the local government to zone for such development only if the zoning is "consistent with provisions permitting other residential uses of a similar density in the same zoning district." *See* N.J. STAT. ANN. § 40:55D-2(1) (West Supp. 1977). The New Jersey Supreme Court in *Weymouth* expressed its disapproval of this provision, finding it inadequate protection against the exclusionary threat of senior citizen housing and worrying that the "similar density" guidelines might impede rather than encourage the development of such housing. 71 N.J. at 292-93, 364 A.2d at 1039-40. Instead, the court endorsed the proposal of the New Jersey Public Advocate that "zoning for planned housing developments for the elderly be permitted only as part of a comprehensive municipal plan for a balanced housing stock." 71 N.J. at 293, 364 A.2d at 1040.

75. On a larger scale, the preliminary inquiry might be into the effect of age-restricted living on society as a whole. There are few answers to be found in the social science literature on this question, although much of the scholarly work on the subject of residential age segregation endorses the social utility of the concept. It is fair to say that the current majority view among gerontologists and sociologists deems the exclusion of younger age groups from retirement communities to be socially acceptable. *See, e.g.*, I. ROSOW, SOCIAL INTEGRATION OF THE AGED (1967); Bultena & Wood, *The American Retirement Community: Bane or Blessing?*, 24 J. GERONTOLOGY 209 (1969); Rose, *The Subculture of the Aging: A Topic for Sociological Research*, 2 THE GERONTOLOGIST 123 (1962). *But see* D. JONAS & D. JONAS, YOUNG TILL WE DIE (1973), in which it is concluded that the planned retirement communities, with their lack of intergenerational contacts and overwhelming emphasis on leisure, turn many older people into "dependent, protected, or playful 'superchildren', [with] the retirement communities . . . becoming what might be called the nurseries of second childhood." *Id.* at 154-55.

Unfortunately, the experts' endorsement of age segregation is often made only indirectly or implicitly, in connection with the study of a particular retirement community or some single aspect of life therein. Those few studies that have addressed the relationship of age-homogeneous living to society often take the form of disproving certain negative hypotheses about the impact of a retirement development on

characterizing age as "a stage in life."[76] Since the general populace theoretically will achieve old age, the provision of housing for senior citizens can be said to serve the welfare of the vast majority who will be old.[77] The New Jersey court in *Weymouth* took a somewhat

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the local community that houses it. *See, e.g.*, K. HEINTZ, *supra* note 1, at 65-144, in which the author seeks to disprove the hypothesis that retirement developments have an adverse fiscal and political impact on their host communities.

Left unaddressed are the more profound questions raised by residential age segregation, such as what it portends for the future relationship of the generations. Widespread age districting raises the possibility that large numbers of children will grow to adulthood without the opportunity for daily contact with older people. Adverse consequences of this kind of isolation include the polarization of the generations—older people would develop a group identity by casting out youth and refusing further involvement with the general culture, and younger people, denied the ability to prepare for their own aging by witnessing the process in others, would face growing old with bewilderment and even fear. Finally, a strong argument can be made that, in a pluralistic society, segregation—particularly the exclusion or inclusion of people based on their physical characteristics—should not be encouraged. Although it is otherwise distinguishable from racial segregation, age districting does share the element of categorizing as undesirable those persons who share only a physical characteristic. To this extent, age segregation, like racial segregation, is offensive because it ignores the individuality of those classified as desirable or undesirable.

76. 36 N.Y.2d at 488, 330 N.E.2d at 408, 369 N.Y.S.2d at 392.

77. Aside from providing adequate shelter for the aged that meets their particular economic and physical needs, senior citizen housing can also be said to serve the "special social and psychological needs of the elderly." Taxpayers Assn. v. Weymouth Township, 71 N.J. 249, 269, 364 A.2d 1016, 1027 (1976). Hard as it may be for the uninitiated to imagine, sociologists have developed a means of measuring morale or happiness in human beings, called the "life satisfaction scale." *See* Neugarten, Havighurst & Tobin, *The Measurement of Life Satisfaction*, 15 J. GERONTOLOGY 134 (1961). A comparative survey of the life satisfaction levels of retired persons in regular and age-segregated communities in Arizona found 75% of the retirement community residents surveyed to be satisfied with retirement life, compared with only 57% of those who resided in normal communities. The median level of satisfaction in the retirement community population ranked in the "high" category, whereas median satisfaction of retirees in outside communities was classified as "medium." Bultena & Wood, *supra* note 75, at 211. *But see* J. JACOBS, FUN CITY (1974), a study of one large retirement community that found many of the residents to be lonely and unable to deal with their isolation. The study concluded that, "while most residents felt that they had achieved the peace and quiet they had sought, it was at a price [*i.e.*, being cut off from society as a whole] that was higher than some had intended to pay." *Id.* at 82.

Scholarly studies and less formal surveys of retirement community dwellers predictably expound a widely shared view that the absence of children and younger adults is an important positive aspect of the age-homogenous environment. Besides ensuring some measure of quiet and order, *see* H. WHITMAN, A BRIGHTER LATER LIFE 169 (1971), age segregation has been claimed to reduce stress by insulating residents from the loss of status generally suffered by retired persons in American society.

> They [the residents] felt a great community bond in the fact that all of them were on an equal plane, as it were. They were not in competition with younger people, nor were they relegated to the back seat automatically reserved for the aged. They were the active movers and doers of the community, not the 'has-beens'. . . . Moreover they were not oppressed . . . by the fad of youth worship.

Id. at 158-59. *See* Rose, *supra* note 75, at 123.

In addition, the "social opportunity" available to retirement community residents

different approach to the issue. Rather than suggesting that age-restrictive zoning ordinances serve the general welfare[78] because the

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is frequently cited by them and others as another important source of satisfaction. Sociologists have tested and confirmed the seemingly paradoxical hypothesis that the more age segregated an area, the more socially integrated are its residents—that is, the more formal and informal social contact between neighbors and more friendships among them. *See* I. Rosow, *supra* note 75. The particular affinity of the elderly for each other derives largely from shared experience. The "empty nest" syndrome—the sense of loss experienced as the children leave home or for other reasons the family begins to diminish—makes more acute the desire and willingness for friendship and provides a common ground of understanding. Common physical limitations, or the increased possibility of their onset, and a shared generational vantage point on a rapidly changing society also contribute to a sense of community among older persons. *See* Rose, *supra* note 75, at 123.

This thesis does not consider the pre-retirement social lives of the populations surveyed, however. It is possible that planned retirement communities are most attractive to those accustomed to an extensive social life. To the extent that the social integration of retirement community residents is related to their previous level of social activity, age segregation loses some of its importance in explaining their involvement with each other.

It may be, however, that the high economic and social status of the residents of a high-priced retirement community favorably affects the level of contentment among the community's residents. Studies have indicated that the widely shared personal attributes and felicitous circumstances of residents are just as important to their psychological welfare as are the exclusion of children and young adults. Although no definitive nationwide statistics exist, studies of particular developments show that, except for the low-income elderly who reside in government-subsidized developments, residents of retirement communities are an elite socioeconomic group among retirees. A study of Arizona retirement community dwellers, for example, showed that 52% had formerly held professional or management positions and that 43% had one or more years of college. They also appeared to enjoy better health than did retirees living in other settings: 75% of those polled in the retirement communities saw their health as good or very good, as compared with 59% of the retirees residing outside. Bultena & Wood, *supra* note 75, at 212. Similarly, a study of the residents of five representative retirement communities in New Jersey found that 43% of the retirement community dwellers had attended college, as compared with 11% of the elderly nationwide; more than two-thirds of the communities' residents had been professional workers, which is twice the proportion of professionals in New Jersey's entire work force; and at least three-quarters of the surveyed population exceeded the national median income for persons aged 65 and over. In terms of racial makeup, these communities were overwhelmingly white. *See* K. HEINTZ, *supra* note 1, at 32-38. The New Jersey study concluded that

> [a]lthough the retirement development group is not generally of the upper-income class, it is, nonetheless, a select status group, when educational and occupational characteristics are examined in combination with income statistics. The New Jersey retirement community population is comparable in socio-economic characteristics to the other national retirement community residents, but is obviously distinct from the elderly population at large on the basis of race, of household composition, and more importantly, of social status indicators such as education, occupation, and income.

Id. at 37.

To the extent that these characteristics would be shared by the residents of a proposed age-restricted community, the question whether the general welfare is served by a zoning ordinance directed at but one insular minority within the elderly minority of the population at large becomes more troublesome.

78. In the New Jersey cases, the issue arose in the context of the question whether the towns' statutorily delegated power to zone to "promote . . . the general welfare" included the power to zone for senior citizen developments. Even though

bulk of the population will at some point become eligible for the benefits afforded the elderly, the court argued that the general welfare concept is "expansive" and "capacious," contemplating "the provision of housing for *all categories of people*, including the elderly."[79] Moreover, the court found it particularly noteworthy that the special housing and social needs of elderly persons—whose numbers are increasing rapidly both in absolute terms and as a percentage of the population—would be served especially well by age-homogeneous retirement communities.[80]

In order to uphold the ordinances challenged in *Maldini*, *Weymouth*, and *Shepard*, the rational basis standard requires a finding that the age-based classifications are reasonably related to the expressed goal of providing appropriate housing for the aged. Of the three ordinances, the one at issue in *Maldini* seems most consistent with that goal. The retirement community anticipated by the *Maldini* ordinance was to be publicly subsidized, and units were to be available to consumers at low cost. Support services were to be provided for those with limited ability to care for themselves. In addition, the ordinance set no precise age limit for exclusion, but rather referred to "residences designed . . . for aged persons."[81]

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the issue was statutory, the considerations brought to bear were the same as those in due process and equal protection analysis.

79. 71 N.J. at 275, 364 A.2d at 1030 (emphasis original).

80. 71 N.J. at 266-75, 364 A.2d at 1025-30.

The court also noted the federal government's actions in recognition of the fact that older people face special problems in locating suitable housing because of low fixed incomes, difficulties in obtaining mortgage financing, and the need for housing specially planned for safety and convenience. *See* Senior Citizens Housing Act of 1962, 12 U.S.C. § 1701r (1970).

Congress has enacted several measures to address these problems, the most important of which are authorization of direct loans for the development of rental housing for low income elderly persons, *see* 12 U.S.C. § 1701q(a)(2) (1970); and rent subsidies for tenants in such housing, *see* 42 U.S.C. § 1437f(g) (Supp. V 1975). *See generally* Melman, *Housing for the Aged—the Government Response: An Analysis of the Missouri Boarding House for the Aged Law*, 8 URB. LAW. 123, 125-30 (1976). It is important to note that Congress' purpose in creating these programs was not to establish age-segregated communities, but rather to increase the supply of housing available to low and moderate income elderly persons. *But cf.* Riley v. Stoves, 22 Ariz. App. 223, 229, 526 P.2d 747, 753 (1974), where the Arizona Court of Appeals incorrectly states that "Congress has recognized the need of elderly Americans for adult communities." Contrary to the Arizona court's statement and the implication contained in the New Jersey cases, Congress has nowhere found or declared that federal funds should be spent to provide elderly persons with a child-free environment. Similarly, the expressed purpose of the New Jersey Senior Citizens Housing Act, N.J. STAT. ANN. 55:14*I*-1 to -9 (West Supp. 1977), which was cited in *Weymouth*, is to facilitate development of federally funded housing projects for lower-income elderly persons, and not to establish age-homogeneous communities. *See* N.J. STAT. ANN. 55:14*I*-2 (West Supp. 1977).

81. 36 N.Y.2d at 483-84, 330 N.E.2d at 405, 369 N.Y.S.2d at 388.

Presumably the development's nonprofit sponsor could admit residents solely on the basis of their need for the facilities provided in the community, without regard to rigid age limitations.[82]

The ordinance in *Weymouth*, however, seems less suited to that town's avowed goal. Although there is no question that mobile homes, the subject of the township's ordinances, are well suited to the needs of the elderly consumer for moderate-cost housing of manageable size, it is less clear whether the residency limitation to persons aged fifty-two and over is reasonably related to the goal of meeting the particularized housing needs of the elderly. Certainly a great many persons over fifty-two do not possess physical and sociological characteristics that suggest housing needs distinct from those in the mainstream of the population.[83] Indeed, the court itself seemed implicitly to acknowledge that fact, for in asserting the need for housing designed specifically for the elderly, the court relied on data concerned exclusively with persons sixty-five and over.[84] However, by placing heavy reliance on the presumption of legislative validity, the court sustained the classification as not unreasonable.[85]

The New Jersey Court granted similar leeway to the ordinance challenged in *Shepard*, though that ordinance was perhaps even less adapted to the generally recognized housing needs of the elderly. Besides setting the minimum age for occupancy at fifty-two, a relatively young age, the disputed measure contemplated construction of high amenity and therefore relatively high-cost housing. Though such housing would be functionally well suited to the elderly, its high

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82. In Campbell v. Barraud, 58 App. Div. 2d 570, 394 N.Y.S.2d 909 (1977), the New York court upheld an ordinance that established the age for residential eligibility at 55, with exceptions for underage spouses and caretakers and for children and grandchildren over the age of 19. It is unclear whether the planned development was to be low or moderately priced.

83. In fact, the age limitation as formulated could operate counter-productively, in that it would permit middle-aged purchasers to compete with the elderly in securing access to a limited supply of suitable housing.

84. *See* 71 N.J. at 266-69, 364 A.2d at 1025-27. To conclude, however, that the minimum age of 52 is too low in light of the purpose of the ordinance is ultimately to conclude that the ordinance, in order to pass the test of reasonableness, must be more restrictive, not less. That is, age-restrictive zoning is most closely related to its purpose when it is most exclusionary. This observation again calls into question whether residential age restrictions can be said to serve the *general* welfare. *See* notes 75-80 *supra* and accompanying text.

85. 71 N.J. at 284-85, 364 A.2d at 1035. The court noted several justifications for concluding that the age 52 cutoff was not unreasonable or without factual basis, including a decline in net income for many persons reaching this age and the general lowering of the age of retirement in this country. A less persuasive reason also given was that the median age at which men and women become grandparents is now 57 and 54, respectively. 71 N.J. at 284, 364 A.2d at 1035.

price does not respond to the needs of those most seriously affected by the housing shortage—elderly persons with low incomes and limited savings. The court, however, was able to find that the ordinance was sufficiently responsible to the needs of the elderly population in general, partly because it believed the ordinance would operate indirectly to provide the elderly with more low-cost housing opportunities.[86] In this connection, the court noted that the increased densities permitted by the ordinance would result in housing that was less expensive than dwellings with comparable amenities in other parts of the town.[87] Additionally, the court predicted that a "filtration effect" would occur in the area housing market:

> [C]onstruction of senior citizen communities will indirectly increase the supply of housing for all income groups as more elderly citizens gravitate towards retirement communities. For example, as middle and upper income persons leave their former homes for retirement communities, more housing will become available for elderly persons with lower incomes . . . .[88]

In sum, the court "was satisfied that the Woodland Township ordinance serve[d] the peculiar housing needs of the elderly,"[89] and, indeed, that it was "in many respects, even more responsive to the special housing needs of the elderly than the zoning ordinances which we upheld in *Weymouth Tp.*"[90]

2. *Due Process*

As with equal protection claims, a challenge on substantive due process grounds calls for a choice between individual rights and legislative assertions of the public interest. Due process claims most

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86. 71 N.J. at 242-43, 364 A.2d at 1012.

87. 71 N.J. at 243, 364 A.2d at 1012.

88. 71 N.J. at 243, 364 A.2d at 1012. The best that can be said for this assertion is that the cause and effect relationship posited is extremely indirect and could be achieved only over a long period of time. Moreover, it is interesting to note that Justice Pashman, author of the *Shepard* opinion, himself refuted the "filtration effect" agrument in his earlier concurring opinion in Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 205, 336 A.2d 713, 741, *appeal dismissed*, 423 U.S. 803 (1975):

> In theory, low and moderate income families should benefit even from construction of new housing which they themselves cannot afford because such housing creates vacancies which "filter down." In reality, however, most of these vacancies are absorbed by the enormous lag between population growth and new housing construction. . . . The housing which does "filter down" to persons with low or moderate incomes is often badly dilapidated and in deteriorating neighborhoods.

89. 71 N.J. at 243, 364 A.2d at 1012-13.

90. 71 N.J. at 240, 364 A.2d at 1011.

often invoke the rational basis test of whether the measure is reasonably related to a legitimate governmental purpose. The legislation is treated with deference and usually survives the limited judicial review.[91] However, as in equal protection analysis, if the challenged measure impinges on certain "fundamental" personal liberties, "the usual judicial deference to the legislature is inappropriate,"[92] and the court will accordingly apply more careful and searching review. To justify the legislation under this more rigid standard, the state must show that the enactment is closely related to the achievement of important governmental interests.[93] This more rigorous scrutiny, of course, correspondingly diminishes the chances that the legislation will survive constitutional challenge.

After *Belle Terre*,[94] young excludees cannot claim infringement upon fundamental personal rights of travel, privacy, or association solely by virtue of their exclusion from a residential area. For essentially the same reasons that an equal protection claim would be unsuccessful, it is unlikely that due process arguments would overturn age-restrictive zoning ordinances. Left to judge the state's ends and means by the standard of reasonableness, the courts are likely to sustain these ordinances under the due process clause, as the highest courts of New York and New Jersey already have, on the ground that these measures reasonably serve the state's legitimate interest in providing for the housing needs of the elderly.

One group of young excludees, however, has a somewhat different claim to assert under substantive due process. Since age-restrictive zoning ordinances are commonly phrased in terms of occupancy and not ownership, young persons, though barred from residence, remain free to own property in a restricted zone. Thus, the situation might arise where a young person acquires property in a retirement community, perhaps by gift or devise, but is barred by law from residing there. For these excludees, the ban on occupancy denies user rights traditionally associated with property ownership and thus arguably violates the fourteenth amendent's guaran-

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91. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court for the first time upheld the constitutionality of zoning. In the course of its analysis of the due process issue, the Court stated: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388.

92. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

93. 431 U.S. at 499.

94. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), discussed in text at notes 57-62 *supra*.

tee against deprivation of property without due process of law. Though this claim has yet to be litigated and thus is difficult to assess with any degree of certainty, it can be argued that the ordinance has deprived the young owner of all personal uses of his property, which might be considered a "taking" in violation of the due process clause.[95] On the other hand, it is clear that the ordinance is not totally confiscatory, since the property can still be rented or sold to persons eligible for occupancy and thus retains at least most of its economic value. Furthermore, courts have sustained the constitutionality of public land restrictions that bar owners from occupying their own property.[96] Finally, communities that enact age-restrictive zoning ordinances can cite the New York and New Jersey cases as support for the claim that such zoning serves a legitimate purpose of the general welfare that justifies the interference with a landowner's normal prerogatives.[97]

C. *Constitutional Claims of Older Excludees*

Age-restrictive zoning ordinances, regardless of their exact formulation, uniformly prohibit residency by school-age children. The most exclusive ordinances bar occupancy by all persons under the specified minimum age, which of course excludes young spouses as well as children. Other less exclusive measures allow spouses below the minimum age and one or more children above high-school

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95. "The general rule . . . is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

For cases in which zoning restrictions were overturned on due process grounds, see Nectow v. City of Cambridge, 277 U.S. 183 (1928); Arvene Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

96. *See, e.g.*, Lamb v. City of Monroe, 358 Mich. 136, 99 N.W.2d 566 (1959); Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956) (upholding noncumulative zoning ordinances excluding residences from industrial districts).

97. *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (sustaining zoning ordinance against attack on due process grounds, the Court having found the legislative purpose to be sufficiently related to the public health, safety, and welfare).

Older owners might advance a similar claim based on fourteenth amendment property rights. Although eligible to reside in the retirement community, their control over the alienation of their property is impaired by the zoning ordinance that establishes a minimum age for occupancy since conveyance to younger persons or, in some instances, to older excludees is effectively precluded when the conveyee is not free to reside on the property. This claim carries considerably less force than does the claim of the excluded owners, however. Unlike excludees who have acquired property in the retirement community, the older owner is eligible to occupy his property. Moreover, property values are unlikely to be significantly affected, and may even be enhanced, by the indirect restraint on alienation so long as demand for retirement living remains high among middle-aged persons.

age (usually those aged nineteen or over). These ordinances thus operate to exclude older persons as well as younger persons, in that residents or potential residents who meet the minimum age requirements may nonetheless be excluded if they live with school-age children or, depending upon the ordinance, with a young spouse.

The Supreme Court has designated as "fundamental to the very existence and survival of the race" the right of privacy and choice in regard to marital and family matters.[98] An important early explication of this "fundamental" right is found in *Meyer v. Nebraska*,[99] where the Court overturned a state statute that forbade the teaching of any language other than English to school children prior to the ninth grade. The decision was based in part upon the parents' right under the "liberty" clause of the fourteenth amendment to control the education of their children. In attempting to delineate this right, the Court stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . .[100]

Two years later, in *Pierce v. Society of Sisters*,[101] the Court used a similar rationale to overturn a state statute that required all children between the ages of eight and sixteen to attend public school. Citing *Meyer*, the Court found that the act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[102] In a later case, *Prince v. Massachusetts*,[103] the Court described *Pierce* and *Meyer* as decisions that "respected the private realm of family life which the state cannot enter."[104]

The Supreme Court has also recognized a fundamental right to freedom from governmental interference in matters involving pro-

98. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

99. 262 U.S. 390 (1922).

100. 262 U.S. at 399.

101. 268 U.S. 510 (1925).

102. 268 U.S. at 534-35.

103. 321 U.S. 158 (1944).

104. 321 U.S. at 166. In *Prince* the Court did permit the state to enter some aspects of family life, however, by upholding the application of the state's child labor laws to religious leafletting by a nine-year-old Jehovah's Witness acting at the direction of her aunt and guardian.

creation. In *Skinner v. Oklahoma*,[105] the first case in this area, the Court applied strict scrutiny to invalidate on equal protection grounds a state statute authorizing sterilization of certain recidivist felons. Later, in *Griswold v. Connecticut*,[106] the Court invalidated on due process grounds a state statute forbidding the use of contraceptive devices. Justice Douglas' opinion found the statute violative of the right to privacy in marriage that, although nowhere specifically mentioned in the Constitution, lies "within the zone of privacy created by several fundamental constitutional guarantees."[107] *Eisenstadt v. Baird*[108] further defined the right of privacy and choice in matters of procreation by overturning a state statute that forbade the sale and advertisement of contraceptives to unmarried people. Similarly, in *Roe v. Wade*,[109] the Court relied on "[t]his right of privacy, whether founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people,"[110] in striking down on due process grounds Texas' anti-abortion statute. Finally, in *Cleveland Board of Education v. LaFleur*,[111] the right of family privacy was found to clash with a state statute mandating retirement of female workers in the fifth month of pregnancy. Overturning the measure on due process and equal protection grounds, the Court stated that it had "long recognized that freedom of personal choice

105. 316 U.S. 535 (1942).

106. 381 U.S. 479 (1965).

107. 381 U.S. at 485. More particularly, Justice Douglas found that the right to privacy resides within the "penumbra" of specific Bill of Rights' guarantees applicable to the states through the due process clause of the fourteenth amendment, including the first, third, fourth, and fifth amendments. 318 U.S. at 482-85. In a now-famous concurring opinion, Justice Goldberg advanced the view that the "liberty" clauses of the fifth and fourteenth amendments, which through the ninth amendment are not restricted to rights specifically mentioned in the first eight amendments, are the sources of the right to marital privacy. 381 U.S. at 493 (Goldberg, J., concurring). In describing the character of the right protected, Justice Goldberg declared that "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." 381 U.S. at 495 (Goldberg, J., concurring).

Justice Harlan, also concurring in the Court's judgment, declared that "[t]he Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom." In his view, the Connecticut statute infringed upon due process "because [it] violates basic values 'implicit in the concept of ordered liberty.'" 381 U.S. at 500. *See* Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). Justice White also based his concurrence in *Griswold* solely on the fourteenth amendment due process clause. 381 U.S. at 502.

108. 405 U.S. 438 (1972).

109. 410 U.S. 113 (1973).

110. 410 U.S. at 153.

111. 414 U.S. 632 (1974).

in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[112]

Besides child-rearing and procreation, the Court has recognized that the right of family privacy and choice extends to the selection of a spouse. *Loving v. Virginia*,[113] in which the Court in part used due process to invalidate Virginia's anti-miscegenation statute, contains a clear statement of the right:

> These statutes also deprive the [plaintiffs] of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.[114]

In a recent case, the Supreme Court held that the right to privacy and choice in family matters extends beyond parent-child and husband-wife relationships to encompass the "extended family" as well. Also, and perhaps more important for present purposes, the Court offered the first clear statement that certain zoning ordinances may by virtue of their exclusivity impinge on protected family rights and thus be subject to strict judicial scrutiny. *Moore v. City of East Cleveland*[115] concerned a housing ordinance limiting occupancy in the city to members of a single family. The ordinance's complicated definition of "family" excluded the combination of relatives living in Mrs. Moore's home, which consisted of Mrs. Moore, one or two of her sons, and two grandsons who were related to each other as first cousins, not as brothers.[116] Mrs. Moore was convicted of violating the ordinance. The Court, in an opinion written by Justice Powell,[117] reversed the conviction on the ground that the ordinance

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112. 414 U.S. at 639-40. *But cf.* 414 U.S. at 651, 652 (Powell, J., concurring) (noting that these freedoms are not absolute).

113. 388 U.S. 1 (1967).

114. 388 U.S. at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

115. 431 U.S. 494 (1977).

116. 431 U.S. at 496. As Justice Stevens notes in his concurring opinion in *Moore*, much of the litigation concerning single-family ordinances has addressed the question whether unrelated persons can be barred from residency. 431 U.S. at 515-19. The East Cleveland housing code was more restrictive than the usual single-family ordinance, in that occupancy was limited to certain combinations of relatives, thus barring some related persons.

117. The 5-4 decision inspired a total of six separate opinions: the majority opinion of Justice Powell (joined by Justices Blackmun, Brennan, and Marshall), concurring opinions by Justice Stevens and Justice Brennan (joined by Justice Marshall), and dissenting opinions by Chief Justice Burger, Justice Stewart (joined by Justice Rehnquist), and Justice White.

worked a denial of "liberty" and thus violated the due process clause of the fourteenth amendment.

Citing *Meyer, Pierce, Griswold,* and *LaFleur*, the Court pointed to the factor that distinguished the East Cleveland ordinance from the zoning ordinance upheld in *Belle Terre*:

> But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . .
>
> When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate.[118]

Adopting Justice Harlan's view of the concept of "liberty" as a dynamic "rational continuum" based on history and tradition,[119] the majority extended the family privacy cases, which were mainly concerned with couples and their dependent children, to find constitutionally protected rights for extended families as well.[120] Since the East Cleveland ordinance impinged on Mrs. Moore's "fundamental" right to live with other members of her family,[121] the Court resolved to "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[122]

To justify its restrictive definition of "family," the City of East Cleveland claimed an interest in limiting the burdens on its school

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118. 431 U.S. at 498-99 (emphasis original). By "*Euclid*," the Court was referring to Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), discussed in note 91 *supra*.

119. 431 U.S. at 501-02 (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).

120. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." 431 U.S. at 504.

121. Dissenting Justice Stewart, joined by Justice Rehnquist, objected both to the Court's recognition of this "new" constitutional right and, more generally, to the Court's failure to exercise proper restraint on this substantive due process issue. 431 U.S. at 531-41 (Stewart, J., dissenting). Justice White, also dissenting, asserted that "the interest in residing with more than one set of grandchildren is [not] one that calls for any kind of heightened protection under the Due Process Clause." 431 U.S. at 549 (White, J., dissenting). Chief Justice Burger's dissent was based upon Mrs. Moore's failure to exhaust administrative remedies. 431 U.S. at 521 (Burger, C.J., dissenting).

122. 431 U.S. at 499.

system and preventing overcrowding and traffic congestion. The Court, however, although acknowledging the legitimacy of those goals, concluded that the East Cleveland ordinance "serve[d] them marginally, at best."[123] In this regard, the Court noted that the ordinance was both underinclusive—for example, a dozen school-age children could live in a single-family dwelling with their parents or with their parent and grandparent without violating the ordinance —and overinclusive—for example, the ordinance would bar occupancy by an adult brother and sister who neither owned a car nor imposed upon the school system. In sum, the Court found the ordinance to have only "a tenuous relation" to the goals espoused, and thus it did not withstand the Court's scrutiny under the due process clause.[124]

The long line of cases vindicating a "fundamental" right to privacy and personal choice in certain matters involving marriage and the family has relevance to the claims of older persons who are excluded from residential areas by age-restrictive zoning ordinances on the basis of their family living arrangements. First, all such zoning restrictions limit the freedom to decide whether to bear children, a right recognized in *Skinner, Griswold, Eisenstadt,* and *Roe.* Under any formulation, these ordinances penalize older persons who decide to have and live with children either by denying such adults the eligibility to reside in the designated zone or by requiring them to move away from their homes should they be residing in the restricted community at the time a child is born. Second, the most restrictive formulation of age-restrictive zoning ordinances affects older persons in the choice of a spouse, a right defined and protected in *Loving.* Under these enactments an older person marrying a spouse below the minimum age for occupancy is for all practical purposes denied access to or forced to leave the community. Similarly, an older person might lose residential eligibility by marrying a spouse with young dependent children, even though the spouse might qualify by age. Finally, the older person's right to live with his children and grandchildren in an extended family group, which is recognized as "fundamental" in

123. 431 U.S. at 500.

124. 431 U.S. at 500. The Court's analysis and conclusions are reminiscent of those propounded by Justice Marshall in his dissenting opinion in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), discussed in text at notes 57-62 *supra.* Justice Marshall found the *Belle Terre* ordinance to be similarly under- and over-inclusive and thus insufficiently related to its declared purposes of preventing congestion and overcrowding. 416 U.S. at 18-19 (Marshall, J., dissenting).

Moore, is also limited by age-restrictive zoning. That limitation has perhaps the most widespread impact, since older persons, like Mrs. Moore, often assume the care and custody of school-age grandchildren. Again, the penalty for undertaking a family living arrangement similar to that of Mrs. Moore is denial of access to or expulsion from the retirement zone.[125]

The question that *Moore* and the other family privacy cases leave unanswered is whether a community might be able to present sufficient justification for the adoption of age-restrictive zoning provisions. Since the older-excludee plaintiffs can assert "fundamental" rights of family privacy, the courts will impose on the defendant community a substantial burden of justification. To withstand the plaintiff's challenge on due process or equal protection grounds, the community must demonstrate that "important" or "compelling" interests are in fact served by the ordinance. As the City of East Cleveland did in the *Moore* case, the community might defend its adoption of the age-restrictive zoning as necessary to prevent overcrowding in certain school districts and the resultant increased burden on taxpayers. In *Moore*, the Supreme Court found that goal to be "legitimate," although the East Cleveland ordinance was held to be insufficiently related to the purpose.[126]

In challenging those provisions in age-restrictive ordinances that prohibit older persons with young spouses, the excludees can make a forceful argument that the means employed are not adequately related to the ends desired. The exclusion of young spouses does nothing to diminish demand on the public schools. As for the provisions excluding children, the town can argue that at least in regard to the school district in which the retirement community is located, the exclusion relates directly to the goal of preventing financial burdens on the public schools. In this respect, the plain-

125. In *Moore*, to be sure, the entire City of East Cleveland was subjected to the family restriction, leaving Mrs. Moore and her grandchildren no housing alternative within the city. Assuming, instead, that only one residential district in town is designated as age-restricted, it might be argued that, since comparable housing alternatives exist within the town, those excluded or expelled have not suffered a legally cognizable harm. *Cf.* 431 U.S. at 550 (White, J., dissenting) (extending this argument to the availability of comparable housing within the entire metropolitan area). This suggested limitation of *Moore* is not persuasive. First, expulsion from one's home, even though comparable housing might be available locally, is a sanction sufficiently serious to warrant legal recognition and constitutional protection. Second, a holding that prescribes only city- or county-wide age restrictions leads to the anomalous result that a giant subdivision with a population of 30,000 might validly be designated an age-restricted community, whereas a small town with a population of 10,000 could not be so limited.

126. 431 U.S. at 500.

tiffs' challenge would be sustained on slightly different grounds from *Moore*. First, the purpose of avoiding the imposition of additional financial burdens on taxpayers might be found to be beyond the police power. More likely, such a fiscal motive could be found to be not sufficiently "important" or "compelling" to outweigh the "fundamental" right of older-excludee plaintiffs to be free in matters of procreation and to make private decisions about family living arrangements.

The town's other justification for the age-restrictive zoning provision would be the supposed purpose of increasing the available housing supply for the elderly. Age-restrictive measures, as they relate to the older excludees, serve this goal only very indirectly at best, since the exclusion of below-age spouses does nothing to increase housing opportunities for older people. In fact, the ban on young spouses is linked to the goal only to the extent that older residents marry fellow-agers because of the restrictions, a result that seems improbable. Neither does the exclusion of older persons who live with young children advance the stated purpose of increasing the housing supply for elderly housing consumers. Perhaps the ban on children might make housing more affordable by forestalling tax increases connected with school expansion. But again, ends and means are only tenuously linked.[127]

127. Another justification that the defendant township might offer is that minimum age restrictions are necessary to achieve the living environment most satisfying to the elderly. Minimum age restrictions effectively eliminate the noise, traffic, and commotion commonly associated with children and younger adults, disturbances which at least some elderly persons find greatly annoying. Similarly, it may be painful for the retired elderly person to be directly reminded of his own now-lost youth, or to accept that the younger and more vigorous must be permitted to lead in the community. Age-restrictive zoning clearly serves to insulate the elderly from these possibly unpleasant contacts. Given this line or argument, the asserted interest behind age-restrictive zoning becomes in some sense aesthetic. The state seeks not only to provide the elderly with housing, but also to see that they live in peace and tranquility.

An essentially similar purpose, though directed toward an entire community rather than simply a development for the elderly, was acknowledged by the Court to be legitimate in *Belle Terre*. Those presumably affected by the statute were, like the actual plaintiffs in the case, students or other more or less transient young adults. The fact that the ordinance was designed to preserve Belle Terre's tranquil character by excluding those deemed most likely to disrupt it did not persuade the Court that the village had exceeded its authority. In affirming this aesthetic dimension to the village's zoning power, the Court stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quite seclusion and clean air make the area a sanctuary for people.

416 U.S. at 9.

If, as seems likely, the Court were to accept the legitimacy of the aesthetic inter-

To summarize, older excludees denied residency under the age-restrictive zoning ordinance as a result of the family arrangements they have formed can claim that their fundamental rights of familial association and privacy have been infringed. This claim is strongly supported by the Supreme Court's recent decision in *Moore*. Since excludees have invoked a fundamental right, it is unlikely that the ordinance can be justified. Thus, as applied to older excludees, age-restrictive zoning ordinances appear to be unconstitutional.

III. Validity of Age-Restrictive Covenants

Residential age limitations are imposed in some retirement communities through a scheme of private restrictive covenants or declarations rather than by zoning legislation. These privately imposed restrictions raise the issue whether the fourteenth amendment can be employed to bar their enforcement, at least against older excludees.[128]

The *Civil Rights Cases*[129] established the proposition that the constraints of the fourteenth amendment apply only to "state ac-

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est served by age-restrictive zoning in light of *Moore*, the question would become whether it would also find it to be "compelling." Since it seems difficult to argue that there is not at least a very high correlation between youth and the types of activity that the elderly may find disturbing, a challenge to the validity of the ordinance would focus not so much on the sufficiency of the relationship between means and ends as on whether the ends are so compelling as to justify the ordinance's infringement on family privacy rights.

Although the issue was not directly addressed in *Moore*, that case, when read in conjunction with *Belle Terre*, seems clearly to limit the state's power to zone in favor of certain intangible interests at the point where such zoning intrudes on family privacy. Of course, the East Cleveland ordinance was also deficient, as was emphasized in Justice Powell's plurality opinion, in that it drew illogical distinctions between various family groupings and seemed based on the assumption that the type of family rather than its size indicated its capacity for increasing traffic or otherwise disturbing the community. But, while this perhaps would offer the Court a basis for distinguishing the questions presented by the East Cleveland ordinance from the age-restrictive zoning ordinance, the importance the Court attached to the family rights found violated in *Moore* argues strongly that the distinction would be deemed insubstantial. More directly, if the right of family members to live with one another as they please can be limited simply by findings that exercise of the choice impairs the serenity of their neighbors, then the right cannot fairly be termed fundamental.

128. Only one reported case has dealt with the enforceability of age-restrictive covenants. In Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974), the young defendants purchased a mobile home in a subdivision and resided there with two children despite a restrictive covenant containing a minimum age provision for occupancy. The Arizona Court of Appeals simply assumed the presence of state action in finding the deed restriction to be constitutionally valid. The court rejected both the claims that the provision was unenforceably vague and violated public policy and the equitable defenses of unclean hands and changed circumstances. The case is analyzed in Note, *Judicial Enforcement of Restrictive Covenants Against Children: An Equal Protection Analysis*, 17 Ariz. L. Rev. 717 (1975).

129. 109 U.S. 3 (1883).

tion," as opposed to purely "private" conduct. Though simple to state, the proposition has proved troublesome and vagarious in its application, likely because it seeks to define such fundamental political constructs as the limit on federal interference with state conduct and even on governmental intervention into private conduct. Thus the definitions of what is "state" and what is "private" action have developed over the years in a pattern that is not entirely coherent or logical, and is probably best explained by an examination of the underlying political considerations. Although a comprehensive overview of the concept of state action is beyond the scope of this work, certain generalities will be hazarded about what does—and does not—constitute "state action," so that an inquiry can be made into whether the fourteenth amendment's requirements of fairness and equality apply to age-restrictive covenants.

One proposition that is now undisputed is that the fourteenth amendment does not apply only to actions initiated by the state. As the Supreme Court declared in one of its more recent pronouncements on the question, "Our cases make clear that the impetus for the forbidden discrimination need not originate with the state if it is state action that enforces privately originated discrimination."[130] Out of this basic notion have come three more or less distinct theories that account for judicial findings of "state action" in cases involving the "non-obvious involvement of the state in private conduct."[131] The first two theories focus on the state and its involvement or relationship with the entity that made the challenged action. One is the "state contacts" theory: state action may be found where the private entity is dependent upon the state for its existence, is heavily regulated by the state, or exists in a symbiotic relationship with the state.

An examination of the Supreme Court's decisions in this area indicates, however, that its view of the state contacts theory has become increasingly restrictive. In *Burton v. Wilmington Parking Authority*,[132] the case from which the theory first developed, the Court found state action in a private restaurant's refusal to serve black patrons. The Court's decision focused upon the facts that the restaurant was located in a parking building owned by the Wilmington Parking Authority, a state agency, that the restaurant was the Authority's lessee, and that the Authority used rent paid

130. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).

131. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

132. 365 U.S. 715 (1961).

by the restaurant to defray certain expenses arising out of the operation of the building. In the next state contacts case, however, *Moose Lodge No. 107 v. Irvis*,[133] the Court refused to expand the theory's application, as it found no state action where a private club operating under a state liquor license refused to serve a black guest solely because of his race. *Jackson v. Metropolitan Edison Co.*,[134] the most recent of the state contacts cases, construes the theory even more narrowly. In that decision, the Court held that no state action existed where a heavily regulated, state licensed, privately owned electric utility company that enjoyed state-created monopoly status and enforced tariff regulations promulgated by the company but authorized and approved by the state terminated service to the petitioner allegedly without notice or hearing.[135]

The other theory of state action that focuses on the state's relationship with the private entity developed from a line of Supreme Court decisions beginning with *Marsh v. Alabama*.[136] According to this theory, if the private entity is performing what is traditionally considered to be a "public function"—*i.e.*, one associated with government and sovereignty—the actions of that private entity are "state action" embraced by the restrictions and limitations of the fourteenth amendment. In the famous *Marsh* case, the Court held that a corporate property owner, the proprietor of an old-fashioned company town, was constrained by the provisions of the first and fourteenth amendments, since the privately owned town was "built and operated primarily to benefit the public and since [its] operation is essentially a public function."[137] The Court's more recent development of this theory, which has occurred principally in a series of shopping center cases, again indicates a trend toward a restrictive definition of state action.[138] The Court has now rejected the claim, based on *Marsh*, that large, modern, suburban shopping centers have replaced the traditional central business district and

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133. 407 U.S. 163 (1972).

134. 419 U.S. 345 (1974).

135. Justice Douglas dissented in *Metropolitan Edison* on the grounds that the company's actions were "sufficiently intertwined with those of the State" and "sufficiently buttressed by state law" to constitute state action. 419 U.S. at 362 (Douglas, J., dissenting).

136. 326 U.S. 501 (1946).

137. 326 U.S. at 506.

138. Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). *See also* Evans v. Newton, 382 U.S. 296 (1965).

thus perform an equivalent public function. In the most recent case in this line, *Hudgens v. NLRB*,[139] the Court found no state action—and thus no violation of the first and fourteenth amendments—in the decision by the proprietor of a large shopping center to prohibit peaceful labor picketing on the premises.[140]

A third discernible theory of state action focuses not so much on the state's role and relationship with the private entity as upon the substance of the challenged private action itself. This theory, propounded in *Shelley v. Kraemer*,[141] has seen very little development in the case law, perhaps because it carries implications of virtually limitless governmental intervention into what has traditionally been considered purely private, individual conduct. In particular, the *Shelley* doctrine says that judicial enforcement of a racially discriminatory private agreement[142] is constitutionally impermissible. Here the constitutional constraints are applied not because of the state's special relation to the acting entity or because the private action is essentially "governmental" in character, but for some other reason that has proved to be difficult to isolate and identify with any degree of precision.[143] Whatever the exact rationale and scope of *Shelley*, the Supreme Court has never extended the case to render constitutionally unenforceable any private discrimination drawn on nonracial grounds.[144]

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139. 424 U.S. 507 (1976).

140. In *Hudgens*, the Court expressly overruled its decision in Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), which had been extensively but unconvincingly distinguished in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). 424 U.S. at 517-20. The Court remanded *Hudgens* to the court of appeals with directions to remand the case to the National Labor Relations Board for consideration under the National Labor Relations Act alone, without reference to the first amendment. Justice Marshall, joined by Justice Brennan, dissented on the grounds that the case should have been decided on statutory rather than constitutional grounds and that *Logan Valley* should not be overruled. 424 U.S. at 525 (Marshall, J., dissenting).

141. 334 U.S. 1 (1948).

142. The prohibited judicial enforcement includes not only the injunctive relief barred in *Kraemer* but awards of money damages as well. Barrows v. Jackson, 346 U.S. 249 (1953).

143. For examples of various attempts to formulate a rationale, see Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

144. *See, e.g.*, Black v. Cutter Laboratories, 351 U.S. 292 (1956), in which the Supreme Court declined to overturn a decision of the Supreme Court of California construing a collective bargaining agreement to render Communist Party membership "just cause" for an employee's dismissal. The Court viewed the California decision

In order to assess the relation of the state action theories to the validity of privately imposed residential age restrictions, it might be useful to posit a hypothetical situation. Suppose that a real estate developer offers a large number of dwelling units for sale pursuant to a scheme of development that includes express restrictions on age. The restrictions may be imposed in the deeds to individual units or, in a condominium offering, in the declaration of condominium and the individual deeds. It is reasonable to assume that, pursuant to the local government's exercise of its state-delegated authority to regulate land subdivision or condominium development, the developer has been required to obtain authorization from several local governmental offices before proceeding with the development. The local government has likely demanded certain concessions from the developer—for example, the dedication of land for streets, schools, or parks—as a condition of its approval of the project. The developer might also be subject to state "blue sky" legislation, which regulates the offering of the subdivided lots or condominium units for sale and makes state approval of the terms of the offering a precondition of sale. Consumer protection measures of this sort usually require the filing of a registration statement with the state's real estate department that sets forth the elements of the development scheme, including the plan to impose age limitations. In sum, the hypothetical developer is subjected to extensive governmental regulation and is in fact dependent upon governmental approval for the success of the project.

Given the present state of the case law, it seems unlikely that a court would find state action under the state contacts theory in the developer's imposition of age restrictions on occupancy. Of the state contacts cases, *Burton* provides the most support for such a finding since in that case the state agency knowingly allowed racial discrimination to be carried out by a private instrumentality when the agency could have easily prevented it as an administrative matter. The developer hypothetical is similar to *Burton* in that the state or local government could prevent the discrimination against young persons by denying permission to develop and sell the units unless the age restrictions were removed. Moreover, in both *Burton* and the hypothetical case the level of contacts between the state and the

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solely as a matter of contract construction under local law and found no substantial federal question presented. Justice Douglas, joined by Chief Justice Warren and Justice Black, dissented on the ground that the state court's action invoked the *Shelley v. Kraemer* principle. 351 U.S. at 302.

private entity is high, in the developer situation as a result of extensive governmental regulation and in *Burton* because of the landlord-tenant relationship existing between the parking authority and the restaurant.

Chances are, however, that an argument based on the *Burton* precedent would not prevail in the hypothetical case, since there are important distinctions between the cases. In *Moose Lodge*, the Court distinguished *Burton* by noting that a relationship of mutual advantages between the government and the private entity might be required to find state action:

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant.[145]

No such mutually beneficial relationship exists in the developer case, where, as in *Moose Lodge*, the state does not derive any direct benefit from the developer's activity.[146] Also, *Burton* involved racial discrimination, a fact that might have led the Court to impose responsibility on the state. The Court might view nonracial limitations of the type imposed by the developer with less hostility and suspicion. Moreover, the Court's later decisions in *Moose Lodge* and *Metropoltian Edison* have circumscribed the *Burton* precedent. *Moose Lodge* is relevant to the developer hypothetical because it holds that state licensing is by itself an insufficient contact for state action. In *Metropolitan Edison*, the Court refused to find state action in the face of extensive state involvement that included licensing, regulation, and even granting the private entity a monopoly for the provision to the public of an essential service. Thus, even though the state's regulatory contacts with the residential land developer are extensive—more extensive, perhaps, than in *Moose Lodge*—they still do not rise to the level found insufficient for state action in *Metropolitan Edison*. As a result, the state contacts theory

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145. 407 U.S. at 175.

146. Though it is, of course, possible that the town in which an age-restricted development is located might gain increased tax revenues or other growth-related advantages, such benefits would appear to be incidental in comparison with the income received from the leasing of state-owned lands to a private commercial enterprise.

will not support a finding of state action in the developer's imposition of age restrictions.

The public function rationale affords little more basis for a finding of state action. In support of the imposition of constitutional constraints, a claim could be made under this theory that the adoption of private use restrictions in connection with land development is the functional equivalent of zoning—the public regulation of land use—with the private developer standing in the shoes of the local government. Certainly private land use limitations greatly concern the public interest and have an important cumulative impact on the nature and quality of our cities and towns. Also, it appears that the larger the development, the more the privately created scheme of land use restrictions takes on the character of zoning legislation, which typically affects whole districts covering relatively large land areas.

But under current case law these considerations are probably insufficient to bring the developer's actions under the same constitutional constraints that restrict the local government. In the shopping center cases culminating with *Hudgens*, the Court effectively limited *Marsh* to its facts and sharply curtailed the public function theory as a basis for governmental regulation of action that is formally private. *Hudgens* clearly demonstrates both the Court's reluctance to expand the range of federal control and its concern for the right of an owner to exercise broad authority over the use of his private property.[147] These conservative instincts would almost surely preclude a finding of state action when a private land developer imposes an age restriction on residential use. Not only would that finding circumscribe the owner's control of his private property, but it would also create endless new opportunities for litigation. If the Court were to find that private land development was invested with a governmental character, then all the private deed restrictions common to residential subdivision schemes might be subject to constitutional challenge. Size, height, and setback limitations, aesthetic requirements like sign control and architectural review, and amenity provisions like the obligation to maintain common areas might all be attacked as discriminatory or unreasonable under the fourteenth amendment. The cases indicate the Court's unwillingness to extend constitutional limitations—and thus the scope of

147. The Court quoted from the *Logan Valley* dissent of Justice Black: "The question is, Under what circumstances can private property be treated as though it were public?" 424 U.S. at 516 (quoting 391 U.S. at 332).

governmental intervention into private decisionmaking—to that degree.

An argument based on *Shelley v. Kraemer* seems the least likely of the three to support a finding that the residential land developer's imposition of age restrictions constitutes state action. Simply put, the *Shelley* principle, with its potential for vast escalation of federal interference with private conduct, has never been extended beyond private discrimination based on race—the evil to which the fourteenth amendment was originally directed. Thus, it is unlikely that any court would hold that judicial enforcement of a privately imposed minimum age limitation would expose that limitation to the strictures of the fourteenth amendment.[148]

Finally, it is important to note that persons seeking to *enforce* private age restrictions are in a position to invoke constitutionally protected rights and liberties of their own. As one commentator has observed, enforcement of a discriminatory private agreement requires the court to choose between competing claims of equality and liberty.[149] Opposing the defendants' assertions of the right to equal treatment in obtaining a residence, the plaintiffs in these covenant actions will claim "the freedom to choose one's neighbors, to make contracts and have them enforced, to deal with whom one chooses . . . to be whimsical, sentimental, irrational, capricious."[150]

148. A further development should be noted in connection with state action and enforcement of residential age restrictions. At least one state—Arizona—has passed legislation to aid in the enforcement of privately created age limitations. The Arizona provision, an amendment to the state's residential landlord and tenant act, makes it illegal for a person to rent his property in circumstances that, were the transaction a sale, would constitute a violation of a covenant against the sale of the property to persons who have a child or children living with them. ARIZ. REV. STAT. §§ 33-303(B), -1317(B) (Supp. 1976). Additionally, the measure prohibits a person from renting to people with children, even in the absence of an age-restrictive covenant, in a subdivision "presently designed, advertised and used as an exclusive adult subdivision." *Id.* Violation of the statute is made punishable by fine and, for repeated offenses, by fine and imprisonment. No cause of action for violation of the provision is granted to private parties, and there are no recorded cases in which the state has prosecuted violators under the statute.

A prosecution by the state under the statute would be state action, of course, and thus would present serious constitutional questions. The measure discriminates against persons not on the basis of age, but on account of family status—that is, whether they have children living with them determines their eligibility to rent. In light of the Supreme Court's decision in *Moore* and the other cases noted above in connection with the rights of older excludees, *see* notes 98-125 *supra* and accompanying text, the class excluded by the Arizona statute could invoke the compelling state interest standard by claiming infringement upon fundamental privacy rights. Property owners might also claim that the measure unreasonably interferes with their fourteenth amendment property rights by severely diminishing the class of persons to whom they can rent. *But see* note 97 *supra.*

149. Henkin, *supra* note 143, at 488.

150. *Id.*

Specifically, the plaintiffs' claim is that the court's refusal to enforce the private age limitation would be state action denying them rights of contract and association protected by the Constitution.

How the court would resolve the conflict between liberty and equality in the area of private age limitations has already been addressed in the analysis of the application of the state action doctrine to these restrictions. To the extent that the courts have decided to favor the claim of equality over the freedom to discriminate, they have found state action in what is formally private conduct and then applied the strictures of the equal protection clause to that conduct. *Shelley v. Kraemer* is a clear example of this result.[151] Under present case law, however, it seems unlikely that a court would find state action in the imposition of private age restrictions. That conclusion, coupled with the demonstrated willingness of courts in the zoning cases to endorse residential age limitations as beneficial, suggests that the plaintiffs' invocation of liberty and property rights will lead to enforcement of private age-restrictive covenants.[152]

IV. Conclusion

The planned retirement community has emerged as a significant element in the national housing picture. Residential age restrictions are imposed in connection with the development of most retirement communities, either by zoning ordinance or private covenant. The restrictions uniformly exclude school-age children from residency. Many establish a minimum age for occupancy, typically fifty-two or fifty-five, sometimes with exceptions for a spouse, a domestic employee under the minimum age, or for children beyond high-school age.

Several recent cases, including decisions from the New York Court of Appeals and the New Jersey Supreme Court, have sustained the validity of age-restrictive zoning ordinances against attack on statutory and constitutional grounds. Although brought by residents and taxpayers who own property near the area designated in the ordinance as a retirement district, the cases have turned on the personal rights of young persons excluded from occupancy. The cases show that age-restrictive zoning can withstand challenge by or on behalf of young excludees on equal protection and due process

151. Even absent state action, liberty and property claims will not guarantee a freedom to discriminate on the basis of race. *See, e.g.*, Railway Mail Assn. v. Corsi, 326 U.S. 88 (1945).

152. As with other restrictive covenants, enforcement of private age restrictions

grounds. Young-agers do not constitute a suspect class and cannot assert fundamental privacy, association, or travel rights sufficient to invoke the court's strict scrutiny and the suspension of the presumption of legislative validity. As applied to young excludees, age-restrictive zoning provisions have been justified as measures designed to increase the supply of housing for the elderly, although some have appeared to be aimed instead at increasing the housing supply for relatively affluent middle-agers.

Age-restrictive zoning ordinances, however, operate to exclude persons on the basis of their family status as well as because of their age. Thus, an older person will be barred when he lives with a school-age child or, depending upon the ordinance, with a young spouse. The rights of older excludees have not been asserted or determined in any case. But on the basis of current Supreme Court case law, it appears that age-restrictive zoning ordinances are unconstitutional when enforced against older excludees, since the measures intrude upon fundamental rights of privacy and association involving marriage and the family. As applied to older excludees, these restrictions at best serve only indirectly to achieve the goal of increasing the housing supply for the elderly, and thus they could not withstand challenge by these plaintiffs, especially if the compelling state interest standard were adopted.

As for privately imposed residential age limitations, the threshold validity question is whether constitutional strictures can be applied

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might be defeated by the assertion of certain nonconstitutional defenses, such as the traditional equitable defenses of unclean hands, laches, acquiescence, and changed circumstances. *See* RESTATEMENT OF THE LAW OF PROPERTY §§ 560-62, 564 (1944); 2 AMERICAN LAW OF PROPERTY §§ 9.38-.39 (A.J. Casner ed. 1952); 5 POWELL ON REAL PROPERTY, §§ 683-84 (P. Rohan rev. ed. 1974). Although the traditional view is that equitable defenses are available only when injunctive relief is sought and thus cannot be asserted in an action for damages, RESTATEMENT, *supra* §§ 561, comment *d*; 562, comment *c*; 563, comment *b*, others have taken the position that a defense sufficient in equity should also be sufficient at law to bar enforcement of the promise, 5 POWELL, *supra* § 684.

For example, in actions to enjoin the sale or rental of property in the retirement community to young persons, the defendant property owners might claim the common-law defense that minimum age restrictions on occupancy constitute an indirect but effective and unreasonable restraint on alienation. *See* RESTATEMENT, *supra* § 406, comment *c*. This argument parallels the fourteenth amendment property rights claim of defendant property owners in age-restrictive zoning cases, *see* text at notes 95-97 *supra*, and probably has as little chance of success so long as there is sufficient demand for retirement community living among eligible older persons. The zoning cases, though decided on constitutional grounds, demonstrate the courts' willingness to find a worthwhile purpose behind the imposition of residential age restrictions, a factor that is an important determinant of the reasonableness of the restraint, *see* RESTATEMENT, *supra* § 406, comment *i*.

to bar their enforcement, at least against older excludees. None of the theories of state action seems to support application of the fourteenth amendment to private age restrictions. Thus, unless facts are present giving rise to one of the traditional equitable defenses, it appears that private age restrictions are legally enforceable.