Montana Law Review

Volume 42
Issue 1 *Winter 1981*

Article 8

January 1981

The Definition of "Family" in Single-Family Zoning

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THE DEFINITION OF "FAMILY" IN SINGLE-FAMILY ZONING

I. INTRODUCTION

May a city limit residency in single-family zones by defining "family" strictly in terms of legal or blood relationships or by limiting the number of unrelated persons that may constitute a "family"? In *State v. Baker*,[1] the Supreme Court of New Jersey held that the use of such narrow definitions of family in zoning ordinances is too restrictive of individual rights and therefore violates the state's constitution. A similar decision was rendered this year by the California Supreme Court, *en banc*, in *City of Santa Barbara v. Adamson*.[2] The state courts chose not to follow the United States Supreme Court decision of *Village of Belle Terre v. Boraas*,[3] which held that use of a narrow definition of family in zoning ordinances is valid under the United States Constitution.

The legitimacy of single-family residence zoning as a means of insuring optimum conditions for family living[4] was established in two federal cases, *Euclid v. Ambler Realty Co.*[5] and *Nectow v. Cambridge*.[6] However, the particular definition of family in city ordinances has created problems.[7] In its traditional usage, "family" means persons related by blood, marriage, or adoption. This definition has been found to be unreasonably restrictive for zoning purposes because zoning may legitimately regulate the *use of land*, but not the internal composition of households.[8] Definitions of family in zoning ordinances that employ a concept of family use, as illustrated below, have been less troublesome for the courts than those

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1. 81 N.J. 99, 405 A.2d 368 (1979).
2. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).
3. 416 U.S. 1 (1974).
4. New Jersey's own version of the legitimate concerns of residential zoning is stated in *Baker*:

> Local governments are free to designate certain areas as exclusively residential and may act to preserve a family style of living. A municipality is validly concerned with maintaining the stability and permanence generally associated with single-family occupancy and preventing uses resembling boarding houses or other institutional living arrangements. Moreover, a municipality has a strong interest in regulating the intensity of land use so as to minimize congestion and overcrowding. (citations omitted.)

Baker, 81 N.J. at ___, 405 A.2d at 371.

5. 272 U.S. 365 (1926).
6. 277 U.S. 183 (1928).
7. *See* Annot., 71 A.L.R.3d 693 (1976).
8. Baker, 81 N.J. at ___, 405 A.2d at 371; Adamson, 27 Cal. 3d at ___, 610 P.2d at 441, 164 Cal. Rptr. at 545. *See generally* Annot., 71 A.L.R.3d 693 (1976).

that prescribe family composition.[9] The following samples illustrate the most common definitions of family in zoning ordinances:

1. One or more persons living and cooking together as a single housekeeping unit.
2. One or more persons related by blood, marriage, or adoption living together as a single housekeeping unit.
3. One or more persons related by blood, marriage, or adoption, *but no more than two persons not so related,* living together as a single housekeeping unit.

The first definition focuses on describing family use, and therefore expands the traditional definition of family. A family is simply any group of persons who live together as a family unit. The two other definitions restrict residential occupancy by prescribing the composition of family units in traditional terms. The effect of the last two definitions in zoning ordinances is to prohibit groups that do not fit the definition from living in a single-family zone, though they live as a family. Such a group cannot lawfully live in any dwelling unit designated for family use.

The justification given for narrow traditional definitions of family in zoning is that groups of unrelated persons living together create more traffic and population density problems than does the traditional family.[10] The control of these kinds of problems has always been a legitimate object of land use control by municipalities through single-family zoning. The validity of such assumptions about the characteristics of families, however, has been eroded in recent years.[11] Changing lifestyles and increased mobility have significantly affected family living. In many cases, "voluntary families," such as those in *Baker* and *Adamson* described below, or other groups of people living together as a family, appear to be different from the traditional family only because they lack legal or blood relationships. In *City of Des Plaines v. Trottner,* the Supreme Court of Illinois observed:

> In terms of permissible zoning objectives, a group of persons bound together only by their common desire to operate a single housekeeping unit, might be thought to have a transient quality

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9. Moore v. City of East Cleveland, 431 U.S. 494, 515 (1977) (Stevens, J., concurring); Note, *Excluding the Commune from Suburbia; The Use of Zoning for Social Control,* 23 HASTINGS L. REV. 1459, 1464 (1972) [hereinafter cited as *Excluding the Commune*].

10. Boraas, 416 U.S. at 9. *See also* City of Des Plaines v. Trottner, 34 Ill. 2d 432, 437, 216 N.E.2d 116, 119 (1966).

11. Baker, 81 N.J. at ___, 405 A.2d at 372. *See also* Note, *Burning the House to Roast the Pig: Unrelated Individuals and Single Family Zoning's Blood Relation Criteria,* 58 CORNELL L. REV. 138 (1972) [hereinafter cited as *Burning the House*]; *Excluding the Commune, supra* note 9, at 1464.

> that would affect adversely the stability of the neighborhood . . . . And it might be considered that a group of unrelated persons would be more likely to generate traffic and parking problems than would an equal number of related persons.
>
> *But none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar.*[12]

The rationale for the narrow traditional definition of family in zoning ordinances is thus no longer consistently supported in fact, and use of criteria based on legal or blood relationships has only a tenuous relationship to legitimate land use control. As the court stated in *Baker*, "[a] city must draw a careful balance between preserving family life and prohibiting social diversity."[13]

Accordingly, the courts have upheld the single-housekeeping-unit definition of family that focuses on family use of dwellings.[14] In some states, family definitions that focus on legal or blood relationships have been held invalid as applied to particular groups, such as stable voluntary families or religious groups.[15] In some states, the traditional definition of family in zoning ordinances has been found to exceed the authority given cities by the states' zoning enabling acts.[16] In New Jersey and California, the restrictive traditional definition of family in zoning has been held to violate those states' constitutions. In states with similar constitutions, the validity of zoning ordinances prescribing family composition in terms of legal or blood relationships may be subject to judicial attack. One should keep in mind that the New Jersey and California courts took different approaches to the constitutional issue and therefore followed different lines of authority. *State v. Baker* is based primarily on substantive due process, while *City of Santa Barbara v. Adamson* is based on California's express right to privacy. Thus, whether a state court will follow *Baker*, *Adamson*, or *Boraas* depends upon the individual state's constitution and the

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12. City of Des Plaines v. Trottner, 34 Ill. 2d 432, 437, 216 N.E.2d 116, 119 (1966) (emphasis added).

13. Baker, 81 N.J. at ___, 405 A.2d at 371. *See also* Moore v. City of East Cleveland, 431 U.S. 494, 518 (1977) (Stevens, J., concurring).

14. Moore v. City of East Cleveland, 431 U.S. 494, 516-17 (1977).

15. Note, *Developments in the Law of Zoning*, 91 HARV. L. REV. 1427, 1574 (1978) [hereinafter cited as *Developments*]; Annot., 71 A.L.R.3d 693 (1976). *But see* Moore v. City of East Cleveland, 431 U.S. 494, 516 n.7 (1977) (groups that have not fared well, such as fraternities, sororities and small institutions).

16. *E.g.*, City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756 (1974); City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966). *See also Burning the House, supra* note 11, at 161.

court's interpretation of it.

This note will begin with a discussion of two federal cases on the definition of family in single-family zoning, *Village of Belle Terre v. Boraas* and *Moore v. City of East Cleveland.* The prior state law of New Jersey and California will be presented as background for the recent state court decisions. This note will then analyze *State v. Baker* and *City of Santa Barbara v. Adamson,* and conclude with an outline of factors that will be essential to the preparation and decision of a case like *Baker* or *Adamson* in the courts of Montana and other states.

II. Prior Law

A. *United States Supreme Court*

The leading case of *Village of Belle Terre v. Boraas*[17] has had an impact on nearly all subsequent state decisions. The ordinance in *Boraas* limited to two the number of unrelated persons who could occupy a single-family dwelling. The defendants were the owners of a single-family rental dwelling and their tenants were six unrelated college students.

Although the ordinance was challenged on several constitutional grounds, the Court's decision was based only on equal protecton analysis. The Court held that the classification of related and unrelated persons for differential treatment did not violate fundamental rights such as privacy or association.[18] The Court's conclusion on this pivotal issue was given without reasoning by simply citing past federal cases establishing these rights in other areas.[19] Since the ordinance was thus classified as social or economic legislation, it must only be reasonable and bear a rational relationship to zoning objectives. The Court held that the ordinance met this standard test for social or economic legislation,[20] and summarily accepted the allegations that unrelated persons living together may contribute to density, traffic, and congestion problems. The connection was held sufficient to justify a classification not subject to strict scrutiny.[21]

Mr. Justice Marshall's dissent objected to the majority's conclusion that no fundamental rights were infringed. He argued that the rights violated were indeed those of privacy and association,

17. 416 U.S. 1 (1973).
18. *Id.* at 7.
19. *Id.*
20. *Id.* at 8.
21. *Id.* at 9.

and that these rights encompass the right to choose one's living companions and establish a home. The infringement of these rights, Mr. Justice Marshall assserted, subjects the ordinance to a much stricter test than mere rationality.[22] He concluded that the distinction created by the numerical limit on households of unrelated persons did not meet the strict scrutiny test and made the ordinance unconstitutional.[23]

In *Baker*, the court adopted this reasoning and expressly held *Boraas* dispositive of federal issues only.[24] The California court, in *Adamson*, quoted Justice Marshall's dissent and stated that the federal right of privacy is much narrower than that envisioned by the California voters when they added it to the constitution.[25]

Moore v. City of East Cleveland,[26] a substantive due process case, was decided by the United States Supreme Court four years after *Boraas* and is important to understanding the *Baker* and *Adamson* decisions. The city ordinance challenged in *Moore* allowed only members of the nuclear family, that is, parents and their children, to occupy a family dwelling unit. The plurality Court announced that the ordinance violated substantive due process and found it unnecessary to reach the equal protection challenge. The right that the ordinance impermissibily infringed was "freedom of personal choice in matters of marriage and family life."[27] The *Boraas* standard of rationality was held inapplicable because fundamental rights of traditional families were affected.

The New Jersey court in *Baker* expressly acknowledged that *Boraas* has been criticized in light of *Moore*.[28] The *Baker* court suggested that *Boraas* may have been undetermined by the *Moore* Court's broad description of the right to freedom of choice in matters of family life, although that suggestion has not been addressed in the federal court. The *Moore* opinion was important to the *Baker* court for its support of the proposition that restrictive definitions of family in zoning infringe upon the fundamental rights of nontraditional as well as traditional families.[29]

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22. *Id.* at 15 (Marshall, J., dissenting).

23. *Id.* at 20.

24. Baker, 81 N.J. at ___, 405 A.2d at 374.

25. Adamson, 27 Cal. 3d at ___, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.

26. 431 U.S. 494 (1977). Four justices joined in the substantive due process opinion. Justice Stevens concurred in judgment only and wrote a separate opinion based on due process analysis.

27. Moore, 431 U.S. at 519 (citing many federal cases).

28. Baker, 81 N.J. at ___, 405 A.2d at 374. *See also Developments, supra* note 15, at 1568-78.

29. Moore, 431 U.S. at 519 (Stevens, J., concurring). *See also* Note, *Moore v. City of East Cleveland: The Emergence of the Right of Family Choice in Zoning*, 5 PEPPERDINE L.

B. *New Jersey's Prior Law*

Examination of the New Jersey court's decisions concerning restrictive definitions of family reveals the court's gradual progression toward the constitutional decision in *Baker*. *Marino v. Borough of Norwood*[30] is representative of several cases in which the court held that ordinances using the traditional definition of family were invalid as applied to a particular group.[31] In dicta, the *Marino* court posed the constitutional question finally decided in *Baker*.[32]

Several other New Jersey cases concerning restrictive definitions of family in zoning ordinances were decided on the grounds that such ordinances exceeded the authority given by the state's zoning enabling act.[33] For example, in *Y.M.C.A. v. Board of Adjustment*,[34] the court stated that zoning power exists to regulate physical use of land and not to distinguish among occupants making the same physical use. In *Gabe Collins Realty v. City of Margate*,[35] the court stated that zoning ordinances containing a restrictive definition of family may not be intended or expected to solve social problems that may be associated with any type of group living, e.g., noisy, obnoxious, or immoral behavior.[36]

Kirsch Holding Company v. Borough of Manasquan[37] and *Berger v. State of New Jersey*,[38] the court's most recent precedents on point, were primarily relied upon in *Baker*. *Berger* and *Kirsch* were both constitutional decisions that held that the restrictive traditional definitions of family in the zoning ordinances in question offended substantive due process. The *Baker* court asserted that *Kirsch* and *Berger* established the rule that zoning methods shall not unnecessarily burden the freedom and privacy of unre-

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REV. 547 (1978).

30. 77 N.J. Super. 587, 187 A.2d 217 (1963).

31. *E.g.*, Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976). *But see* City of Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (1961) (family with foster children held in violation of ordinance).

32. Marino, 77 N.J. Super. at 592, 187 A.2d at 220.

33. *E.g.*, J. D. Constr. Corp. v. Board of Adjustment, 119 N.J. Super. 140, 290 A.2d 452 (1972); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); Gabe Collins Realty v. City of Margate, 112 N.J. Super. 341, 271 A.2d 430 (1970); Larson v. Mayor of Spring Lake Heights, 99 N.J. Super. 365, 240 A.2d 31 (1968).

34. 134 N.J. Super. 384, 391, 341 A.2d 356, 359 (1975).

35. 112 N.J. Super. 341, 344, 271 A.2d 430, 434 (1970).

36. The California court in *City of Santa Barbara v. Adamson* specifically discounts arguments that groups of unrelated persons living together hazard an immoral environment for children. 27 Cal. 3d at ___, 610 P.2d at 441, 164 Cal. Rptr. at 544.

37. 59 N.J. 241, 281 A.2d 513 (1971).

38. 71 N.J. 206, 364 A.2d 993 (1976) (dealing with protective covenants hinging on the city's definition of family).

lated individuals who may choose to live together.[39] The *Baker* decision is based partially on the right to privacy which the court construed in *State v. Saunders*.[40] That right was held to encompass decisions concerning family life, and to be broader than the federal right in some areas.[41]

C. *California's Prior Law*

The California court in *Adamson* relied entirely on its leading right of privacy case, *White v. Davis*,[42] and Mr. Justice Marshall's dissent in *Boraas*. The privacy right was held to "ensure [privacy] not only in one's family but also in one's home."[43] Several New Jersey cases were cited by the *Adamson* court, including *Baker*.[44] California's own prior law is but briefly reviewed.[45] The *Adamson* court regarded the question as one of first impression depending for an answer primarily on the right of privacy in California.[46] When viewed in light of these prior decisions concerning traditional definitions of family in zoning, the significance of the fact situations in *Baker* and *Adamson* can be fully appreciated.

III. FACTS

A. *State v. Baker*[47]

Defendant Dennis Baker was the owner of a Plainfield, New Jersey, home in a zone restricted to single-family use. On three occasions during the fall of 1976 he was charged with allowing more than one family to reside in his home in violation of the Plainfield zoning ordinance, which defined "family" as:

> One or more persons occupying a dwelling unit as a single nonprofit housekeeping unit. More than four persons . . . not related by blood, marriage, or adoption shall not be considered to constitute a family.[48]

The Bakers' home was generally shared by nine individuals: Mr. and Mrs. Baker, their three daughters, Mrs. Conata, and her three children. Several other persons also resided within the household

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39. Baker, 81 N.J. at ___, 405 A.2d at 372.
40. 75 N.J. 200, 381 A.2d 333 (1977).
41. Saunders, 75 N.J. at 217, 381 A.2d at 341.
42. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).
43. Adamson, 27 Cal. 3d at ___, 610 P.2d at 439, 164 Cal. Rptr. at 542.
44. *Id.* at ___, 610 P.2d at 442, 164 Cal. Rptr. at 545.
45. *E.g.*, Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962).
46. Adamson, 27 Cal. 3d at ___, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.
47. Baker, 81 N.J. at ___, 405 A.2d at 370.
48. PLAINFIELD, N.J., CODE § 17:3-1(a)(17).

for indeterminate periods.

The Bakers and Conatas regarded each other as part of one family and had no desire to reside in separate homes. Defendant, an ordained minister of the Presbyterian Church, testified that the living arrangement arose out of the individuals' religious beliefs and their desire to go through life as "brothers and sisters." The Bakers and Conatas ate together, shared common areas, and held communal prayer sessions. Each occupant contributed a fixed amount per week for household expenses.

The defendant was convicted in city court on the charges, and the county court reached the same decision on trial de novo. The appellate division reversed and vacated the convictions, holding the ordinance invalid insofar as it classified permissible uses according to occupants' legal or blood relationships. The supreme court affirmed this outcome on different constitutional grounds on the state's petition for certification.[49]

B. *City of Santa Barbara v. Adamson*[50]

The defendants of *Adamson* were three residents of a house in a single-family zone where the minimum lot size was one acre. They and others formed a group of 12 adults who lived in a 24-room, 10-bedroom, 6-bathroom house owned by Adamson. The occupants were in their late 20's and 30's and included, among others, a business woman, a graduate biochemistry student, a tractor-business operator, a real estate saleswoman, and a lawyer. They chose to reside together when Adamson made it known she was looking for congenial people with whom to share her house. Since then, they had become a close group with social, economic and psychological commitments to each other. They shared expenses, rotated chores and ate together. Some had children who visited regularly. The housemates said they regarded their group as a family and that they wanted to share several values of conventionally composed families. The defendants appealed directly to the supreme court from a preliminary injunction against their continued occupancy in violation of the city ordinance on single-family zoning.[51]

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49. Baker, 81 N.J. at ___, 405 A.2d at 370.

50. Adamson, 27 Cal. 3d at ___, 610 P.2d at 438, 164 Cal. Rptr. at 541.

51. Santa Barbara's ordinance defining family states:

Family.

1. An individual, or two (2) or more persons related by blood, marriage, or legal adoption living together as a single housekeeping unit in a dwelling unit.

2. A group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit.

SANTA BARBARA, CAL., CODE § 28.040230.

The significance of the fact situations in both *Baker* and *Adamson* is that the defendants were stable voluntary families. This apparent stability and interpersonal commitment of these groups presented the most convincing setting for the issue: whether a voluntary family should have the same right as a traditional family to live in a family dwelling under zoning laws.

It should be noted that the defendants in *Boraas* were unrelated college students. In some courts, a group of college students might not be the most persuasive example of a voluntary family.[52] In addition, the concept of the "rights of a voluntary family" appeared disturbing to the dissenters in both *Baker* and *Adamson*. Both dissents expressed the fear that the majority decisions might dilute the rights and preferred position of traditional families and family values in areas other than zoning.[53] Anyone prepared to argue a case like *Baker* or *Adamson* should be aware of the broader issues the voluntary family concept may raise for some courts.

IV. HOLDINGS

A. *State v. Baker*

The holding in *Baker* is simply stated and unqualified:

> [W]e hold that the zoning regulations which attempt to limit residency based upon the number of unrelated individuals present in a single non-profit housekeeping unit cannot pass constitutional muster. Although we recognize that we are under a constitutional duty to construe municipal powers liberally, . . . municipalities cannot enact zoning ordinances which violate due process.[54]

The decision is based on state constitutional guarantees of privacy and due process[55] and an express constitutional provision for zoning[56] that has been construed previously.[57] The court stated:

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52. *See* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 306, 313 N.E.2d 756, 758 (1974).

53. Adamson, 27 Cal. 3d at ___, 610 P.2d at 446, 164 Cal. Rptr. at 549; Baker, 81 N.J. at ___, 405 A.2d at 380.

54. Baker, 81 N.J. at ___, 405 A.2d at 375.

55. N.J. CONST. art. I, states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Although it contains no express due process or privacy guarantees, this paragraph had been construed to encompass both. Baker, 81 N.J. at ___, 405 A.2d at 375.

56. N.J. CONST. art. VI, § 6.

57. South Burlington City NAACP v. Township of Mt. Laurel, 67 N.J. 151, 174, 336 A.2d 713, 725 (1975) (holding that zoning ordinances must comport with due process).

> [W]hen read together, [these provisions] require that zoning restrictions be accomplished in the manner which *least impacts upon the right of individuals to order their lives as they see fit.* For the reasons contained herein, the Plainfield regulation fails this test. Thus, it violates the right of privacy and due process.[58]

B. *City of Santa Barbara v. Adamson*

The California decision is based on the state's express constitutional right to privacy,[59] which had been broadly construed in an earlier case.[60] The court asked "whether that right now comprehends the right to live with whomever one wishes or, at least, to live in an alternate family."[61] The court answered affirmatively and held invalid "the distinction effected by the ordinance between (1) an individual or two or more persons related by blood, marriage, or adoption, and (2) groups of more than five other persons."[62] The ordinance was held to bear no substantial relationship to zoning goals.[63]

The courts in both *Adamson* and *Baker* upheld the single-housekeeping-unit definition of family, which focuses on family use, and other less restrictive means of preserving a family style of living.[64]

V. Reasoning

The reasoning in *Baker* may be criticized at the outset for being less precise constitutional analysis than that in *Boraas* or *Adamson.* While the *Baker* court labels its analysis "due process,"[65] many of its statements are characteristic of equal protection analysis.[66] To the extent that due process and equal protection analyses are similar in examining the relationship of a law to its objective,[67] the *Baker* reasoning is useful. By comparison, the *Adamson* decision is based straightforwardly on the state's constitutional right to privacy. One may disagree with the court's thresh-

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58. Baker, 81 N.J. at ___, 405 A.2d at 375 n.10 (emphasis added).
59. Cal. Const. art. I, § 1.
60. White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).
61. Adamson, 27 Cal. 3d at ___, 610 P.2d at 439, 164 Cal. Rptr. at 542.
62. *Id.* at ___, 610 P.2d at 442, 164 Cal. Rptr. at 545.
63. *Id.* at ___, 610 P.2d at 441, 164 Cal. Rptr. at 544.
64. Baker, 81 N.J. at ___, 405 A.2d at 372; Adamson, 27 Cal. 3d at ___, 610 P.2d at 442, 164 Cal. Rptr. at 545.
65. Baker, 81 N.J. at ___, 405 A.2d at 375 n.10.
66. *Id.* at ___, 405 A.2d at 371-72 (the court discussed the effects of "classifications" and overinclusive-underinclusive elements).
67. *See generally* J. Nowak, Constitutional Law 383 (1978).

old decision that privacy rights are abridged by a restrictive definition of family, but the reasoning that follows this conclusion clearly supports the ultimate decision that individual rights are unjustifiably burdened.

A. *The Baker Reasoning*

The "least impacts" test for zoning ordinances adopted by the *Baker* court is the significant point of the decision. The test was drawn by the court from a careful examination of the real-world conflict between individuals' rights and the effects of residential zoning. Three factors emerged in the examination.

The first factor is the aggregate of prior decisions holding that zoning ordinances must comport with due process. Zoning methods must therefore meet a much higher standard than the *Boraas* "rational relationship." There must be a "real and substantial relationship" between the ordinance and legitimate zoning objectives.[68]

The second factor considered is the actual effectiveness the disputed family definition has had in accomplishing the goals of zoning. The court discusses the ways in which such definitions are unreasonably restrictive as a method of accomplishing the legitimate purposes of zoning in controlling land use. The tenuous relationship between the effects of the ordinances and the goal of ensuring a family style of living was found insufficient.[69]

Finally, the court discusses less restrictive means of accomplishing zoning goals, such as living space apportionment and parking restrictions.[70] The validity of the single-housekeeping-unit definition and its application are discussed as an alternative. When combined with the exclusion of industrial, commercial, and boardinghouse uses, these less restrictive methods are held to effect an adequate balance of rights.[71]

B. *The Adamson Reasoning*

In addition to all the elements considered by the *Baker* court,[72] the *Adamson* court examines options under the ordinances, such as conditional use permits and variances. The court concludes that "illusory escape hatches" cannot justify the imposition of burdens on fundamental rights.[73]

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68. Baker, 81 N.J. at ___, 405 A.2d at 371 (citing cases).
69. *Id.*
70. *Id.* at ___, 405 A.2d at 372-73.
71. *Id.*
72. Adamson, 27 Cal. 3d at ___, 610 P.2d at 440-42, 164 Cal. Rptr. at 544-45.
73. *Id.* at ___, 610 P.2d at 444, 164 Cal. Rptr. at 547.

The courts in both *Baker* and *Adamson* quoted the statement from *City of White Plains v. Ferraioli*:[74] "As long as a group bears the generic character of a family unit as a relatively permanent household, it should be equally as entitled to occupy a single-family dwelling as its biologically related neighbors."[75]

VI. Analysis

The merits of a decision like *Baker* or *Adamson* have been the focus of this note so far. This analysis section takes the approach of dealing with the opposition to a decision like *Baker* or *Adamson* by listing the arguments made in the dissenting opinions and pointing out the majority courts' arguments against them.

The most formidable opposition, of course, is the argument against the constitutional basis for decision. The dissent in *Baker* argues on several premises for a statutory basis that would avoid the constitutional issue.[76] It is contended that the legislature is the proper body to promulgate definitions of family in zoning. While the experience of the legislature and courts in Illinois is offered in support of the dissent, that experience clearly illustrates the necessity for a constitutional decision. In Illinois, an ordinance similar to the *Baker* ordinance was held invalid under the state's zoning enabling act. The following year, the legislature authorized the same legal-or-blood-relationships definition of family in city zoning ordinances.[77] One can argue that the statutory solution merely delays solving the constitutional problem and creates more litigation on particular city ordinances. Faced with the number of cases in New Jersey on similar ordinances, the *Baker* court chose the constitutional decision. Whether another state court will follow the *Baker* or *Adamson* decision might depend on the sheer weight of the problem and the particular court's willingness to resolve constitutional issues.

The second major argument raised by the dissenters is against the threshold conclusion that restrictive definitions of family in zoning ordinances infringe upon constitutionally protected rights. The dissenters simply accepted *Boraas* as controlling,[78] and dis-

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74. 34 N.Y.2d 300, 306, 310 N.E.2d 756, 758, 357 N.Y.S.2d 449, 453 (1974).

75. Baker, 81 N.J. at ___, 405 A.2d at 372; Adamson, 27 Cal. 3d at ___, 610 P.2d at 442, 164 Cal. Rptr. at 545. Although *City of White Plains v. Ferraioli* was not a constitutional decision, it was cited for the reasoning that included this statement.

76. Baker, 81 N.J. at ___, 405 A.2d at 376.

77. *Id.* at ___, 405 A.2d at 378.

78. *Id.* at ___, 405 A.2d at 379; Adamson, 27 Cal. 3d at ___, 610 P.2d at 445, 164 Cal. Rptr. at 548.

regarded prior state decisions that the majority courts thought required that initial conclusion. The dissents also cited other state decisions that have followed *Boraas* and criticized the decisions for being result-oriented because of the threshold decision.[79] The state court's obligation to interpret its own constitution is the strongest argument against following *Boraas*.[80]

The third dissenting argument concerns the protection of the property rights of persons in single-family zones living next to rental dwellings.[81] The majority counters this argument in its reasoning for single-housekeeping-unit definition, which, the majority holds, properly balances the property rights of *all* persons concerned.[82] The single-housekeeping-unit definition may require further refinement by the courts. Given the experience of New Jersey and other states in applying that definition, the problem of refinement should not be difficult.[83]

The dissent in *Baker* argues further that according an indefinite number of unrelated persons the same right as traditional families to live in single-family dwellings effects a denigration of the traditional family. How such a denigration occurs, however, is left entirely unclear by the dissent.[84] This argument may be countered by emphasizing that the issue is zoning and its legitimate methods and objectives.

VII. CONCLUSIONS

The effect of *Baker* and *Adamson* on the other state courts confronting the issue will depend on a number of factors:

1. the inclination of the court to construe its own constitution more broadly than the United States Constitution, especially on substantive rights such as privacy;

2. the construction of state constitutional provisions for zoning and zoning enabling acts;

3. the court's approach to deciding constitutional issues, especially its tendency toward a statutory solution before reaching constitutional issues;

4. the particular fact situation and how the issue is framed;

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79. *Id.*

80. Baker, 81 N.J. at ___, 405 A.2d at 374; Adamson, 27 Cal. 3d at ___, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3. *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

81. Baker, 81 N.J. at ___, 405 A.2d at 376.

82. *Id.* at ___, 405 A.2d at 372.

83. *Id. See also* Annot., 71 A.L.R.3d 693 (1976).

84. Baker, 81 N.J. at ___, 405 A.2d at 380.

5. the frequency with which such ordinances are litigated.

A court that interprets privacy rights broadly, casts a scrutinizing eye on zoning laws, and takes a willing approach to constitutional questions might make the decision the California and New Jersey courts made.

VIII. Implications for Montana

There is little precedent in Montana directly on family definitions in zoning. Collateral sources of support in Montana law for a *Baker* or *Adamson* decision will be discussed in terms of three factors: (1) prior state decisions on zoning enabling statutes and ordinances; (2) interpretations of the Montana constitution that could form the basis for a decision like *Baker* or *Adamson* in Montana; and (3) the types of definitions of family in the zoning ordinances of Montana cities.

A. *Prior State Decisions*

The only Montana case that had any similarity to *Baker* and *Adamson* is *State ex rel. Thelen v. City of Missoula.*[85] *Thelen* dealt with the potential violation of a single-family zoning ordinance by a group of persons who did not fit the city's definition of family.[86] The plaintiffs were selling their home for use as a group home for handicapped persons. The city tried to block the sale on the grounds that the statute[87] authorizing residential use by such a group conflicted with the city's definition of family, and was unconstitutional. The supreme court upheld the statute as a valid implementation of an express constitutional provision for the care and rights of institutionalized handicapped persons.[88] The court stated:

> In the instant case, while respondent city may well have acted within the power granted it by the legislature in adopting its "one-family" criteria for zoning, that power was modified by later legislative language and respondent city should have revised its zoning regulations to meet the legislative requirements.[89]

Village of Belle Terre v. Boraas was offered by the city as au-

85. 168 Mont. 375, 377, 543 P.2d 173, 175 (1975).

86. Missoula's city ordinance defines family as one or more persons related by blood, marriage, or adoption living together as a single housekeeping unit, but limits to two the number of unrelated persons that may be considered a family. Missoula, Mont., Code § 32-2, amend. Ordinance No. 1640 (May 6, 1974).

87. Montana Code Annotated [hereinafter cited as MCA] §§ 76-2-313, -314 (1979).

88. Mont. Const. art. XII, § 3.

89. Thelen, 168 Mont. at 380, 543 P.2d at 177.

thority for the constitutionality of the city's definition of family. The court, however, distinguished *Thelen* from *Boraas* on the facts and issues, and found the equal protection holding in *Boraas* inapplicable to *Thelen*.[90] Although *Thelen* was not a constitutional decision, the court's discussion of *Boraas* provides indirect support for the argument that fundamental rights of non-traditional family groups are infringed upon by the restrictive definition of family in zoning ordinances.[91] The particular fact situation will determine the success of such an argument in future cases.

Several other Montana zoning cases have dealt with objections to a city's imposition of a zoning or re-zoning plan,[92] or with the statutory procedure for implementing zoning.[93] In these cases, the court has insisted on strict adherence by cities to the procedures and purposes for zoning.[94] In *Lowe v. City of Missoula*,[95] the court translated the statute on zoning purposes[96] into twelve tests for the validity of a zoning plan. The city's plan was struck down because the city council had not considered enough valid evidence to conclude that the tests had been met. The court quoted from an early zoning case, *Freeman v. Board of Adjustment*:[97] "Any law or regulation which imposes unjust limitations upon the full use and enjoyment of property, or destroys property value or use, deprives the owner of property rights."[98] The *Lowe* decision is an indication that the court will scrutinize the actual relationship a challenged ordinance has to accomplishing zoning objectives, as the courts did in *Baker* and *Adamson*.

The recent decision in *Cutone v. Anaconda Deer Lodge*[99] is also significant, although not directly on point. In *Cutone*, the plaintiff was denied a variance to operate a bar and restaurant in an area re-zoned for residential use. The court upheld the constitutionality of the city's actions, and deferred to city authorities to determine if an ordinance has a "real and substantial" bearing on

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90. *Id.* at 382, 543 P.2d at 178.

91. *Id.* at 383, 543 P.2d at 178.

92. *E.g.*, Cutone v. Anaconda Deer Lodge, ___ Mont. ___, 610 P.2d 691 (1980); Schanz v. City of Billings, ___ Mont. ___, 597 P.2d 67 (1979); State ex rel. Diehl Co. v. City of Helena, ___ Mont. ___, 593 P.2d 458 (1979).

93. *E.g.*, Dover Ranch v. County of Yellowstone, ___ Mont. ___, 609 P.2d 711 (1979); Allen v. Flathead County, ___ Mont. ___, 601 P.2d 399 (1979); Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974).

94. MCA §§ 76-2-301 to -328 (1979).

95. 165 Mont. 38, 41, 525 P.2d 551, 552 (1974).

96. MCA § 76-2-304 (1979).

97. 97 Mont. 342, 355, 34 P.2d 534, 538 (1934).

98. Lowe, 165 Mont. at 46, 525 P.2d at 555.

99. ___ Mont. ___, 610 P.2d 691 (1980).

the public welfare.[100] The court quoted approvingly from *Village of Belle Terre v. Boraas* on the equal protection arguments, but acknowledged that *Boraas* had dealt primarily with economic interests relative to rental dwellings.[101] If a case were brought that focused on the substantive individual rights which are abridged by a restrictive definition of family, the court's dicta concerning *Boraas* in *Cutone* might not be controlling.

The major factor in determining how the Montana Supreme Court might decide a case like *Baker* is the court's prior broad interpretation of the power given cities by the zoning enabling statutes. In *Schanz v. City of Billings*,[102] the court said:

> Practically the same rules of construction apply to an ordinance as apply to a statute. If the language of an ordinance is plain and unambiguous, it is not subject to interpretation or open to construction, but must be accepted and enforced as written.

In *State ex rel. Diehl Co. v. City of Helena*,[103] the court stated that zoning statutes have the legislative intent of a broad grant of power to municipalities to restrict use of land. Given these holdings, and the court's dicta in *Thelen* about the power of cities to define family, the court might decide a case like *Baker* on statutory rather than constitutional grounds.[104] If a case like *Baker* or *Adamson* is brought in Montana, the issue should be carefully framed toward the constitutional basis for decision.

B. *Constitutional Interpretations*

Montana's constitution contains no express provision for zoning, but the zoning enabling statutes have been construed often. The constitutional requirements of due process and equal protection for zoning ordinances were established in 1934 in *Freeman v. Board of Adjustment*,[105] and prevail unmodified. The court quoted *Freeman* in *Cutone v. Anaconda Deer Lodge*:[106] "The basis for the finding of constitutionality is that such ordinances constitute a valid exercise of the police power; that is to say, they have a sub-

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100. *Id.* at ___, 610 P.2d at 696.
101. *Id.*
102. ___ Mont. ___, 597 P.2d 67, 69 (1979).
103. ___ Mont. ___, 593 P.2d 458, 462 (1979).
104. 168 Mont. 375, 380, 543 P.2d 173, 177 (1975). *See also* Board of Comm'rs v. District Ct., ___ Mont. ___, 597 P.2d 728, 731 (1979) (the court stated a preference for statutory decision).
105. 97 Mont. 342, 352, 34 P.2d 534, 538 (1934).
106. Cutone, ___ Mont. ___, 610 P.2d at 696. *See also* Keefer, *City-County Planning in Montana*, 25 MONT. L. REV. 185, 197 (1964).

stantial bearing upon the public health, safety, morals, and general welfare of a community." This is the same standard applied by the courts in *Baker* and *Adamson.*

A constitutional challenge to a restrictive definition of family might best be grounded on Montana's express constitutional guarantee of privacy[107] as it was in *Adamson.* The federal privacy right has been defined in a number of leading cases.[108] In Montana, the right has been construed primarily in criminal cases involving search and seizure procedures.[109] In *State v. Brackman,*[110] the court held that "[a] state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional grounds." Although this holding applied to the narrow area of warrantless electronic monitoring, the court did discuss the privacy right generally, and suggested that the Montana privacy right is broader than the federal right in other areas.[111]

Another indication of the breadth of the right to privacy is found in Montana's constitutional provision for the right to know.[112] The right to privacy must prevail where the demand of individual privacy exceeds the merits of public disclosure.[113] These interpretations and the *Moore* opinion could form the basis for the argument that Montana's privacy right encompasses a right to freedom of personal choice in matters of family life. Of course, one would first have to persuade the court that a restrictive definition of family in zoning ordinances infringes upon this fundamental right. A convincing fact situation and the *Moore, Baker* and *Adamson* decisions should make a strong foundation for that argument.

C. *Definition of Family in the Ordinances of Montana Cities*

A survey[114] of the definitions of family in ordinances from cities of various sizes in Montana yielded the following results: (1) five cities define family as a group of persons living together as a

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107. MONT. CONST. art. II, § 10.

108. *See* Boraas, 416 U.S. at 15 (citing cases) *and* Towe, *Growing Awareness of Privacy,* 37 MONT. L. REV. 39, 41 (1976).

109. *E.g.,* State ex rel. Zander v. District Ct., ___ Mont. ___, 591 P.2d 656, 660 (1979).

110. ___ Mont. ___, 582 P.2d 1216, 1220 (1978).

111. *Id.*

112. MONT. CONST. art. II, § 9.

113. *Id.*

114. The author thanks the city attorneys who responded to the survey by sending copies of their cities' definitions of family.

single housekeeping unit;[115] (2) one city defines family as a group of persons related by blood or marriage;[116] (3) nine cities define family as a group of persons related by blood, marriage, or adoption, and place a limit on the number of unrelated persons that may be considered a family.[117] The number of unrelated persons that may be a family varies from two to six in the last group of ordinances.

The results of the survey indicate a potential for litigation in Montana on the restrictive definitions of family. The fact that only one case has reached the supreme court raises some interesting issues. Montana does not have the complex problems of urbanization that New Jersey or California has. Perhaps Montanans have not needed or wanted the kind of suburban exclusivism promoted by enforcement of the restrictive definitions of family in zoning.[118] Probably the violations that have been prosecuted have not been appealed for want of precedent.

Speculation aside, the possibility that a case like *Baker* or *Adamson* will arise in Montana definitely exists. As it has been noted, the outcome of such a case will depend primarily on a convincing fact situation and skillful framing of the issue toward a constitutional decision.

Joan Newman

115. Dillon, Mont., Ordinance 256 (Feb. 2, 1949); GLASGOW, MONT., CODE § 21-1 (1953); GREAT FALLS, MONT., CODE § 17.09.170 (1976); LIVINGSTON, MONT., CODE § 30-1(11) (1971); Miles City, Mont., Ordinance 796 (June 22, 1976). The Livingston code will change to a more restrictive definition this year.

116. HELENA, MONT., CODE § 11-1-2 (1979) (does not include adoption).

117. ANACONDA, MONT., CODE § 2.35 Appendix (1976); BILLINGS, MONT., CODE art. 2-Definitions (1977); BUTTE-SILVER BOW, MONT., CODE § 17.04.165 (1980); Cut Bank, Mont., Ordinance 352 (Oct. 17, 1980); GLENDIVE, MONT., CODE § 11.10.033 (1976); HAMILTON, MONT., CODE § 11.02.030 (1978); HARDIN, MONT., CODE § 11-1-2-1(I) (1958); KALISPELL, MONT., CODE § 2.01 Appendix (1977); MISSOULA, MONT., CODE § 32-2, amend. Ordinance No. 1640 (May 6, 1974).

118. *See* articles cited *supra* note 11.