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# Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy

Gerald Korngold\*

## INTRODUCTION

In order to create attractive residential subdivisions, developers often impose restrictions, enforceable as covenants running with the land, to control the nature of the improvements and the uses of the lots.<sup>1</sup> One commonly employed provision limits the occupants of the property to a single family by barring use of the property for other than a "single family dwelling"<sup>2</sup> or through other similar language.<sup>3</sup>

Such clauses present difficult doctrinal and policy issues for the courts. To decide these cases, courts must understand and define "family." This has traditionally been a difficult task for family professionals and scholars.<sup>4</sup> The undertaking is made harder in light of current ma-

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<sup>1</sup> This Article uses real covenant, covenant running with the land, covenant, and servitude synonymously. For a discussion of the proposed unification of servitudes law, see *infra* note 34 and accompanying text.

<sup>2</sup> See, e.g., *Bellarmino Hills Ass'n v. Residential Sys., Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978); *London v. Handicapped Facilities Bd.*, 637 S.W.2d 212 (Mo. Ct. App. 1982); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 469 U.S. 804 (1984); *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985); *Omega Corp. v. Malloy*, 288 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985).

<sup>3</sup> Some of these provisions are very clear. See, e.g., *London*, 637 S.W.2d at 214 n.1 ("no more than one family shall live in any residence"); *Feely v. Birenbaum*, 554 S.W.2d 432, 434 (Mo. Ct. App. 1977) (not to be used "by more than one family"); *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 897 (Sup. Ct. 1953) ("one family only"). See generally Annotation, *What Constitutes a "Family" Within Meaning of Zoning Regulation or Restrictive Covenant*, 71 A.L.R.3d 693 (1976).

<sup>4</sup> See, e.g., E. DYER, *THE AMERICAN FAMILY: VARIETY AND CHANGE* 16 (1979)

for changes in American family life. These developments include significant rises in the number of divorces,<sup>5</sup> single parent families,<sup>6</sup> and working women;<sup>7</sup> developing equality between husbands and wives;<sup>8</sup> and decreases in birth rates<sup>9</sup> and family size.<sup>10</sup> Currently, the living arrangements of over seventy-five percent of the population differs from the earlier model of a working husband, nonworking wife, and two or more children.<sup>11</sup> Moreover, courts must confront single family use covenants in the context of recently developing living and support relationships that are alternatives to the traditional family. These developments include increases in heterosexual couples living together;<sup>12</sup> expansion of the traditional family to include other intimate people who share responsibilities and provide mutual emotional support;<sup>13</sup> growing num-

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(requiring relationship by blood, marriage or adoption); M. GORDON, *THE AMERICAN FAMILY: PAST, PRESENT, AND FUTURE* 25-28 (1978) (discussing functional vs. kinship tests, with former not requiring relationship of blood, marriage, or adoption but focusing on shared activities and goals); S. LEVITAN & R. BELOUS, *WHAT'S HAPPENING TO THE AMERICAN FAMILY?* 11 (1981) (excluding unmarried couples).

<sup>5</sup> See M. GORDON, *supra* note 4, at 293-96; POPULATION REFERENCE BUREAU, INC., *THE AMERICAN FAMILY: CHANGES AND CHALLENGES* 2 (1984) [hereafter POPULATION REFERENCE] (a record of 1.21 million divorces in 1981); WHITE HOUSE CONFERENCE ON FAMILIES, *A SUMMARY: LISTENING TO AMERICA'S FAMILIES* 79 chart 3 (1980) [hereafter WHITE HOUSE CONFERENCE].

<sup>6</sup> See E. DYER, *supra* note 4, at 411 (stating increase due to increased divorce, unwed mothers, and single parent adopting); S. LEVITAN & R. BELOUS, *supra* note 4, at 13 (estimating that approximately 45% of children born in the mid-1970s will live in a one parent family at least some time prior to eighteenth birthday); WHITE HOUSE CONFERENCE, *supra* note 5, at 78 chart 2 (finding percentage of single parent families increased from 11 to 19 between 1970 and 1978).

<sup>7</sup> M. GORDON, *supra* note 4, at 71 (stating women were 3% of labor force in 1890); cf. Mintz & Kellogg, *Recent Trends in American Family History: A Commentary Describing Dimensions of Demographic and Cultural Change*, 21 HOUS. L. REV. 789, 790 (1984) (finding that by 1980 over 50% of white married women were in the work force).

<sup>8</sup> See Mintz & Kellogg, *supra* note 7, at 792.

<sup>9</sup> See M. GORDON, *supra* note 4, at 115 (stating fertility rate has fallen below replacement level over recent years); POPULATION REFERENCE, *supra* note 5, at 4 (stating 1975 birth rate was 1.7 children per woman versus 1957 rate of 3.6 for white women and 4.8 for black women).

<sup>10</sup> See M. GORDON, *supra* note 4, at 63-64 (finding decrease in extended families); POPULATION REFERENCE, *supra* note 5, at 7 (noting smaller size of households).

<sup>11</sup> See S. LEVITAN & R. BELOUS, *supra* note 4, at 8.

<sup>12</sup> See E. DYER, *supra* note 4, at 399-400; S. LEVITAN & R. BELOUS, *supra* note 4, at 11; POPULATION REFERENCE, *supra* note 5, at 7; see also M. GORDON, *supra* note 4, at 187 (stating that from 1970 to 1976 government figures show increase from 654,000 to 1.32 million people; figures viewed to be low).

<sup>13</sup> See E. DYER, *supra* note 4, at 401; M. GORDON, *supra* note 4, at 353.

bers of foster parents;<sup>14</sup> group homes for the emotionally or developmentally handicapped;<sup>15</sup> and increased acceptance of homosexual "life partners."<sup>16</sup> Finally, in determining these cases, courts must recognize and address the rapid increase in demand for housing units, caused at least in part by these changes in families and living arrangements.<sup>17</sup>

Courts have already decided whether occupancy of a property by an extended family,<sup>18</sup> a foster home for disabled children,<sup>19</sup> a group of elderly citizens,<sup>20</sup> two single men jointly owning a home,<sup>21</sup> group homes for the mentally and developmentally disabled,<sup>22</sup> a number of college students,<sup>23</sup> boarders and tenants,<sup>24</sup> and religious groups,<sup>25</sup> violates a single family use covenant. One can imagine, as well, attempts to enforce such clauses against occupancy by other current alternatives to traditional family life, such as an unmarried heterosexual couple,<sup>26</sup> foster

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<sup>14</sup> See Eastman, *Foster Parenthood: A Nonnormative Parenting Arrangement*, in *ALTERNATIVES TO TRADITIONAL FAMILY LIVING* 96-97 (H. Gross & M. Sussman eds. 1982).

<sup>15</sup> See *infra* note 100 and accompanying text.

<sup>16</sup> *Braschi v. Stahl Assocs. Co.*, 143 A.D.2d 44, 45, 531 N.Y.S.2d 562, 563 (1988) ("gay life partner").

<sup>17</sup> See *POPULATION REFERENCE*, *supra* note 5, at 7 (increase in number of households causing rapid increase in demand for housing units).

<sup>18</sup> See, e.g., *Kiernan v. Snowden*, 123 N.Y.S.2d 895 (Sup. Ct. 1953); *Tucker v. Soliz*, 483 S.W.2d 367 (Tex. Ct. App. 1972).

<sup>19</sup> See, e.g., *Evergreen Meadow's Homeowners' Ass'n v. Double D Manor, Inc.*, 743 P.2d 39 (Colo. Ct. App. 1987); *Bellarmine Hills Ass'n v. Residential Sys. Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978); *London v. Handicapped Facilities Bd.*, 637 S.W.2d 212 (Mo. Ct. App. 1982).

<sup>20</sup> See, e.g., *Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978).

<sup>21</sup> See, e.g., *Feely v. Birenbaum*, 554 S.W.2d 432 (Mo. Ct. App. 1977).

<sup>22</sup> See, e.g., *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596 (1984); *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407 (Mo. 1986); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985); *Shaver v. Hunter*, 626 S.W.2d 574 (Tex. Ct. App. 1981).

<sup>23</sup> See, e.g., *Seely v. Phi Sigma Delta House Corp.*, 245 Mich. 252, 222 N.W. 180 (1928); *McCord v. Pichel*, 35 A.D.2d 879, 315 N.Y.S.2d 717 (1970).

<sup>24</sup> See, e.g., *Hooker v. Alexander*, 129 Conn. 433, 29 A.2d 308 (1942); *Kiernan v. Snowden*, 123 N.Y.S.2d 895 (Sup. Ct. 1953); *Southampton Civic Club v. Couch*, 159 Tex. 464, 322 S.W.2d 516 (1958).

<sup>25</sup> See, e.g., *Boston-Edison Protective Ass'n v. Paulist Fathers, Inc.*, 306 Mich. 253, 10 N.W.2d 847 (1943); *Cash v. Catholic Diocese*, 414 S.W.2d 346 (Mo. Ct. App. 1967).

<sup>26</sup> See generally *Zavala v. City of Denver*, 759 P.2d 664 (Colo. 1988) (construing zoning ordinance); *City of Takoma Park v. County Bd. of Appeals*, 259 Md. 619, 270 A.2d 772 (1970) (same); *City of Ladue v. Horn*, 720 S.W.2d 745 (Mo. Ct. App. 1986)

parents with nondisabled children,<sup>27</sup> "three unrelated schoolteachers,"<sup>28</sup> a homosexual couple,<sup>29</sup> and two unmarried women (each with children) living together.<sup>30</sup>

There are different perspectives on how recent changes in American family life and the growth of alternatives should affect the courts' enforcement of single family use restrictions. Two questions emerge. In light of a growing spirit of personal autonomy and the development of new lifestyles, should individuals be restrained from choosing nonconforming family, living and personal relationships within their own homes? In a time when there are many pressures on the traditional family, can and should people's agreements to insulate traditional family arrangements in a neighborhood be respected? The issues are inextricably linked while in fundamental conflict, since it is the same traditional family mold from which the nonconformist seeks to escape that the majority wants to protect. These are difficult and provocative social questions that require careful resolution in the context of disputes over single family use clauses.

These issues are also important since the courts' decisions in single family use covenant cases will likely have an effect on family choices in the late twentieth century. To the extent that courts are not receptive to new types of alternate family arrangements, they may create disincentives to such structures and shape future family choices.<sup>31</sup> The courts' decisions will also directly affect the variety of shelter arrangements available to families and other groups of people that live together, a

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(same); *Marino v. Mayor of Norwood*, 77 N.J. Super. 587, 187 A.2d 217 (Ct. App. Div. 1963) (same).

<sup>27</sup> See generally *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (applying "single family unit" within zoning ordinance); *Saunders v. Clark County Zoning Dep't*, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981) (same).

<sup>28</sup> *Omega Corp. v. Malloy*, 288 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985).

<sup>29</sup> See *Braschi v. Stahl Assocs. Co.*, 143 A.D.2d 44, 45, 531 N.Y.S.2d 562, 563 (1988) (stating "gay life partner" not a member of family of deceased tenant entitled to continue the lease). *Contra* *Jane St. Co. v. Yalis*, N.Y.L.J., Jan. 13, 1988, at 13, col. 3 (Civ. Ct.) (finding no rational basis to exclude "gay life partners" from class of family members entitled to continue the lease).

<sup>30</sup> See, e.g., *People v. Skidmore*, 69 Misc. 2d 320, 329 N.Y.S.2d 881 (Sup. Ct. 1971) (construing a zoning ordinance).

<sup>31</sup> While we are told by the economists that people will react as rational economic actors to incentives and disincentives and make their choices on that level, they may not act so rationally when it comes to family choices and matters of the heart. Thus, when a court imposes disincentives to certain family arrangements through occupancy restrictions, the degree of effect on people's plans remains to be seen.

very important issue during a time of tight housing.

This Article maintains that single family use covenants should not be applied to limit personal choices taking place within the home. Rather, they should be enforced only to the extent that they limit fallout projected from a household on the rest of the neighborhood. "Family" would thus have a flexible meaning in the context of single family use restrictions. This proposal is necessary not only in light of general policy considerations but also because it strikes a proper balance between freedom of contract values and the policy against restrictions on land which are inherent in real covenants law. The approach will protect traditional family life to a great, albeit not the fullest, extent while respecting individual autonomy. Moreover, the proposed rule also seems appropriate when contrasted with other devices limiting family housing choices, such as single family use restrictions created by zoning and private covenants restricting the age of occupants.

Part I reviews the conflict essential to all real covenants, including single family use restrictions, between freedom of contract and the policy against ties on land. It offers a policy basis for the rule suggested in this Article. Part II shows how courts have failed to reach the proper result in light of these policies when deciding single family use covenant cases. Part III suggests a doctrinal basis to effectuate the suggested result both under current law and a modernized law of servitudes. Part IV examines zoning for single family use and private age restrictions since they serve as valuable contrasts to single family use covenants and also tell much about how the law of property is currently defining the family.

## I. SINGLE FAMILY USE RESTRICTIONS AND REAL COVENANTS

### A. *The Relevance of Real Covenants*

The debate over whether private land use restrictions can be used to limit the types of people occupying property takes place in the context of the doctrine of covenants running with the land and its competing policy considerations.<sup>32</sup> This makes analysis of the issues more complicated, but reference to the policy framework of covenants ultimately can yield a more effective resolution of the issues.

People enter into private land use agreements to allocate rights and responsibilities in realty. The agreements allow the acquisition of non-possessory rights in the land of another. They might confirm on the

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<sup>32</sup> For an overview of the doctrinal requirements of real covenants, see Stoebe, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861 (1977).

holder an affirmative right, such as a right of way. They might create a negative restriction that gives its holder the right to prevent activities of the burdened property, such as a prohibition of nonresidential uses. Traditionally, affirmative rights have been governed by easements law and restrictions by real covenants law,<sup>33</sup> although recent scholarship suggests a merger of the two doctrines into a unified law of servitudes.<sup>34</sup> Under classic rules, a single family use restriction is categorized as a real covenant.

Consider the situation where a landowner makes an agreement with her neighbor to restrict the neighbor's land to single family use. The original promisee should be able to enforce against the original promisor as a straightforward matter of contract law. However, when a subsequent owner of the original promisee's lot seeks enforcement against

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<sup>33</sup> There are, of course, traditional exceptions. Affirmative obligations binding the owner of the burdened land, such as a requirement to pay maintenance costs for common areas, are evaluated as covenants running with the land, *see generally* *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938), while certain negative restrictions are treated as easements. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF REAL PROPERTY* § 8.1 (1984) (light, air, view); 3 R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY* ¶ 405 (1987) (lateral support, stream flow); *RESTATEMENT (FIRST) OF PROPERTY* § 452 comments a, b (1944).

<sup>34</sup> *E.g.*, Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323 (1982); Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337 (1986); Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12 (1978); Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982); French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982) [hereafter French, *Modern Law of Servitudes*]; French, *Design Proposal for the New Restatement of the Law of Property — Servitudes*, 21 U.C. DAVIS L. REV. 1213 (1988) [hereafter French, *Design Proposal*]; Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984) [hereafter Korngold, *Conservation Servitudes*]; McDougal, *Land-Use Planning by Private Volition: A Framework for Policy-Oriented Inquiry*, 16 ARIZ. L. REV. 1 (1974); Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes: Two Concepts, or One?*, 21 HASTINGS L.J. 1319 (1970); Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982); Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403 (1982); Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985); Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity*, 1989 WIS. L. REV. 1. I have suggested an additional merger of servitudes and defeasible fees. *See* Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533 (1988) [hereafter Korngold, *Unifying Servitudes*].

a subsequent owner of the original promisor's lot, classical contract law does not provide an easy solution. Rather, the defendant may offer a two-prong argument against liability by stating that *she* never promised anything and that no promise was ever made to *plaintiff* but only to the original promisee. The law of covenants running with the land developed to meet this problem of second generation enforcement and to provide a doctrinal basis to move the benefits and the burdens of the promise to future owners.<sup>35</sup>

Therefore, one would expect that courts deciding about the enforcement of single family use agreements would operate in the universe of real covenants. Oddly enough, none of the cases cited in this Article states that real covenants are relevant. Neither do the cases apply the usual tests to determine whether the covenant should run, even though the stated facts show that second generation enforcement is sought.<sup>36</sup> Moreover, the courts rarely indicate whether the plaintiff and defendant are the original promisor and promisee or second generation owners, the key facts necessary to determine whether contract or real covenant analysis is appropriate.<sup>37</sup> Rather, the cases approach the issue as a straightforward contract interpretation issue.<sup>38</sup> Additionally, not one of

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<sup>35</sup> See Newman & Losey, *supra* note 34, at 1323 (suggesting that the privity requirement was a meaningless attempt to justify the running of burdens); RESTATEMENT (FIRST) OF PROPERTY § 537 comment h (1944) (explaining touch and concern as a means to limit the covenants which can run). Unfortunately, much of this doctrinal framework merely creates hoops for an enforcing party to jump through and has little to do with addressing the difficult problem of binding someone who has not expressly consented to be bound. Contract presupposes consent before one can be obligated. See RESTATEMENT (SECOND) OF CONTRACTS § 328 (1981); E. FARNSWORTH, CONTRACTS § 11.10 (1982).

<sup>36</sup> See, e.g., *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459 (Ind. Ct. App. 1987) (finding defendant was successor to original purchaser); *Feely v. Birenbaum*, 554 S.W.2d 432 (Mo. Ct. App. 1977) (stating that since restriction created in 1914 and defendants purchased in 1971, it is unlikely they are original owners); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 469 U.S. 804 (1984) (holding defendant is lessee from original covenantor).

<sup>37</sup> See, e.g., *London v. Handicapped Facilities Bd.*, 637 S.W.2d 212 (Mo. Ct. App. 1982); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *McCord v. Pichel*, 35 A.D.2d 879, 315 N.Y.S.2d 717 (1970); *Kiernan v. Snowden*, 123 N.Y.S.2d 895 (Sup. Ct. 1953); *Gregory v. State*, 495 A.2d 997 (R.I. 1985); *Southampton Civic Club v. Couch*, 159 Tex. 464, 322 S.W.2d 516 (1958); *Omega Corp. v. Malloy*, 288 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985).

<sup>38</sup> Even when the facts indicate that the action is between the original covenanting parties, there is no mention of why contract, as opposed to real covenant, analysis is appropriate. See, e.g., *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*,



the decisions asks whether a single family use covenant "touches and concerns" the benefitted and burdened parcels, a prerequisite for a covenant to run. Finally, while there is vague reference in a few of the cases to some of the policy themes of real covenants, few, if any, courts make the clear and articulated analysis of the policy conflict of real covenants that is necessary to achieve better decision making in single family use restriction cases.

### B. The Policy Conflict

Some courts dealing with single family use restrictions engage in a battle of maxims. One set states that the "clear intent and plain and unambiguous purposes expressed" in a covenant should be enforced, in the manner of other contracts.<sup>39</sup> Another group, however, notes that "restrictive covenants are not favorites of the law . . . [and should] be read narrowly in favor of the free use of property."<sup>40</sup> This linguistic duel reflects the conflict between values of freedom of contract and a policy disfavoring restrictions on land (the "antirestrictions policy"). As with other real covenants, courts dealing with single family use restrictions do not examine and articulate this conflict beyond the occasional reference to a maxim.

#### 1. Contract Values

There are compelling reasons why real covenants should be enforced like other contracts.<sup>41</sup> Indeed, scholars have recently argued for such a result.<sup>42</sup> Single family use covenants should be evaluated in light of this.

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302 N.C. 64, 274 S.E.2d 174 (1981).

<sup>39</sup> *Shaver v. Hunter*, 626 S.W.2d 574, 576 (Tex. Ct. App. 1981); *accord Imler*, 505 N.E.2d at 464; *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596, 599 (1984); *Feely*, 554 S.W.2d at 436.

<sup>40</sup> *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407, 408 (Mo. 1986); *accord Franklin v. White Egret Condominium*, 358 So. 2d 1084, 1087 (Fla. Dist. Ct. App. 1977); *Knudtson*, 216 Neb. at 655, 345 N.W.2d at 6; *J.T. Hobby & Son*, 302 N.C. at 70-71, 274 S.E.2d at 179; *Jackson v. Williams*, 714 P.2d 1017, 1021 (Okla. 1985); *Crowley v. Knapp*, 94 Wis. 2d 421, 434, 288 N.W.2d 815, 822 (1980).

<sup>41</sup> In order to be bound, the successor to the covenantor's parcel must have notice of the covenant. *See, e.g., Meierhenry v. Smith*, 208 Neb. 88, 302 N.W.2d 365, 366 (1981); *Tulk v. Moxhay*, 2 Phillips 774, 778, 41 Eng. Rep. 1143, 1144 (1848); *see also Imler*, 505 N.E.2d at 464; *Feely*, 554 S.W.2d at 437.

<sup>42</sup> *See, e.g., Berger, supra* note 34, at 1329 (arguing that the law should accord the intent of the parties a dominant position); French, *Modern Law of Servitudes, supra* note 34, at 1305 (arguing that agreements creating servitudes should be treated like

a. *Efficiency*

Real covenants assist in the efficient allocation of land resources by allowing parties to transfer less than fee rights. Thus, one seeking to limit the use of her neighbor's land to single family purposes can acquire a servitude. She need not waste resources buying a fee, and the neighbor can retain productive use of the land subject to the servitude. In order to encourage parties to enter into such efficiency-maximizing arrangements, the law must enforce them.

When real covenants are employed in a subdivision to grant reciprocal burdens and benefits among the parcels, there may be additional efficiency gains. Although an individual parcel theoretically loses value when it is restricted to single family use, the loss may be offset if the restriction similarly binds surrounding lots and creates a valuable "family environment."

Parties and courts relying on single family use covenants to bar non-traditional living arrangements allude to efficiency. They indicate that these covenants enhance the value of the benefitted land,<sup>43</sup> and that failure to enforce them would depress property values.<sup>44</sup> Courts recognize that such covenants create property rights,<sup>45</sup> and those who rely on restrictions in contracting should be protected.<sup>46</sup> One judge declared that "[t]hose individuals who have invested their life savings in a home, 'The American Dream' are entitled to protection under the law, including enforcement of the covenant, which they relied on when investing in the area . . . ."<sup>47</sup>

However, the strength of the efficiency argument is weakened since, in at least some cases, little or no loss in the benefitted land's value results from the nontraditional family use in question.<sup>48</sup> Such stable values might occur if the nontraditional family use is neither widespread nor highly nonconformist. On the other hand, stability also might occur if purchasers in the marketplace do not really care what goes on inside their neighbor's home as long as there are no spillovers (such as noise) outside of the home that exceed those of a typical fam-

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other agreements).

<sup>43</sup> See, e.g., *Imler*, 505 N.E.2d at 464.

<sup>44</sup> See, e.g., *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 900 (Sup. Ct. 1953); *Jackson*, 714 P.2d at 1019 n.4; *Gregory v. State*, 495 A.2d 997, 999 (R.I. 1985).

<sup>45</sup> See, e.g., *Imler*, 505 N.E.2d at 464.

<sup>46</sup> See, e.g., *Kiernan*, 123 N.Y.S.2d at 900.

<sup>47</sup> *Crowley v. Knapp*, 94 Wis. 2d 421, 448, 288 N.W.2d 815, 828 (1980) (Coffey, J., dissenting).

<sup>48</sup> See, e.g., *Kiernan*, 123 N.Y.S.2d at 901; *Gregory*, 495 A.2d at 1009.

ily. If this is the case, the efficiency gains of a covenant controlling the type of occupants (as opposed to their spillover effects) may be limited, and may be outweighed by other policy considerations.<sup>49</sup>

### *b. Moral Obligation*

Some courts indicate that single family use restrictions should, like other real covenants, be enforced for moral reasons. When a person has actual or record notice of the servitude before buying, she can offer a lower price to reflect the restriction and protect herself.<sup>50</sup> If she does not, she cannot subsequently evade the agreement and destroy the expectations of the covenantee about the nature of the community.<sup>51</sup> One judge observed in a related case dealing with a covenant barring children under twelve years of age:

All young couples buying living units can foresee the possibility of children and this restriction has not 'snuck' up on them, for they well knew of it prior to purchase or conception. The choice was theirs.<sup>52</sup>

Other real covenant cases state that it is also improper to allow the covenantor to pay a reduced price for the land with the covenant and then attempt to sell it at a higher price free of the burden.<sup>53</sup>

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<sup>49</sup> To some courts the lack of value loss is relevant. *See, e.g., Gregory*, 495 A.2d at 1002 (stating that character of neighborhood and quality of life not threatened by home for mentally retarded). However, to other courts it is not. *See, e.g., Kiernan*, 123 N.Y.S.2d at 901 ("The fact that money damage to plaintiffs is unsubstantial is immaterial.")

Covenants based on "irrational prejudice," *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (addressing zoning restricting group homes for the mentally retarded), will also be valued by the hypothetical "rational economic person," and, if not, should they be protected for efficiency concerns?

<sup>50</sup> *See, e.g., Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459, 464 (Ind. Ct. App. 1987) (recorded covenants gave "notice to the world of their contents"); *Kiernan*, 123 N.Y.S.2d at 900 ("The defendants purchased their respective properties with express or implied knowledge of the restrictions and it is not contrary to equity that they be compelled to respect them and the rights of others who, in reliance upon the protection of the covenants, established their residences in the locality.").

<sup>51</sup> *See, e.g., Gregory*, 495 A.2d at 999 (covenantee claiming that a group home for the mentally retarded would depress property values and "'destroy the integrity . . . and the tranquility of the neighborhood that we enjoy and paid for.'"); *Crowley*, 94 Wis. 2d at 448, 288 N.W.2d at 828 ("Those individuals who have invested their life savings in land and a home . . . are entitled to protection . . . including enforcement of the covenant, which they relied on when investing in the area.").

<sup>52</sup> *Franklin v. White Egret Condominium*, 358 So. 2d 1084, 1092-93 (Fla. Dist. Ct. App. 1977).

<sup>53</sup> *See, e.g., Van Sant v. Rose*, 260 Ill. 401, 413, 103 N.E. 194, 198 (1913) (stating it would be inequitable if a party purchased property with restriction, then sold it free

However, these "moral" arguments must be measured against the "moral" right of privacy in family matters claimed by the nonconformist, as well as against other policy concerns.

*c. Freedom of Choice*

Real covenants express the voluntary choices of the parties. They allow an individual to control her environment and achieve some degree of personal autonomy in a world where the individual is often confronted by external pressures. Thus, real covenants should be enforced as a general matter to permit this self-fulfillment. This is part of the concept of freedom of contract.

Many owners view single family restrictions as a personal choice designed to support traditional family life. Their choice reflects a common belief that the family is important to bring personal development and fulfillment,<sup>54</sup> to sustain society by inculcating values and norms, and to socialize the next generation.<sup>55</sup> The cases indicate that owners of lots benefitted by such restrictions seek a certain neighborhood "character,"<sup>56</sup> "integrity and tranquility."<sup>57</sup> They believe that this arrangement can help "impart strong values."<sup>58</sup> Owners fear that nontraditional family uses may cause "an annoyance and a nuisance,"<sup>59</sup> and seek to "prevent flexibility by ascribing a fixed, unambiguous definition" to single family use.<sup>60</sup> For many courts single family use restrictions should be enforced since they "were important"<sup>61</sup> to the benefitted own-

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of restriction for higher price); *Welitoff v. Kohl*, 105 N.J. Eq. 181, 187-88, 147 A. 390, 393 (1929) ("[I]t would be unfair to permit one, who had bought presumably at a lower price because of the imposed restrictive covenant, to make a profit by selling at a higher price clear of the restriction.").

<sup>54</sup> See WHITE HOUSE CONFERENCE, *supra* note 5, at 80 (80% of survey respondents feel that family is the most, or one of the most, important elements in their lives); S. LEVITAN & R. BELOUS, *supra* note 4, at 12, 20 (stating that young adults indicate that family life and marriage are two of the most important factors contributing to a "normal" and "productive" life).

<sup>55</sup> S. LEVITAN & R. BELOUS, *supra* note 4, at 6.

<sup>56</sup> *Jackson v. Williams*, 714 P.2d 1017, 1019 n.4 (Okla. 1985).

<sup>57</sup> *Gregory v. State*, 495 A.2d 997, 999 (R.I. 1985).

<sup>58</sup> *Shaver v. Hunter*, 626 S.W.2d 574, 579 (Tex. Ct. App. 1981) (Countiss, J., concurring).

<sup>59</sup> *Jackson*, 714 P.2d at 1019.

<sup>60</sup> *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596, 599 (1984); *accord Shaver*, 626 S.W.2d at 576 ("The clear intent and the plain and unambiguous purpose expressed in the covenant is to restrict the use of the property to a single family residence.").

<sup>61</sup> *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459, 461 (Ind. Ct. App.

ers when they bought their lots. Moreover, courts should recognize that people are particularly concerned if rights relating to their homes are not protected, given the importance of the family home in American culture and history.<sup>62</sup>

Protection of the personal choice of the covenanting parties is especially important when a scheme of reciprocal subdivision covenants is involved. Each owner receives increased "health, happiness, and peace of mind" from the arrangement in exchange for submitting to controls.<sup>63</sup> Often, those subdivisions have the additional benefit of democratic self-determination.<sup>64</sup> The law must protect that choice by the owners in order to ensure the benefits.<sup>65</sup>

However, the difficulties occur when the choice appears to be irrational, such as when fears that residents of a group home for the mentally ill will cause disturbances prove unfounded,<sup>66</sup> or when the choices of one person preempt private and personal choices of living arrangements of another.<sup>67</sup> The law must strike a balance in such cases.

## 2. The Antirestrictions Policy

Courts construing single family use covenants have noted that "it is in the best interests of society that the free and unrestricted use and

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1987).

<sup>62</sup> See *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 900 (Sup. Ct. 1953) (upholding covenants for the benefit of homeowners who, "in reliance upon the protection of the covenants, established their residences in the locality"); *Crowley v. Knapp*, 94 Wis. 2d 421, 448, 288 N.W.2d 815, 828 (1980) (Coffey, J., dissenting) ("a home, 'The American Dream'").

<sup>63</sup> *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181 (Fla. Dist. Ct. App. 1975).

<sup>64</sup> See *Korngold, Conservation Servitudes*, *supra* note 34, at 468-69.

<sup>65</sup> For cases declaring the benefits of reciprocal subdivision arrangements, see *Swaggerty v. Petersen*, 280 Or. 739, 742-43, 572 P.2d 1309, 1312 (1977) (stating drafters of restriction sought to limit overall density in subdivision); *Benton v. Bush*, 644 S.W.2d 690, 691-92 (Tenn. Ct. App. 1982) (stating that restrictions promoted uniform development, value of property, and beauty of neighborhood); *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981) (finding restrictions enhance property values and induce purchasers).

<sup>66</sup> See *Jackson v. Williams*, 714 P.2d 1017, 1024 (Okla. 1985) (inferring from evidence that home for five mentally handicapped women did not constitute annoyance or nuisance); *Shaver v. Hunter*, 626 S.W.2d 574, 579 (Tex. Ct. App. 1981) (Countiss, J., concurring) (stating housemother and three handicapped residents would not interfere with integrity of neighborhood).

<sup>67</sup> It is unclear whether covenantees are really interested in controlling activities within their homes or fallout from those houses on the rest of the neighborhood. See *infra* text accompanying notes 92-94.

enjoyment of land be encouraged to its fullest extent.”<sup>68</sup> These statements echo those in other real covenant cases. Usually, this policy is not explained. The importance of this antirestrictions concern must be understood to properly analyze single family use servitudes.

*a. Marketability*

It has been suggested that real covenants should be deterred because they create problems for the marketability of land.<sup>69</sup> However, as long as a buyer can discover the restriction through record notice, she can set her offer accordingly. Thus, she can choose to buy subject to a single family use restriction at a price presumably below that of unencumbered title. If she seeks to use the land free of the covenant, she may attempt to buy the covenantee's rights. Transaction costs necessary to locate the covenantee — a prerequisite to bargaining — should not be great since family use covenants are appurtenant and the benefitted neighboring owners can easily be found.<sup>70</sup> While there may be difficulties in actually reaching an agreement, especially in a subdivision context when there are many covenantees, theoretically resolution is just a matter of the buyer offering enough consideration. Concerns about marketability, therefore, do not adequately explain the antirestrictions policy.<sup>71</sup>

*b. Dead Hand Control*

The antirestrictions policy, however, is justified by another important consideration — limitation of the power of the dead hand. Covenants created today will bind future generations owning the property, perhaps in perpetuity. This can be harmful in two ways.

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<sup>68</sup> *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 70-71, 274 S.E.2d 174, 179 (1981); *accord* *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407, 408 (Mo. 1986); *Crowley v. Knapp*, 94 Wis. 2d 421, 435, 288 N.W.2d 815, 823 (1980).

<sup>69</sup> See C. CLARK, *REAL COVENANTS AND OTHER INTERESTS THAT "RUN WITH LAND"* 72 (2d ed. 1947).

<sup>70</sup> Appurtenant covenants and easements benefit and attach to a piece of land. In gross interests are held by the person, without reference to a benefitted parcel. See 2 *AMERICAN LAW OF PROPERTY* § 9.32 (A.J. Casner ed. 1952); *RESTATEMENT (FIRST) OF PROPERTY* §§ 453-454 (1944). A distance of three blocks between the benefitted and burdened parcels may prevent a burden from running. See *Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E.2d 824 (1971); *RESTATEMENT (FIRST) OF PROPERTY* § 537 comment f, illustration 4 (1944).

<sup>71</sup> If single family use restrictions were held in gross, there may be serious marketability issues. See Korngold, *Unifying Servitudes*, *supra* note 34, 543-44.

First, old ties can prevent current owners from shifting the use of their land to meet contemporary needs of the public which are expressed through the marketplace. This restraint frustrates the societal goal of efficient use of our limited land resources. For example, as the size of traditional families decreases,<sup>72</sup> should single family use restrictions be enforced to prevent owners from filling excess space in their homes with other people?<sup>73</sup> As housing becomes scarcer, should people be prevented from making arrangements for the limited amount of shelter by application of these covenants?<sup>74</sup> Should people be prevented from banding together to purchase housing that they individually could not afford?<sup>75</sup> The Rule Against Perpetuities does not literally apply to real covenants,<sup>76</sup> but we should not ignore its lesson that longstanding ties on land can have harmful effects on society's efficient allocation of resources.<sup>77</sup>

Dead hand control has a second deleterious effect. When a court enforces a servitude it frustrates the aspirations and personal autonomy of the current owner and imposes the vision of a past generation. One dissenting judge noted that the majority's decision in determining that a single family use covenant required an injunction barring two unre-

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<sup>72</sup> See *supra* notes 9 & 10 and accompanying text.

<sup>73</sup> See POPULATION REFERENCE, *supra* note 5, at 7 (indicating that today, people are reaching the "empty nest" stage earlier, thus the single family home has less appeal); Shaman, *On Long Island: The War on Illegal Accessory Rentals*, N.Y. Times, Sept. 14, 1986, § 8, at 10, col. 1 (describing benefits of illegal accessory apartments in single dwellings as providing needed housing for the young and revenue for owners).

<sup>74</sup> See *Liberty Nat'l Bank v. Zimmerman*, 333 Ill. App. 94, 104, 77 N.E.2d 49, 54 (1947) (recognizing housing shortage in denying possession to landlord for alleged breach due to occupancy by extended family).

<sup>75</sup> See *Marino v. Mayor of Norwood*, 77 N.J. Super. 587, 594, 187 A.2d 217, 221 (Ct. App. Div. 1963) (holding that people having economic or other reasons for living together as a "single housekeeping unit" did not violate zoning restriction); *People v. Skidmore*, 69 Misc. 2d 320, 322, 329 N.Y.S.2d 881, 883 (Sup. Ct. 1971) (holding that two individuals — each with their own children — who "for economic . . . reasons joined forces" and pooled funds to afford rental — constituted a family within zoning ordinance).

<sup>76</sup> See *Browder*, *supra* note 34, at 29-30, 34 nn.87-88, 104.

<sup>77</sup> See *Copelan v. Acree Oil Co.*, 249 Ga. 276, 278, 290 S.E.2d 94, 96 (1982) (stating that former owners should control land use only in severely restricted circumstances); *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 368 (Minn. 1979) ("This court has serious reservations about the wisdom of allowing provisions contained in a 1949 real estate transaction . . . to prevent the development of a substantial piece of real estate in 1978."); Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1868-69 (1986).

lated, male co-owners from living in the property, "would oust one of the tenants in common from enjoying his own home."<sup>78</sup> In an era of diminishing resources — such as housing — inflicting the wishes of past owners on present users can be especially onerous. Social discontent may result when the law intrudes into the privacy of people's homes to enforce the wishes of past owners.

The enforcement of single family use restrictions inflicts not only the vision but also the values of past generations on future owners. These servitudes do not allow different behavior, whether it is the "eccentric" actions of the individual nonconformist or an emerging pattern of conduct that is followed by numerous members of the social minority.<sup>79</sup> While the traditional single family was perhaps the norm in earlier times, social and economic forces have permitted or compelled people to join together in nontraditional arrangements for living and mutual support. The law should be careful in denying them self-fulfillment and imposing a tyranny of the conventional because their neighbors find them to be out of the ordinary.

Private covenants that barred racial and religious minorities provide a painful reminder. Were it not for the Supreme Court's stretch to find state action,<sup>80</sup> these covenants expressing the prejudice of past generations might still be valid even though most in our society have come to regard private discrimination for personal characteristics to be anathema. To be sure, one's race is immutable while her living choices are not. Moreover, the law strictly examines racial discrimination unlike living and quasi-family choices. Still, the lesson remains that the bias of past generations should not limit choices of current land owners.

Moreover, the value judgments of courts deciding single family use covenant cases seep into their decisionmaking. In one recent case prohibiting a group home for mentally retarded children on the grounds that it was not a "single-family dwelling," the court used judgmental terms when it noted that only "normal" and "usual" family units were permitted.<sup>81</sup> Another court barred a group home for four mentally retarded adults and a counselor from occupying a house, find-

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<sup>78</sup> Feely v. Birenbaum, 554 S.W.2d 432, 438 (Mo. Ct. App. 1977).

<sup>79</sup> For a discussion of changed conditions and relative hardship, see *infra* note 145.

<sup>80</sup> See Shelley v. Kraemer, 334 U.S. 1 (1948); see also *infra* notes 134-35 and accompanying text.

<sup>81</sup> Evergreen Meadows Homeowners' Ass'n v. Double D Manor, Inc., 743 P.2d 39, 40 (Colo. Ct. App. 1973). For a different attitude, see Jackson v. Williams, 714 P.2d 1017, 1023 (Okla. 1985) ("When . . . the . . . covenant . . . does not address itself to the composition of the family, a court is loathe to restrict a family unit to that composed of persons who are related, one to another, by consanguinity or affinity.").



ing that they did not comprise a "family."<sup>82</sup> At the same time, though, the court stated that "the holding does not mean . . . that 'three unrelated schoolteachers' cannot live together . . . ."<sup>83</sup> While the court distinguished the situations on the basis that there is supervision in a group home, one wonders if the decision really turned on the court's view that three unrelated schoolteachers are an acceptable deviation from the single family norm while other nonconventional arrangements are not.<sup>84</sup> Still another court permitted the occupancy by an owner, his wife, son, and daughter-in-law but prohibited another owner from allowing his three married daughters, two cousins, a niece and their children from residing in the home.<sup>85</sup> While the court maintained that it was concerned with overcrowding, suspicion lingers that the court's sense of what is "typical" controlled.<sup>86</sup>

Finally, using single family use restrictions to control behavior within the home is especially ironic in light of the forces behind the development of the single family home model. It is argued that the single family home became an ideal in the mid-19th century as part of a developing concept of family privacy.<sup>87</sup> The home was viewed as a special refuge from the commercial world where the individual could find satisfaction. Over time the home has grown into a "self-contained entity," and "familial privacy has become an increasingly important theme."<sup>88</sup> The internal privacy of the single family home, not the purity of the neighborhood, has been key. It thus seems strange to use covenants designed to support single dwellings to interfere in the home of a nonconformist.

### 3. Making an Accommodation

How then can these problems of dead hand control be harmonized with the efficiency and freedom of choice benefits of covenants? These values can best be accommodated by a rule that allows enforcement of a

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<sup>82</sup> *Omega Corp. v. Malloy*, 228 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985).

<sup>83</sup> *Id.* at 18, 319 S.E.2d at 731.

<sup>84</sup> This might also explain why some courts permit boarders and lodgers. *See, e.g., Southampton Civic Club v. Couch*, 159 Tex. 464, 468, 322 S.W.2d 516, 519 (1958) (permitting owners of homes restricted to single family residences to rent rooms).

<sup>85</sup> *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 898-99 (Sup. Ct. 1953).

<sup>86</sup> Certainly the court was not suggesting that a "traditional" single family with many children would be prohibited because of overcrowding.

<sup>87</sup> M. GORDON, *supra* note 4, at 66-68.

<sup>88</sup> *Id.* at 68. *See generally* Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135 (1985) (discussing the family's public and private elements).

servitude only to the extent that it regulates external behavior of a current owner rather than her status or private conduct (and measures that external behavior by objective, nonnormative criteria). Thus, restrictions that control the harmful spillovers of an owner's use on the rest of the neighborhood should generally be valid, provided that they are limited only to negative effects that are projected beyond the borders of the property (e.g., noise, parking) rather than the personal choices which take place within the home.<sup>89</sup> The rule would protect the tranquility of the neighborhood, reinforcing the contract benefits of servitudes, but would not impose the past generation's values.<sup>90</sup> It would also recognize the new pluralistic nature of American families and households.<sup>91</sup>

It is true that not all contract benefits of covenants would be secured under this rule. For example, it would not protect a desire to shield one's family from "immoral" or "different" behavior that might be taking place in the privacy of the next house. Nor would it permit the creation of a certain "moral ambience"<sup>92</sup> in the neighborhood. The need to limit the dead hand, however, trumps these wishes to install normative controls. Moreover, the fact that there are not many reported cases challenging nontraditional living arrangements, such as unmarried people living together, may indicate that covenantees are indeed mostly

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<sup>89</sup> See *Crowley v. Knapp*, 94 Wis. 2d 421, 433, 288 N.W.2d 815, 821 (1980) (stating that neighbors were initially concerned residents of group home for mentally retarded adults would create "a common law nuisance or be an annoyance" but uncontradicted evidence showed that this did not actually occur).

<sup>90</sup> A few courts have been sensitive to this distinction. See, e.g., *Knudtson v. Trainor*, 216 Neb. 653, 658, 345 N.W.2d 4, 7 (1984) ("From the outside, the home looks like all other single family homes in the neighborhood." (quoting *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 27 (Minn. 1981))); *Gregory v. State*, 495 A.2d 997, 1002 (R.I. 1985) ("carrying on the day-to-day activities of all the other homes"); see also *Pierce v. Harper*, 311 Mo. 301, 304, 278 S.W. 410, 411 (1925) (defendants claimed that "there are no outward signs of any kind by which any person could know to what uses said premises are being put."). For zoning cases recognizing the distinction, see *City of Des Plaines v. Trottnor*, 34 Ill. 2d 432, 438, 216 N.E.2d 116, 120 (1966) (rejecting "zoning ordinances that penetrate so deeply . . . into the internal composition of a single housekeeping unit."); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 23 (Minn. 1981) ("From the exterior, the building would be indistinguishable from any other single-family building in the subdivision.").

<sup>91</sup> See S. LEVITAN & R. BELOUS, *supra* note 4, at viii ("Whether or not society is better off because of the new sexual and household freedoms depends . . . on personal value judgments. However, the ability to turn the clock back to an older, dominant family structure does not appear to be in the offing.").

<sup>92</sup> Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 194 (1977-78) (discussing zoning restrictions on family use).

concerned with objective, external effects and not what goes on inside the covenantor's home.<sup>93</sup> "Single family use" might just be a very rough way of expressing the expectation that the use of the house should not create more fallout in the neighborhood than would the use by a traditional family.<sup>94</sup>

The decisions of the United States Supreme Court on zoning ordinances restricting occupancy to a single family seem at odds with this proposed rule but ultimately support it. *Village of Belle Terre v. Boraas* and *Moore v. City of East Cleveland* indicate that governmental regulation of living arrangements of families will receive strict scrutiny, while those of unrelated people will not.<sup>95</sup> Rather, nonfamily living arrangements must defer to the legislature's power to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."<sup>96</sup> Arguably this means that the courts should also defer to similar private choices created by covenants.

But there are two critical reasons why private controls over unrelated people should be closely scrutinized. First, servitudes are perpetual. Zoning legislation can be changed through the democratic process to meet new needs and views. There is no such flexibility with dead hand control. Second, zoning controlling nonfamily living relationships will not be upheld if there is no rational relationship between the legislation and a legitimate state objective.<sup>97</sup> For example, zoning restrictions on group homes for the mentally ill have been struck as being based on "mere negative attitudes or fear"<sup>98</sup> and "irrational prejudice."<sup>99</sup> Real

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<sup>93</sup> The great number of challenges to group homes, *see infra* note 100, might be due to people's (unfounded) fears about the handicapped.

<sup>94</sup> *See Trottnier*, 34 Ill. 2d at 437, 216 N.E.2d at 119 (rejecting view that limiting family to relationships may be thought to limit intensity of use and control traffic and parking problems). The court stated: "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." *Id.*

<sup>95</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977).

<sup>96</sup> *Belle Terre*, 416 U.S. at 9.

<sup>97</sup> *Id.* at 8. Moreover, zoning ordinances have tended to include groups other than traditional families within their definition of "family." *See, e.g., Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 205, 326 A.2d 841, 845 (1974) (defining family as "one or more persons occupying the premises as a single housekeeping unit"); *Town of Ithaca v. Lucente*, 36 A.D.2d 560, 560, 317 N.Y.S.2d 679, 680 (1971) (same).

<sup>98</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

<sup>99</sup> *Id.* at 450.

covenants law has no parallel doctrine. Thus, dead hand concerns must be given effect through other means.

## II. SINGLE FAMILY USE COVENANT CASES

The courts' decisions in single family use restrictions cases must be analyzed to determine whether they strike an appropriate balance between freedom of contract and the antirestrictions policy. The courts have typically decided the cases based on narrow constructional devices, rather than by articulating and addressing the policy issues. As a result, courts provide little guidance on how to resolve the truly difficult case where the covenant not only clearly limits occupancy to one family but also expressly defines "family" to include only a "traditional" nuclear family.

In recent years, much of the single family use litigation has involved group homes for the mentally and developmentally handicapped, with the decisions going both ways.<sup>100</sup> Restrictions have also been applied to bar two unrelated male co-owners,<sup>101</sup> a group home for elderly citizens,<sup>102</sup> members of religious orders,<sup>103</sup> and eight college students.<sup>104</sup> While there are no reported decisions regarding other types of non-traditional living arrangements, the language of the covenants and existing holdings raise significant doubts as to their viability.

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<sup>100</sup> Cases prohibiting such homes include *Evergreen Meadows Homeowners' Ass'n v. Double D Manor, Inc.*, 743 P.2d 39 (Colo. Ct. App. 1987); *Adult Group Properties, Ltd., v. Imler*, 505 N.E.2d 459 (Ind. Ct. App. 1987); *London v. Handicapped Facilities Bd.*, 637 S.W.2d 212 (Mo. Ct. App. 1982); *Shaver v. Hunter*, 626 S.W.2d 574 (Tex. Ct. App. 1981); *Omega Corp. v. Malloy*, 228 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985). *Contra* *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596 (1984); *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407 (Mo. 1986); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 472 N.Y.S.2d 901, 460 N.E.2d 1336, *cert. denied*, 469 U.S. 804 (1984); *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985); *Crowley v. Knapp*, 94 Wis. 2d 42, 288 N.W.2d 815 (1980). *See generally* *Brussack, Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33 (1981) (discussing group homes for disabled individuals).

<sup>101</sup> *See, e.g., Feely v. Birenbaum*, 554 S.W.2d 432 (Mo. Ct. App. 1977).

<sup>102</sup> *See, e.g., Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978).

<sup>103</sup> *See, e.g., Simons v. Work of God Corp.*, 36 Ill. App. 2d 199, 183 N.E.2d 729 (1962); *Cash v. Catholic Diocese*, 414 S.W.2d 346 (Mo. Ct. App. 1967).

<sup>104</sup> *See, e.g., McCord v. Pichel*, 35 A.D.2d 879, 315 N.Y.S.2d 717 (1970).

### A. Use or Structure Restriction

A number of courts avoid the issue of the validity of limitations on occupants by construing the covenant as restricting only the types of structures allowed on the premises rather than who may use or occupy it.<sup>105</sup> These cases usually rely on a fair reading of language such as "no structure shall be erected other than a single family dwelling" to reach this result.<sup>106</sup> The courts also use narrow construction principles.<sup>107</sup>

However, other courts do not avoid the problem of single family use covenants through construction. For example, some hold that language seemingly referring only to structures does indeed restrict the use of the property.<sup>108</sup> Additionally, some courts hold that a limitation on structures also restricts use.<sup>109</sup>

Therefore, interpretative techniques may not always provide a way out of difficulty of the enforceability of single family use covenants. Certainly, when the covenant makes it explicit that occupancy and use

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<sup>105</sup> See, e.g., *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407 (Mo. 1986); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E.2d 174 (1981); *Jackson v. Williams*, 714 P.2d 1017 (Okla. 1985).

<sup>106</sup> See, e.g., *Blevins*, 707 S.W.2d at 407 ("no buildings shall be erected . . . other than single or double family dwellings"); *Knudtson*, 216 Neb. at 658-59, 345 N.W.2d at 7 ("no structures or buildings shall be erected . . . other than one detached single family dwelling" (quoting *Malcolm v. Shamie*, 290 N.W.2d 101, 102 (Mich. Ct. App. 1980))); *Jackson*, 714 P.2d at 1021 ("[a] building, other than a mobile home, containing one dwelling unit designed for occupancy by not more than one family.").

<sup>107</sup> See, e.g., *Blevins*, 707 S.W.2d at 410.

<sup>108</sup> See, e.g., *Evergreen Meadows Homeowners' Ass'n v. Double D Manor, Inc.*, 743 P.2d 39, 40 (Colo. Ct. App. 1987) ("All sites shall be for residential use only, with only one single-family dwelling permitted on any site."); *Shaver v. Hunter*, 626 S.W.2d 574, 576 (Tex. Ct. App. 1981) ("residential purposes only" construed to mean single family use); *Omega Corp. v. Malloy*, 228 Va. 12, 15, 319 S.E.2d 728, 729 (1984) ("one detached single-family dwelling"), *cert. denied*, 469 U.S. 1192 (1985).

<sup>109</sup> See, e.g., *Bellarmino Hills Ass'n v. Residential Sys. Co.*, 84 Mich. App. 554, 269 N.W.2d 673, 675 (1978) (stating that restrictive covenant applies not only to physical construction, but also to actual use); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 159, 460 N.E.2d 1336, 1338, 472 N.Y.S.2d 901, 904 (same), *cert. denied*, 469 U.S. 804 (1984); *McCord v. Pichel*, 35 A.D.2d 879, 880, 315 N.Y.S.2d 717, 719 (1970) (same); *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 898-99 (Sup. Ct. 1953) (same).

are restricted,<sup>110</sup> the conflict between contract and antirestriction considerations must be faced.

### B. Construction Norms

When courts must decide what is a "family" under a single family use clause and the term is not defined in the covenant, they often resort to constructional devices. Some courts take the view that the failure to define "family" requires an expansive reading of the word, noting that the parties must expressly provide a more restrictive meaning.<sup>111</sup>

However, other courts use the "ordinary and popular"<sup>112</sup> meaning of the term family when it is not defined, and include only "traditional" families.<sup>113</sup> Other constructional devices favor traditional families over alternative arrangements. For example, some courts look to the subsequent behavior of the covenanting parties to understand what is meant by "family." This approach is likely to reinforce the majority's traditional position against nonconformists.<sup>114</sup> Additionally, some courts insist that they must look to the meaning of "family" as of the time the covenant was written,<sup>115</sup> with the effect that the older the covenant, the

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<sup>110</sup> See, e.g., *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596, 597 n.1 (1984) ("[S]uch dwellings shall be . . . occupied by only one (1) single family."); *London v. Handicapped Facilities Bd.*, 637 S.W.2d 212, 214 n.1 (Mo. Ct. App. 1982) ("No more than one family shall live in any residence."); *Feely v. Birenbaum*, 554 S.W.2d 432, 434 (Mo. Ct. App. 1977) (prohibiting "use . . . by more than one family").

<sup>111</sup> See, e.g., *Franklin v. White Egret Condominium*, 358 So. 2d 1084, 1087 (Fla. Dist. Ct. App. 1977) ("Substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant." (quoting *Moore v. Stephens*, 90 Fla. 879, 106 So. 901, 904 (1925))); *Jackson v. Williams*, 714 P.2d 1017, 1023 (Okla. 1985) (stating that when composition of family is not addressed, court is loathe to restrict its meaning); *Crowley v. Knapp*, 94 Wis. 2d 421, 427, 288 N.W.2d 815, 823 (1980) (same).

<sup>112</sup> *London*, 637 S.W.2d at 215.

<sup>113</sup> See, e.g., *Evergreen Meadows Homeowners' Ass'n v. Double D Manor, Inc.*, 743 P.2d 39, 40 (Colo. Ct. App. 1973) (stating that since "single-family dwelling" is not specifically defined, it should retain its traditional definition); *London*, 637 S.W.2d at 215 (stating that the court should give the terms used their ordinary meaning in the context of their usage); *Feely*, 554 S.W.2d at 435 (same).

<sup>114</sup> See, e.g., *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459, 467 (Ind. Ct. App. 1987) (finding fact that traditional families occupied 34 of 35 lots in restricted subdivision indicates the intent of the original covenanting parties).

<sup>115</sup> See, e.g., *Feely*, 554 S.W.2d 432 (1914 purchaser and suit brought in 1971); *McCord v. Pichel*, 35 A.D.2d 879, 880, 315 N.Y.S.2d 717, 720 (1970) (stating that developer did not mean eight or nine unrelated students when it imposed the "family" restriction).

more traditional the definition. This is a dubious position since it ignores the intent of the covenantor's successor even though for other purposes we treat her as a contracting party.<sup>116</sup>

### C. Defining "Family"

After declaring constructional ground rules, the courts then define "family." One group of courts adopts a narrow articulation, limiting a family to "persons related by blood, marriage or adoption."<sup>117</sup> Some restrict the group almost to a nuclear family, allowing only "a father, mother, children and immediate blood relatives."<sup>118</sup> These courts note that while other groupings share "indicia of family life"<sup>119</sup> and may do some things that families do, this does not make them a family.<sup>120</sup>

In many respects these definitions are accurate descriptions of the "traditional" family.<sup>121</sup> Their use would help preserve traditional family neighborhoods, effectuating the choice of the covenanting parties. However, some of the definitions, such as those limiting collateral relatives, are overly restrictive in light of historical norms.<sup>122</sup> Moreover, some of the definitions are outdated as descriptions of the current "traditional" family. For example, the requirement that a "family" have a "single head or management"<sup>123</sup> seems inapplicable today to even a "traditional" family in light of the legal and social empower-

<sup>116</sup> The successor demonstrates her intent by purchasing with notice of the covenant. *See supra* note 41 and accompanying text.

<sup>117</sup> *Feely*, 554 S.W.2d at 435; *accord London*, 637 S.W.2d at 215; *Omega Corp. v. Malloy*, 228 Va. 12, 18, 319 S.E.2d 728, 731 (1984), *cert. denied*, 469 U.S. 1192 (1985); *Crowley v. Knapp*, 94 Wis. 2d 421, 442, 288 N.W.2d 815, 825 (1980) (Day, J., dissenting); *Contra Jackson v. Williams*, 714 P.2d 1017, 1023 (Okla. 1985).

<sup>118</sup> *Imler*, 505 N.E.2d at 466. There is a debate over whether extended families are permitted. *Compare* *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 898-99 (Sup. Ct. 1953) (barring extended family of owner's married children, niece and cousin) *with* *Shaver v. Hunter*, 626 S.W.2d 574, 577 (Tex. Ct. App. 1981) (resisting limitation to the nuclear family).

<sup>119</sup> *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 159, 460 N.E.2d 1336, 1338, 472 N.Y.S.2d 901, 904, *cert. denied*, 469 U.S. 804 (1984).

<sup>120</sup> *Crowley*, 94 Wis. 2d at 443, 288 N.W.2d at 826 (Day, J., dissenting). The courts have also looked at various factors present in the group to distinguish it from a family. *See, e.g., Omega*, 228 Va. at 18, 319 S.E.2d at 731 (element of supervision in a group home for the mentally retarded).

<sup>121</sup> *See supra* note 4 and accompanying text.

<sup>122</sup> *See supra* note 10 (extended family has recently become less prevalent).

<sup>123</sup> *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 899 (Sup. Ct. 1953); *see also* *Steva v. Steva*, 332 S.W.2d 924, 926 (Mo. 1960) ("one head and one domestic government," *quoted in Feely v. Birenbaum*, 554 S.W.2d 432, 435 (Mo. Ct. App. 1977)).

ment of women.<sup>124</sup> Finally, these articulations do not reflect the evolving nature of the family and modern alternative living and support mechanisms.

Other courts have more broadly defined the term "family" by using functional rather than kinship tests.<sup>125</sup> Several types of broad definitions emerge. The first focuses on the outward manifestations of the group living together. Thus, one court held that a family is "a group of people who live, sleep, work and eat upon the premises as a single housekeeping unit" and no relationship is necessary.<sup>126</sup> This very broad articulation would include many types of groups. A second categorization requires that the group's structure and obligations mirror the ideal traditional family. One court defined a family "as a collective body of persons under one head and one domestic government, who have reciprocal, natural, or moral duties to support and care for each other."<sup>127</sup> This articulation is broader than the traditional family definition, including, for example an unmarried couple, but may not be large enough to encompass a group of college students living together. A third description demands that the group have traditional family values and feelings, defining a family as "a stable housekeeping unit of two or more persons who are emotionally attached to each other and share a relationship that emulates traditional family values, promotes mutual protection, support, happiness, physical well-being and intellectual growth and is not in violation of the penal laws."<sup>128</sup> If single family use restrictions are limited to controlling the external negative effects of a group on the neighborhood, as opposed to creating a certain moral atmosphere, the first of these three broader definitions is all that is needed to accomplish that goal.

#### D. Policy Bases

While most courts decide the validity of single family use restrictions on a constructional and definitional level, a few courts rely on public

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<sup>124</sup> See *Brady v. Superior Court*, 200 Cal. App. 2d 69, 77, 19 Cal. Rptr. 242, 247 (1962) (rejecting head of household requirement in zoning case); see also *supra* note 8 and accompanying text.

<sup>125</sup> See *supra* note 4.

<sup>126</sup> *Crowley v. Knapp*, 94 Wis. 2d 421, 437, 288 N.W.2d 815, 823 (1980); accord *Knudtson v. Trainor*, 216 Neb. 653, 658, 345 N.W.2d 4, 7 (1984) ("family-type setting and call the dwelling their home").

<sup>127</sup> *Steva*, 332 S.W.2d at 926-27.

<sup>128</sup> *Shaver v. Hunter*, 626 S.W.2d 574, 579 (Tex. Ct. App. 1981) (Countiss, J., concurring).



policy to void application of these covenants to group homes for the mentally and developmentally handicapped. These courts find that enforcement of the covenant would frustrate specific statutory or state constitutional provisions favoring group homes and so the covenant must fall.<sup>129</sup> However, these cases are not very helpful when the non-traditional family arrangement is not endorsed by such a specific legislative provision.<sup>130</sup>

There also is a vast group of cases describing and extolling "family" in contexts other than single family use restrictions.<sup>131</sup> But a favorable quotation broadly defining "family" in another context will likely not provide a sufficient basis for a court to void a single family use covenant as being offensive to public policy.<sup>132</sup> This Article has suggested a more precise, and long respected, policy basis — the contracts/anti-restrictions conflict — as a means of analyzing the issue.

### E. Constitutional Challenges

Some courts suggest that the United States Constitution might bar the application of single family use covenants against certain nontraditional family arrangements.<sup>133</sup> However, these positions are extremely

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<sup>129</sup> See, e.g., *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596, 599 (1984); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 160, 460 N.E.2d 1336, 1339, 472 N.Y.S.2d 901, 904, cert. denied, 469 U.S. 804 (1984).

<sup>130</sup> For statutes that void covenants barring group homes, see IND. CODE ANN. § 16-13-21-14 (West Supp. 1988); MO. ANN. STAT. § 89.020(3) (Vernon Supp. 1989); WIS. STAT. ANN. § 46.03(22)(d) (West 1987).

<sup>131</sup> See 16 WORDS AND PHRASES 302-62 (West 1959 & Supp. 1988).

<sup>132</sup> For example, courts differ on the issue of whether zoning decisions defining "family" are relevant to servitude cases. For examples of cases supporting the use of zoning definitions, see *Knudtson v. Trainor*, 216 Neb. 653, 658, 345 N.W.2d 4, 7 (1984); *Crowley v. Knapp*, 94 Wis. 2d 421, 437, 288 N.W.2d 815, 823 (1980); see also *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559, 565-66 (1982) (Allen, J., dissenting) (holding policy that invalidates zoning restriction is inapplicable to covenants); *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981) (holding restrictions enforced if they "do not offend articulated considerations of public policy") (emphasis added). *Contra* *Feely v. Birenbaum*, 554 S.W.2d 432, 435 (Mo. Ct. App. 1977) (refusing to apply policy of zoning ordinance to private covenant); *Crane Neck Ass'n*, 61 N.Y.2d at 159-60, 460 N.E.2d at 1338-39, 472 N.Y.S.2d at 904 (distinguishing zoning ordinance decisions and policies from those affecting private covenants).

<sup>133</sup> See, e.g., *Jackson v. Williams*, 714 P.2d 1017, 1023 n.24, (Okla. 1985) (unmarried persons living together); *Crowley*, 94 Wis. 2d at 437 n.2, 288 N.W.2d at 823 n.2. In related cases, a few courts have found covenants that prohibit children to be unconstitutional. See, e.g., *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974); *Franklin*

doubtful. First, it is unlikely that the courts will find state action and extend *Shelley v. Kraemer*<sup>134</sup> beyond racial covenants.<sup>135</sup> Moreover, even assuming state action were found, courts use strict scrutiny only with restrictions against relatives living together.<sup>136</sup> Courts will test limitations on living arrangements of unrelated people only for a rational relationship, and they likely will sustain the limitation.<sup>137</sup>

### III. RESOLVING THE DIFFICULT CASE

These decided cases, marked by interpretative devices, occasional reference to a specific state policy, and a failure to articulate and examine the contracts/antirestrictions debate, are of little assistance in resolving the difficult case when a group of people living together does not fall within the covenant's express definition of permissible occupants.<sup>138</sup> As suggested earlier, the competing policy concerns can be best accommodated by enforcing servitudes only to the extent that they limit spill-overs projected from the property rather than the owner's status or private choices on the land. This rule might regulate behavior such as excessive noise,<sup>139</sup> traffic congestion,<sup>140</sup> and overcrowding.<sup>141</sup> Whether occupancy could be limited to a single housekeeping unit is problematic.<sup>142</sup>

v. White Egret Condominium, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977).

<sup>134</sup> 334 U.S. 1 (1948).

<sup>135</sup> See *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459, 465 (Ind. Ct. App. 1987); *Jackson*, 714 P.2d at 1023 n.24; *Travalio, Suffer the Little Children — But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST. L.J. 295, 324-34 (1979).

<sup>136</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

<sup>137</sup> See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974).

<sup>138</sup> See, e.g., *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596, 597 n.1 (1984) ("[D]wellings shall be . . . occupied by only one (1) single family . . . . A family shall mean one person or a group of two or more persons living together and inter-related by bonds of consanguinity (sic), marriage, or legal adoption."); *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559, 560 (1982) (covenant expressly barring group homes as defined in statute).

<sup>139</sup> See *Gallon v. Hussar*, 172 A.D. 393, 396-97, 158 N.Y.S. 895, 898 (1916). One court has noted that "groups of college students are for the most part exuberant, boisterous and hilarious, use vibrant . . . instruments, and do not ordinarily keep regular hours." *Robertson v. Western Baptist Hosp.*, 267 S.W.2d 395, 397 (Ky. Ct. App. 1954).

<sup>140</sup> See *McCord v. Pichel*, 35 A.D.2d 879, 880, 315 N.Y.S.2d 717, 719 (1970).

<sup>141</sup> See *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 900 (Sup. Ct. 1953).

<sup>142</sup> It has been asserted that a "single housekeeping unit" limitation is designed to prevent overcrowding, see, e.g., *Neptune Park Ass'n v. Steinberg*, 138 Conn. 357, 84 A.2d 687, 691 (1951), and may also improve neighborhood relations by helping to keep

Well-drafted covenants should expressly articulate the behavior that is being controlled. Courts should interpret covenants that refer only to "single family use" and do not describe activities as permitting the owner to project on the neighborhood only the types and amount of fallout that a "reasonable" single family would.<sup>143</sup> In this way a "single family use" servitude retains meaning and validity.

There may be some uncertainty as to which living arrangements and quasi-families are permitted under such a rule, arguably creating some disincentive to entering into servitude arrangements. However, the uncertainty seems no greater than the current confusion over the enforcement of single family use servitudes.<sup>144</sup> Moreover, the importance of limiting the dead hand outweighs the harm due to lack of predictability.

The approach suggested in this Article can be implemented under existing real covenants law through the touch and concern test and the rule barring enforcement of covenants violating public policy.<sup>145</sup> It

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out transients. These may, however, be too intrusive in the internal composition of the house.

<sup>143</sup> Some courts have indicated that refusal to enforce a single family use covenant would violate the contracts clause of the United States Constitution, article I, § 10. *See, e.g.,* *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459 (Ind. Ct. App. 1987); *see also* *Crowley v. Knapp*, 94 Wis. 2d 421, 446, 288 N.W.2d 815, 827 (1980) (Day, J., dissenting) (speculating whether a statute voiding covenants barring group homes for the disabled can be applied retroactively). Other theories that deny enforcement of a covenant (such as changed conditions doctrine, *see infra* note 145) usually do so because of the presumed intent of the parties not to enforce under the circumstances, *see, e.g.,* *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927), and so do not present the contracts clause problem. The view that nonenforcement of a single family use clause creates a constitutional problem has been rejected on the theory that contracts can be impaired through "social welfare legislation" which is "reasonably necessary to further an important public purpose and that the measures taken . . . are reasonable and appropriate to effectuate the purpose." *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 167, 460 N.E.2d 1336, 1343, 472 N.Y.S.2d 901, 908, *cert. denied*, 469 U.S. 804 (1984). *But see* *Barret v. Lipscomb*, 194 Cal. App. 3d 1524, 1533, 240 Cal. Rptr. 336, 342 (1987) (refusing to apply retroactively statute voiding covenants limiting group homes). In *Crane Neck* there was a specific statute endorsing group homes; in other situations involving nontraditional living arrangements there is likely no specific statutory support. Courts typically void contracts that offend public policy without even raising the contracts clause issue and even though no specific statutory policy exists. *See generally* E. FARNSWORTH, *supra* note 35, at §§ 5.2-.6.

<sup>144</sup> *See* *Boston-Edison Protective Ass'n v. Paulist Fathers, Inc.*, 306 Mich. 253, 258, 10 N.W.2d 847, 849 (1943). ("It is obvious that each case involving the construction of reciprocal negative easements must be decided on its merits, considering the facts of the case.").

<sup>145</sup> The doctrines of changed conditions and relative hardship would not be gener-

should also be reflected in the unified law of servitudes that is currently being articulated in the *Restatement (Third) of Property — Servitudes*.<sup>146</sup>

### A. Touch and Concern

The touch and concern test traditionally limits the subject matter of real covenants.<sup>147</sup> Although the test is difficult to articulate, classically a covenant touches and concerns if it burdens the promisor in his capacity as a landowner and benefits the promisee in the same capacity, rather than being a benefit or burden unrelated to the enjoyment of the land.<sup>148</sup>

Professor Reichman has developed a touch and concern formulation that would permit enforcement only of servitudes "that are objectively intended to promote land utilization."<sup>149</sup> The formulation bars servitudes attempting to enforce "ideologically prescribed modes of behavior" as they would permit the imposition of "modern variations of feudal serfdom."<sup>150</sup> Professor Reichman's test achieves the policy accommodation suggested above by preserving the benefits of freedom of contract but, at the same time, limiting the reach of the dead hand.

If courts applied this touch and concern test to single family use covenants they would reach the result suggested in this Article. Personal choices within the homes could not be regulated, while objective, disturbing actions outside the home that affect the neighborhood could be

ally helpful to attack application of single family use restrictions to nontraditional living arrangements. The changed conditions rule would void only obsolete restrictions, see Korngold, *Unifying Servitudes*, *supra* note 34, at 557-58, while in the view of the majority, the single family restriction would still be valuable. The relative hardship doctrine would bar only equitable enforcement of the servitude, leaving the nontraditional homeowner liable to his neighbors for damages. See Korngold, *Conservation Servitudes*, *supra* note 34, at 486-89.

<sup>146</sup> See French, *Design Proposal*, *supra* note 34.

<sup>147</sup> The necessity for the touch and concern requirement has been questioned lately. See Epstein, *supra* note 34, at 1360 (rejecting the test as intrusion on free choice); French, *Design Proposal*, *supra* note 34, at 1220 n.18 (noting cases); French, *Modern Law of Servitudes*, *supra* note 34, at 1308 (suggesting increased use of modification doctrines rather than touch and concern rule).

<sup>148</sup> C. CLARK, *supra* note 69, at 99; Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645 (1913-14). Other statements of the rule appear at 2 AMERICAN LAW OF PROPERTY 378-83 (A.J. Casner ed. 1952); 5 R. POWELL AND P. ROHAN, *POWELL ON REAL PROPERTY* ¶ 673[2][a] (1981).

<sup>149</sup> Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 150 (1978).

<sup>150</sup> Reichman, *supra* note 34, at 1233.

prevented.

Surprisingly, none of the cases involving single family use restrictions cited in this Article raises the touch and concern issue. Indeed, they usually do not indicate that the case involves real covenants but address it as a simple contract action.<sup>151</sup> To be sure, the touch and concern test has its flaws. Most notably, it is only a rough vehicle for addressing the contracts/antirestrictions conflict and does not straightforwardly examine the issues. Rather, it forces the problem into an arcane framework replete with jargon. The touch and concern test needs to be reformulated or replaced in a modern law of servitudes.<sup>152</sup> However, it is better than nothing when it comes to single family use covenants.

### B. Covenants Violating Public Policy

Courts often state that covenants will not be enforced if they violate public policy.<sup>153</sup> Most often, however, these declarations are dicta<sup>154</sup> or flat assertions that the covenant in question does not offend public policy.<sup>155</sup> Few cases make a detailed analysis of the policy issue.<sup>156</sup>

Even fewer cases actually refuse enforcement of a servitude on the grounds that public policy is offended. Those that do usually rely on a conflict between the covenant and an express statutory provision<sup>157</sup> or a

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<sup>151</sup> It is unclear why this is so. It may be that traditional use covenants, such as limitations to residential purposes only, have been recognized for so long as meeting the touch and concern test that the courts (mistakenly) assume it is true of all use restrictions.

<sup>152</sup> See Korngold, *Unifying Servitudes*, *supra* note 34, at 571-72.

<sup>153</sup> See, e.g., *Wier v. Isenberg*, 95 Ill. App. 3d 839, 842, 420 N.E.2d 790, 793 (1981); *Bob Layne Contractors, Inc. v. Buenagel*, 158 Ind. App. 43, 53, 301 N.E.2d 671, 678 (1973); *Loeb v. Watkins*, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968).

<sup>154</sup> See, e.g., *Vickery v. Powell*, 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976); *Huey v. Davis*, 556 S.W.2d 860, 863 (Tex. Ct. App. 1977).

<sup>155</sup> See, e.g., *Normandy Square Assocs. v. Ellis*, 213 Neb. 60, 64, 327 N.W.2d 101, 104 (1982); *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 669, 268 S.E.2d 494, 500 (1980); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270-71, 363 S.E.2d 891, 894 (1987).

<sup>156</sup> For examples of cases making a detailed policy analysis and upholding the covenant, see *Rasp v. Hidden Valley Lake, Inc.*, 519 N.E.2d 153, 157 (Ind. Ct. App. 1988) (mandatory hook up and fee for water and sewer service); *Thayer v. Thompson*, 36 Wash. App. 794, 797, 677 P.2d 787, 789 (1984) (covenant barring any building without seller's consent valid because owner could still use the land).

<sup>157</sup> See, e.g., *Westwood Homeowners Ass'n v. Tenhoff*, 155 Ariz. 229, 234, 745 P.2d 976, 981 (Ct. App. 1987) (statute voiding covenants barring group homes for the developmentally disabled); *Hoye v. Shepherds Glen Land Co.*, 753 S.W.2d 226 (Tex. Ct. App. 1988) (statute voiding covenants that require the use of wood shingle roof); *Overlook Farms Home Ass'n v. Alternative Living Servs.*, 143 Wis. 2d 485, 489-91,

longstanding common law policy, such as policies against monopolies,<sup>158</sup> restraints on alienation,<sup>159</sup> and limits on access to the courts.<sup>160</sup> None of these specific policies is offended by enforcement of single family use covenants against nontraditional living arrangements. However, to the extent that such covenants violate the public policy favoring the limitation of the dead hand, the general rule could be applied to bar their enforcement.

### C. A Modern Law of Servitudes

Various commentators argue that a modern law of servitudes should enforce covenants in the manner of other consensual arrangements without using a touch and concern test or other device to scrutinize the substance of the covenant.<sup>161</sup> However, there must be some controls on the subject matter of real covenants in order to bar enforcement of covenants creating dead hand problems or eccentric limitations. Rather than using the flawed touch and concern test, courts could specifically examine the contracts/antirestrictions dichotomy and evolve rules dealing with difficult types of covenants. Thus, courts could expressly examine a particular single family use covenant and the facts in light of the policy analysis suggested in this Article and determine whether, and what aspects of, the covenant should be enforced. The *Restatement (Third) of Property — Servitudes* could provide for such a review in a section specifically dealing with the subject matter of servitudes or as part of the doctrine barring enforcement of servitudes violating public policy.

## IV. ZONING FOR SINGLE FAMILY USE AND PRIVATE AGE RESTRICTIONS

Zoning for single family use and private age restriction covenants raises some of the issues inherent in single family use servitudes. They

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422 N.W.2d 131, 134 (1988) (statute voiding covenants barring group homes for the mentally disabled).

<sup>158</sup> See, e.g., *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 92, 390 N.E.2d 243, 250 (1979); *Hall v. American Oil Co.*, 504 S.W.2d 313, 319 (Mo. Ct. App. 1973); *DeBlois v. Crosley Bldg. Corp.*, 117 N.H. 626, 629, 376 A.2d 143, 145 (1977).

<sup>159</sup> See, e.g., *Tuckerton Beach Club v. Bender*, 91 N.J. Super. 167, 170, 219 A.2d 529, 531 (1966); *Mountain Springs Ass'n v. Wilson*, 81 N.J. Super. 564, 574-75, 196 A.2d 270, 276 (1963).

<sup>160</sup> See, e.g., *Fugazzotto v. Brookwood One*, 295 Ala. 169, 173, 325 So. 2d 161, 164 (1976).

<sup>161</sup> See *supra* note 147.

provide a useful lens for analyzing single family use covenants. Moreover, they aid in understanding the larger issue posed in this Article — how real property law in the late twentieth century views the family.

### A. Zoning Restrictions on Single Family Use

Various zoning ordinances limit occupancy to single family use. It is noteworthy that many nontraditional arrangements that are barred under many private covenants are permitted under zoning. This is due to broader definitions of "family" in many of these ordinances, more flexible judicial interpretation, and constitutional limitations not present in most private covenants. Thus, public law often demonstrates a more flexible and broad concept of the family than does the law of servitudes, and so places fewer limitations on the ability of nonfamily groups to obtain housing.<sup>162</sup>

#### 1. Legislative Definitions and Judicial Interpretation

Many of the express definitions of "family" in zoning laws include, and thus authorize, many living arrangements besides the traditional family. Numerous ordinances expressly define a family simply as a group of people living as a "single housekeeping unit," without any further requirement such as relationship.<sup>163</sup> Additionally, many ordinances that limit family to blood, marital or adoptive relationships expressly provide that a limited number of individuals without such a relationship are also deemed a family.<sup>164</sup>

In applying the "single housekeeping unit" definition, the courts

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<sup>162</sup> For discussions of zoning restrictions to single family use, see Babcock, *The Egregious Invalidity of the Exclusive Single-Family Zone*, 6 URB. L. & POL'Y 185 (1983); Scott, *A Psycho-social Analysis of the Concept of Family as Used in Zoning Laws*, 88 DICK. L. REV. 368 (1984); Ziegler, *The Twilight of Single-Family Zoning*, 3 UCLA J. ENVTL. L. & POL'Y 161 (1983).

<sup>163</sup> See, e.g., *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 24 (Minn. 1981); *Saunders v. Clark County Zoning Dep't*, 66 Ohio St. 2d 259, 262, 421 N.E.2d 152, 155 (1981). For additional ordinances using the "single housekeeping unit" definition, see *infra* notes 165-72 and accompanying text. One commentator has stated that the majority of ordinances define family in this way. 4 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 9.29-.30, at 196-98 (3d ed. 1986).

<sup>164</sup> See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974) (permitting six unrelated persons); *Hayward v. Gaston*, 542 A.2d 760, 768 (Del. 1988) (permitting four unrelated persons); *Jackson v. Williams*, 714 P.2d 1017, 1019 (Okla. 1985) (permitting five unrelated persons); cf. *Borough of Glassboro v. Vallorosi*, 221 N.J. Super. 610, 612, 535 A.2d 544, 547 (1987) (defining family as "a traditional family unit or the functional equivalency thereof").

have refused to imply other requirements unless specified, such as a relationship by blood, marriage or adoption,<sup>165</sup> numerical limits on the occupants,<sup>166</sup> or a head of the household.<sup>167</sup> The courts indicate that they must follow the legislature's intent as expressed by the ordinance, without further intrusion on the legislative sphere or private action.<sup>168</sup> As a result, courts have found under the "single housekeeping unit" test that occupancy by four sisters and their children,<sup>169</sup> a group of students living in a communal arrangement,<sup>170</sup> a group of religious novices,<sup>171</sup> and a group of twenty nurses sharing a house<sup>172</sup> constituted a "family."

The broad definitions adopted by legislatures, the judicial attitude in their application, and the case results contrast with single family use covenants. As discussed above, covenants rarely define family and the few that do have narrow definitions, often in terms of the traditional family.<sup>173</sup> Thus, many nontraditional arrangements might be permitted under zoning laws but barred under covenants. The democratic process, that may account for the legislatures' flexibility in definition, and notions of separation of powers and deference, that may explain the judicial attitude, are not in play with private servitudes.

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<sup>165</sup> See, e.g., *JALC Real Estate Corp. v. Zoning Hearing Bd.*, 104 Pa. Commw. 605, 522 A.2d 710, 712 (1987).

<sup>166</sup> See, e.g., *Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 203, 326 A.2d 841, 845 (1974).

<sup>167</sup> See, e.g., *Brady v. Superior Court*, 200 Cal. App. 2d 69, 72, 19 Cal. Rptr. 242, 244 (1962).

<sup>168</sup> See, e.g., *Carroll v. City of Miami Beach*, 198 So. 2d 643, 646 (Fla. Dist. Ct. App. 1967); *Linn County v. City of Hiawatha*, 311 N.W.2d 95, 99 (Iowa 1981).

<sup>169</sup> See, e.g., *Neptune Park Ass'n v. Steinberg*, 138 Conn. 357, 363, 84 A.2d 687, 691 (1951); cf. *Prospect Gardens Convalescent Home v. City of Norwalk*, 32 Conn. Supp. 214, 219, 347 A.2d 637, 640-41 (holding unrelated individuals without communal relationship did not constitute a family).

<sup>170</sup> See, e.g., *Town of Ithaca v. Lucente*, 36 A.D.2d 560, 561, 317 N.Y.S.2d 679, 681 (1971); cf. *Commonwealth v. Jaffe*, 398 Mass. 50, 54-55, 494 N.E.2d 1342, 1345 (1986) (although family was not defined in the ordinance, eight unrelated adults living together without communal arrangement were not a family).

<sup>171</sup> See, e.g., *Carroll*, 198 So. 2d at 644.

<sup>172</sup> See, e.g., *Robertson v. Western Baptist Hosp.*, 267 S.W.2d 395, 397 (Ky. Ct. App. 1954).

<sup>173</sup> See, e.g., *Craig v. Bossenbery*, 134 Mich. App. 543, 351 N.W.2d 596, 597 n.1 (1984) (requiring "consanguinity (sic), marriage, or legal adoption"); *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559, 562 (1982) (Mackenzie, J., concurring) (expressly excluding group homes as a family); see also *supra* notes 117-20 and accompanying text.



## 2. Constitutional Protections

Zoning, unlike single family use covenants, is a governmental action and subject to constitutional scrutiny. This may provide protections, not available with private servitudes, to some living arrangements that differ from traditional, nuclear families.

The first of the important recent Supreme Court cases in the area was *Belle Terre*.<sup>174</sup> That case involved a challenge, brought by owners of a house leased to six college students, to a zoning ordinance that defined family in terms of blood, adoption, or marriage.<sup>175</sup> The Court upheld the ordinance, stating that it was merely economic and social legislation, not involving a fundamental right. Thus, the Court only had to find that the statute was not arbitrary or unreasonable and that it had a rational relationship to a permissible state objective. The Court stated that it was permissible for the state "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people," and that the Court must defer to the legislative judgment.<sup>176</sup>

*Belle Terre* on its face appears to be strong precedent against challenges to traditional family zoning.<sup>177</sup> The declaration that no fundamental right, such as privacy or association, is involved, coupled with the weak rational relationship test and the deference shown by courts in applying that test, appears to make successful attacks on such ordinances unlikely. Indeed, courts have followed *Belle Terre* to enforce zoning restrictions that limit "family" to blood, marriage or adoption against nontraditional families, such as an unmarried couple and their respective children living together<sup>178</sup> and a group home for ten emotionally disturbed juveniles.<sup>179</sup>

However, *Belle Terre* may not permit limitations against all non-traditional family groups. First, some cases distinguish the facts of *Belle Terre* that involved college students and the special problems of noise and crowding which they bring.<sup>180</sup> Thus, even though ten foster chil-

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<sup>174</sup> Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

<sup>175</sup> The ordinance also defined two unrelated people to be a family. *Id.* at 2.

<sup>176</sup> *Id.* at 9.

<sup>177</sup> Various ordinances define family only in terms of a blood, marital, or adoptive relationship and do not provide an exception for a limited number of unmarried people living together. See, e.g., Zavala v. City of Denver, 759 P.2d 664 (Colo. 1988); City of Des Plaines v. Trotner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

<sup>178</sup> See, e.g., City of Ladue v. Horn, 720 S.W.2d 745 (Mo. Ct. App. 1986).

<sup>179</sup> See, e.g., Hayward v. Gaston, 542 A.2d 760 (Del. 1988).

<sup>180</sup> See *supra* note 23 and accompanying text.

dren living with their married foster parents did not fall within the ordinance's definition of family, it could not be enforced against them since "to all outward appearances [they were] a relatively normal, stable, and permanent family unit" that had no adverse effect on the neighborhood.<sup>181</sup> Another court remanded to determine whether a fundamental right was implicated, and strict scrutiny thus required, in the enforcement of an ordinance limiting "family" to certain relatives against an unmarried man and woman who were co-owners of a house.<sup>182</sup> Additionally, a plurality of the Supreme Court held that zoning regulations limiting the ability of related people to live together are not controlled by *Belle Terre* but effect fundamental rights that require strict scrutiny.<sup>183</sup>

Second, the Supreme Court in *City of Cleburne v. Cleburne Living Center*<sup>184</sup> indicated that application of the rational relationship to zoning classifications does not ensure the sustaining of the governmental action.<sup>185</sup> In that case, the court overturned a city's decision that a group home for thirteen mentally retarded adults required a special permit.<sup>186</sup> The Court found that the regulation served no legitimate public purpose and that it was instead based on "irrational prejudice against the mentally retarded."<sup>187</sup> This case may be helpful to challenge application of narrow definitions of family against groups that cause no greater disturbances to a neighborhood than would a traditional family.

Finally, courts have used state constitutions to provide greater protection to nonfamily groups.<sup>188</sup>

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<sup>181</sup> *Ferraioli*, 34 N.Y.2d at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

<sup>182</sup> *See Zavala v. City of Denver*, 759 P.2d 664 (Colo. 1988).

<sup>183</sup> *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

<sup>184</sup> 473 U.S. 432 (1985).

<sup>185</sup> *Id.* at 446-50.

<sup>186</sup> *Id.* at 450.

<sup>187</sup> *Id.*

<sup>188</sup> *See, e.g., Open Door Alcoholism Program, Inc. v. Board of Adjustment*, 200 N.J. Super. 191, 200, 491 A.2d 17, 22 (App. Div. 1985) (finding halfway house for 10 recovering alcoholics not to be a family because of transient nature); *State v. Baker*, 81 N.J. 99, 108-09, 405 A.2d 368, 372 (1979) (holding that New Jersey Constitution bars restriction on groups having the "generic character of a family unit as a relatively permanent household"); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985) (finding under New York Constitution no rational relationship between prohibition of group which is the "functional and factual equivalent of a natural family" and the goal of controlling traffic, parking, noise and population density).

### B. Age Restrictions

A number of courts have reviewed the validity of restrictions, created by private agreements among landowners, on the age of occupants in subdivisions<sup>189</sup> and condominiums.<sup>190</sup> These cases are instructive on several levels. They demonstrate how courts in the late twentieth century struggle with conflicting concepts of family and that the resolution of the conflict directly affects the availability of shelter for families. Second, the age restriction cases provide a foil for the evaluation of single family use covenants and the approach suggested in this Article.<sup>191</sup> Finally, the ultimate resolution of the age restriction issue through federal legislation may be a unique result not likely to be repeated with restrictions on other classes of occupants.<sup>192</sup>

#### 1. Case Law

Age restrictions are usually drafted to exclude children,<sup>193</sup> although some cases have involved prohibitions against persons under thirty<sup>194</sup> or forty-five<sup>195</sup> years of age. Bans on children are sought by some elderly persons and nonelderly single people and childless couples in order to avoid the noise and disturbances that children might cause.<sup>196</sup>

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<sup>189</sup> See, e.g., *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974).

<sup>190</sup> See, e.g., *Everglades Plaza Condominium Ass'n v. Buckner*, 462 So. 2d 835 (Fla. Dist. Ct. App. 1984); *Franklin v. White Egret Condominium*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977); *Covered Bridge Condominium Ass'n v. Chambliss*, 705 S.W.2d 211 (Tex. Ct. App. 1985).

<sup>191</sup> Although condominium restrictions are imposed in a recorded declaration as authorized by statute, they are analogous to servitudes. Both are private law devices that impose obligations on land, enforceable against subsequent purchasers with notice. See Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1004 (1963).

<sup>192</sup> On the topic of age restrictions, see Doyle, *Retirement Communities: The Nature and Enforceability of Residential Segregation by Age*, 76 MICH. L. REV. 64 (1977); Note, *The Necessity for Shelter: States Must Prohibit Discrimination Against Children in Housing*, 15 FORDHAM URB. L.J. 481 (1987); Note, *Why Johnny Can't Rent — An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829 (1981).

<sup>193</sup> See, e.g., *Riley*, 22 Ariz. App. at 226, 526 P.2d at 749 (prohibiting residents under 21 years of age); *Constellation Condominium Ass'n v. Harrington*, 467 So. 2d 378, 380 (Fla. Dist. Ct. App. 1985) (prohibiting residents under 12 years of age); *Everglades Plaza*, 462 So. 2d 835, 836 (prohibiting residents under 16 years of age).

<sup>194</sup> See, e.g., *Covered Bridge*, 705 S.W.2d 211.

<sup>195</sup> See, e.g., *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 226 Cal. Rptr. 199 (1986).

<sup>196</sup> See Note, *Housing Discrimination Against Children: The Legal Status of a*

The courts have most often upheld age restrictions.<sup>197</sup> In doing so they make a noteworthy statement about the current status of the traditional family. As shown earlier, the courts' sustaining of single family use covenants arguably reinforces traditional family values by preserving neighborhoods where they can flourish. In contrast, the decisions upholding age restrictions harm traditional families (which, by most definitions, are comprised of children<sup>198</sup>) by limiting the shelter opportunities available to them and, at least theoretically, raising the price for the remaining unrestricted housing.<sup>199</sup> This is troubling given the large numbers of families with children<sup>200</sup> and the shortage of decent and affordable housing.<sup>201</sup>

The methods and reasoning of the courts have been diverse and often unsatisfying. A number of courts entertain constitutional attacks, although they ultimately sustain the age restrictions.<sup>202</sup> They apparently make, without much (if any) discussion, the very dubious assumption

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*Growing Social Problem*, 16 J. FAM. L. 559, 561 (1977-1978).

<sup>197</sup> See, e.g., *Riley*, 22 Ariz. App. 223, 526 P.2d 747; *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978); *Roth v. Normandy Shores Yacht & Country Club*, 511 So. 2d 658 (Fla. Dist. Ct. App. 1987); *Roczek v. Markowitz*, 492 So. 2d 460 (Fla. Dist. Ct. App. 1986); *Constellation Condominium*, 467 So. 2d 378; *Everglades Plaza*, 462 So. 2d 835; *Pacheco v. Lincoln Palace Condominium, Inc.*, 410 So. 2d 573 (Fla. Dist. Ct. App. 1982); *Preston Tower Condominium Ass'n v. S.B. Realty*, 685 S.W.2d 98 (Tex. Ct. App. 1985). But see *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983); *Park Redlands*, 181 Cal. App. 3d 87, 226 Cal. Rptr. 199.

<sup>198</sup> See *supra* notes 4-11 and accompanying text.

<sup>199</sup> The problem of discrimination against children seems most acute in rental housing. See *Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 44 (1987) [hereafter *Fair Housing Hearings*] (statement of Peter W. Rodino, Jr., Chairman, Comm. on the Judiciary, describing the shortage of housing for families with children); Schober, *Exclusion of Families with Children from Housing*, 18 U. MICH. J.L. REF. 1121, 1127-29 (1985). The problem may not be as great with sales of homes. See Note, *supra* note 196, at 564 (suggesting that the market will limit developers' discrimination against children.)

<sup>200</sup> See *Fair Housing Hearings*, *supra* note 199, at 166 (testimony of David S. Liederman stating that 73% of households have children).

<sup>201</sup> See *id.* at 372 (testimony of James B. Morales).

<sup>202</sup> See, e.g., *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974); *Roczek v. Markowitz*, 492 So. 2d 460 (Fla. Dist. Ct. App. 1986); *Preston Tower Condominium Ass'n v. S.B. Realty*, 685 S.W.2d 98 (Tex. Ct. App. 1985); see also *Franklin v. White Egret Condominium*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977) (sustaining the restriction on equal protection grounds but barring enforcement against the owner on the theory of selective enforcement).

that there is adequate state action.<sup>203</sup> Moreover, the leading case in the area, *Riley v. Stoves*,<sup>204</sup> decided that there was no violation of the Equal Protection Clause.<sup>205</sup> The court found that only a rational relationship must be established between the restriction and a permissible objective.<sup>206</sup> This reasoning is questionable, however, since the plurality in *Moore*<sup>207</sup> subsequently indicated that a higher level of scrutiny is required with zoning restrictions on related persons.<sup>208</sup>

Other cases scrutinize age restrictions without resorting to constitutional law. California courts have found that age restrictions violated the state's Civil Rights Act,<sup>209</sup> although an exception was made for housing specifically designed for the elderly.<sup>210</sup> Other courts have sustained such restrictions against challenges apparently based on contract law.<sup>211</sup>

## 2. Contracts/Antirestrictions Issues

The cases that sustain age restrictions against constitutional or other challenges sometimes support their result by alluding to ideas encompassed within the freedom of contract concept this Article develops. Some courts refer to purchasers' reliance on the restriction, evoking the efficiency theory of the benefits of covenants.<sup>212</sup> Moreover, many courts place weight on the fact that the restriction was recorded, giving the

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<sup>203</sup> See, e.g., *Riley*, 22 Ariz. App. at 229, 526 P.2d at 751; *Franklin*, 379 So. 2d at 349; Travalio, *supra* note 135, at 324-31 (discussing state action); see also *supra* notes 134-35 and accompanying text.

<sup>204</sup> 22 Ariz. App. 223, 526 P.2d 747 (1974).

<sup>205</sup> *Id.* at 232, 526 P.2d at 753.

<sup>206</sup> *Id.* at 230, 526 P.2d at 752. Similarly, other cases state that such restrictions will be upheld unless they are unreasonable or arbitrary. See, e.g., *Rocek*, 492 So. 2d 460; *Preston Tower*, 685 S.W.2d 98.

<sup>207</sup> *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

<sup>208</sup> For cases rejecting strict scrutiny with age restrictions, see *Franklin*, 379 So. 2d at 351; *Covered Bridge Condominium Ass'n v. Chambliss*, 705 S.W.2d 211, 213 (Tex. Ct. App. 1985).

<sup>209</sup> See, e.g., *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983); *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 226 Cal. Rptr. 199 (1986). *Contra* *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978). These cases apply the Unruh Civil Rights Act. See generally CAL. CIV. CODE § 51 (West Supp. 1988).

<sup>210</sup> See, e.g., *Park Redlands*, 181 Cal. App. 3d at 94, 226 Cal. Rptr. at 202 (1986).

<sup>211</sup> See, e.g., *Constellation Condominium Ass'n v. Harrington*, 467 So. 2d 378, 381-82 (Fla. Dist. Ct. App. 1985) (language of rule was unambiguous, restriction was reasonable, rule was understood by owners before purchase).

<sup>212</sup> See, e.g., *Riley v. Stoves*, 22 Ariz. App. 223, 230, 526 P.2d 747, 752 (1974).

owner notice before he purchased;<sup>213</sup> this relates to the moral basis for enforcement of servitudes. Finally, many courts view age restrictions as legitimate and beneficial exercises of freedom of choice and find the restrictions a valid means to provide for the different housing needs of different age groups.<sup>214</sup>

However, there is very little discussion of the antirestrictions policy in the opinions, which helps to explain why age limitations are given such little scrutiny.<sup>215</sup> In light of the antirestrictions policy, should age restrictions be sustained under the test suggested in this Article? On first glance age restrictions should fall, since they bar people based on their status, rather than on control of fallout on the neighborhood. Arguably, instead of a per se prohibition on children, there should be limits on specific disturbing behavior.<sup>216</sup>

Yet, on closer analysis, the antirestrictions policy does not compel that result in all cases. Two reasons support different treatment for age restrictions employed in bona fide senior citizen housing arrangements. First, evidence indicates that age restrictions provide affirmative benefits to the elderly and do more than protect them from the "nuisances"

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<sup>213</sup> See, e.g., *Constellation Condominium*, 467 So. 2d at 381 (stating that recorded rule clothed with strong presumption of validity because purchasers have adequate notice); *Franklin v. White Egret Condominium*, 379 So. 2d 346, 350 (Fla. 1979) ("an individual can choose at the time of purchase whether to sign an agreement with these restrictions or limitations"); *Preston Tower Condominium Ass'n v. S.B. Realty*, 685 S.W.2d 98, 102 (Tex. Ct. App. 1985) (stating that rule in declaration possesses strong presumption of validity since purchasing owners know and accept restrictions).

The notice argument is taken quite far by some courts sustaining age restrictions enacted after the owner bought. They state that although there was no age restriction in effect at purchase, he had notice that the condominium rules could be changed. See, e.g., *Everglades Plaza Condominium Ass'n v. Buckner*, 462 So. 2d 835 (Fla. Dist. Ct. App. 1984); *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978).

<sup>214</sup> See, e.g., *Riley*, 22 Ariz. App. at 230, 526 P.2d at 752 ("a quiet, peaceful neighborhood by eliminating noise associated with children at play or otherwise"); *Franklin*, 379 So. 2d at 351 (describing special construction and social needs of elderly citizens); *Preston Tower*, 685 S.W.2d at 101 ("[A]ge limitations or restrictions are reasonable means to accomplish the lawful purpose of providing appropriate facilities for the differing housing needs and desires of varying age groups."); *Ritchey*, 81 Cal. App. 3d at 695, 146 Cal. Rptr. at 699 ("[The restriction] does much to eliminate the noise and distractions caused by children." (quoting *Riley*, 22 Ariz. App. at 232, 526 P.2d at 753)).

<sup>215</sup> For vague references, see *Riley*, 22 Ariz. App. at 231, 526 P.2d at 752 (stating that there is no evidence of a housing shortage); *Ritchey*, 81 Cal. App. 3d at 695, 146 Cal. Rptr. at 699 (finding no impermissible restraint on alienation).

<sup>216</sup> See *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 796-97, 662 P.2d 427, 431, 191 Cal. Rptr. 320, 324 (1983).

of children. A "seniors only" community provides "significant psychological, social and economic benefits."<sup>217</sup> The presence of other elderly people boosts morale, facilitates social interaction, and creates an environment that sustains the community.<sup>218</sup> While there may be some "moral ambience" benefits in living in a single family use zone,<sup>219</sup> they do not seem as direct as age restrictions in a bona fide senior housing arrangement. Moreover, the plight of seniors in our society may be even more precarious than that of families.

Second, the differences between condominiums and residential subdivision restrictions may be relevant. Many, though not all, condominiums are established in multi-unit, high-rise buildings where there is close proximity of people, a sharing of common facilities, and a communal focus. In those situations the courts may be especially solicitous of the affirmative benefits of age restrictions. This contrasts with a subdivision of single family houses where there is less interaction and a greater emphasis on individual autonomy.

### 3. Fair Housing Amendments Act of 1988

Congress has recently preempted much of the debate over restrictive covenants barring children with the passage of the Fair Housing Amendments Act of 1988. The act amended the Fair Housing Act of 1968.<sup>220</sup> The amendments bar discrimination in the sale or rental of dwellings on the basis of "familial status,"<sup>221</sup> which is defined as being an individual under eighteen domiciled with a parent or another person having legal custody over the individual or with a designee of the parent or other person.<sup>222</sup> The statute specifically does not bar discrimination against children in "housing for older persons," defined either as housing under certain federal or state programs, intended for and solely occupied by persons over 62, or, subject to certain requirements, intended and operated for occupancy by at least one person over 55.<sup>223</sup>

Although the amendment applies to both sales and rentals, appar-

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<sup>217</sup> Travaglio, *supra* note 135, at 318.

<sup>218</sup> *Id.* at 318-19.

<sup>219</sup> Michelman, *supra* note 92, at 194; *see also supra* notes 92-94 and accompanying text.

<sup>220</sup> Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 1985 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1619.

<sup>221</sup> *Id.* § 6(b).

<sup>222</sup> *Id.* § 5(b).

<sup>223</sup> *Id.* § 5(d).

ently the greater focus was on rental discrimination.<sup>224</sup> Concurrently, the legislation meets the concerns and political power of elderly citizens by preserving bars against children in bona fide senior communities.

Moreover, although the protected class under the legislation is children, parents are perhaps the more direct beneficiaries since it is the parents who actually have been prevented from leasing and buying. Thus, the amendment's protections are noteworthy in that one can choose whether to have children, while the other forms of discrimination barred by the statute are based on immutable characteristics such as race and sex.<sup>225</sup> The legislative history indicated that the amendments were part of Congress' "long tradition of defining and protecting families."<sup>226</sup> Apparently Congress also felt that the protection of traditional family life, encompassing the birth and rearing of children, was so important that it extended the concept of the statute.<sup>227</sup> A congressional consensus to extend protection to other groups running afoul of single family use servitudes seems unlikely. This is because extending protection would benefit nonconforming rather than traditional behavior and because the problem of single family use covenants does not seem as pervasive or severe as age restrictions.

### CONCLUSION

In recent years there has been an increase in living and support arrangements which differ from traditional family life. During that same time, there have been fundamental changes in the structure and stability of the prototypical American family. These developments have a direct effect on the validity and enforceability of real covenants limiting occupants of realty to a single family. Application of a traditional family definition will bar many alternate arrangements but reinforce the choice of the covenantee, while use of a broad definition may erode some barriers designed to protect traditional family life.

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<sup>224</sup> See *supra* notes 199-201 and accompanying text; see also 134 CONG. REC. S10,454-55 (daily ed. Aug. 1, 1988) (remarks of Sen. Edward M. Kennedy, the Bill's sponsor).

<sup>225</sup> See 42 U.S.C. § 3604 (1982) (race, color, religion, sex, national origin). Theoretically, one can change religion; however, the religion one received at birth can remain a basis for discrimination.

<sup>226</sup> HOUSE OF REPRESENTATIVES COMM. ON THE JUDICIARY, FAIR HOUSING AMENDMENTS ACT OF 1988, H. REP. 100-11, June 17, 1988, at 19.

<sup>227</sup> See *id.* at 95 (dissenting views of members Hyde, Sensenbrenner, Gekas, Dannemeyer, Swindall, and Slaughter).



This Article has suggested a middle ground between these two positions. It will protect a single family house neighborhood from spillover projected beyond the borders of a particular house, but it will not control private choices within the privacy of the home. This result is compelled under general policy considerations and by specific policies of real covenants law. It also recognizes and reinforces the plurality of American households in the late twentieth century.