

MAKE WAY FOR THE NEW KID ON THE BLOCK: THE
POSSIBLE ZONING IMPLICATIONS OF *LAWRENCE V.*
TEXAS

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*This note examines the potentially far-reaching impact of the Supreme Court's decision in *Lawrence v. Texas*, specifically the possible implications for zoning regulations that relate to familial composition. Many municipalities have adopted zoning ordinances that prohibit certain household compositions from living in a residential neighborhood. The most common example of this type of zoning regulation limits nontraditional living arrangements in single-family neighborhoods.*

*After examining the evolution of zoning regulations in the United States, this note examines, in light of *Lawrence*, the validity of ordinances that seek to regulate activity within the four walls of the home. Although courts have traditionally deferred to the discretion of zoning bodies, *Lawrence* may provide the ammunition necessary to eliminate laws that mandate traditionally accepted living arrangements. This note examines how familial zoning ordinances fail to comport with, and even conflict with, permissible zoning objectives. Finally, this note concludes that courts should rely on the reasoning of *Lawrence* to invalidate existing familial zoning ordinances.*

“[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”¹

I. INTRODUCTION

The purchase of a home is arguably one of the most important investments that one will ever make. Imagine finding the perfect abode, only to be locked out by a zoning ordinance that prohibits certain familial compositions from residing in the neighborhood. Ordinarily, the primary focus of zoning bodies is the use of the land as opposed to the iden-

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1. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

tity and composition of a building's inhabitants.² However, municipal zoning entities have strayed from their traditional regulatory role in the area of familial ordinances. Familial ordinances regulate who may reside in the home by distinguishing biologically or legally related inhabitants from unrelated inhabitants. Familial ordinances place a cap on the number of unrelated inhabitants allowed in a home. The practical effect of such ordinances is to exclude nontraditional families from certain neighborhoods.

When evaluating the constitutionality of zoning ordinances, courts typically defer to the judgment of municipal bodies. This judicial deference has resulted in broad power for municipalities to carve out single-family residential zones. However, in light of the recent Supreme Court decision in *Lawrence v. Texas*,³ municipalities across the country might have to alter their zoning strategies. This note will examine how *Lawrence* can be applied to challenge zoning ordinances and the effects of such application. Part II discusses the history of judicial deference given to zoning bodies when drafting zoning ordinances.⁴ Part II also discusses the difficulty of drawing a line between permissible and impermissible zoning regulations.⁵ Finally, Part II describes decisions involving laws and ordinances which permeate the four walls of the home.⁶ Part III explores the possibility of using *Lawrence* to challenge familial zoning ordinances.⁷ Part IV concludes that if *Lawrence* is applicable, municipalities will be unable to zone through the regulation of housing inhabitants and instead will be forced to focus solely on the external land use impacts of a proposed use.⁸

II. BACKGROUND

A. *Deference to the Legislature in the Composition of Zoning Ordinances*

The principles of modern-day zoning originated in early Roman laws and regulations which recognized the need to protect streets against encroachments and to restrict the height of buildings.⁹ Zoning was common in European cities long before it emerged in the United States.¹⁰ The slow development of zoning in the United States has been attributed mainly to the courts' tendency to preserve and protect individual prop-

2. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 14–15 (1974) (Marshall, J., dissenting).

3. 539 U.S. 558 (holding that it was a substantive due process violation for the government to interfere with the liberty to maintain the privacy of intimate sexual conduct inside the home).

4. *See infra* text accompanying notes 9–42.

5. *See infra* text accompanying notes 43–60.

6. *See infra* text accompanying notes 61–96.

7. *See infra* text accompanying notes 97–170.

8. *See infra* text accompanying notes 171–75.

9. 1 E.C. YOKLEY, *ZONING LAW AND PRACTICE* § 1-3 (4th ed. 2000).

10. *Id.* § 1-4.

erty rights from the arbitrary control of municipalities.¹¹ With the increasing size of American cities, however, “it soon became apparent that much harm was being done by the unregulated use of land and the failure of cities to enact regulations addressing the overcrowding of buildings.”¹² Perhaps noticing the increasing harm of unregulated land use, the Supreme Court upheld municipal laws restricting the use of land before zoning laws were widely codified.¹³ New York City adopted the first comprehensive zoning law in 1916.¹⁴ Thereafter, zoning flourished as a byproduct of the “rise of the American city as a hub of manufacturing and commerce and immigration.”¹⁵ From 1916 through 1926, numerous cities adopted zoning laws and state courts were called upon to adjudicate their constitutionality.¹⁶ The state courts’ holdings, however, were inconsistent: some state courts upheld the constitutionality of zoning laws while others found similar laws invalid.¹⁷

In 1926, the U.S. Supreme Court confronted the issue of zoning in the seminal case of *Village of Euclid v. Ambler Realty Co.*¹⁸ The controversy began when the Village of Euclid adopted an ordinance “establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc.”¹⁹ The ordinance divided the village into six classes of use districts, three classes of height districts, and four classes of area districts.²⁰ The plaintiff’s parcel of land fell under the directive of three different use districts.²¹ Specifically, the plaintiff argued that the ordinance confiscated and destroyed the value of his land by restricting and controlling its use.²² The plaintiff asserted that such regulation violated both the U.S. Constitution²³ and the Constitution of the State of Ohio,²⁴ and requested an injunction prohibiting the village from enforcing the ordinance against him.²⁵

11. *Id.*

12. *Id.*

13. *Id.* § 1-6. The Supreme Court upheld an ordinance excluding stables from commercial districts. *Reinman v. Little Rock*, 237 U.S. 171, 180 (1915). The Supreme Court also struck down an ordinance prohibiting laundries in wooden structures. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

14. DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 23 (3d ed. 1999).

15. Yaromir Steiner, *Solving the Suburban Zoning Crisis*, RETAIL TRAFFIC, May 1, 2000, available at http://retailtrafficmag.com/ar/retail_solving_suburban_zoning/.

16. CALLIES ET AL., *supra* note 14, at 23.

17. *Id.*

18. 272 U.S. 365 (1926). It is ironic that the constitutionality of zoning would be decided in Euclid, Ohio, as the small city was named after Euclid, the Greek mathematician who invented the science of Geometry based upon the marking off and defining of spaces. Steiner, *supra* note 15.

19. *Euclid*, 272 U.S. at 379–80.

20. *Id.* at 380–81.

21. *Id.* at 382.

22. *Id.* at 384.

23. *Id.* The plaintiff argued that the ordinance violated the Fourteenth Amendment because it “deprives [plaintiff] of liberty and property without due process of law and denies it the equal protection of the law” *Id.*

24. *Id.*

25. *Id.*

A majority of six justices upheld the constitutionality of the *Euclid* ordinance.²⁶ By sustaining the government regulation, the holding diverged significantly from the Court's previous jurisprudence, which was based on substantive due process and traditionally protected property and contractual rights.²⁷ However, the Court justified its decision by noting that the changing use and occupation of private lands required dynamic restrictions.²⁸ While constitutional guarantees are constant, the Court stated that "the scope of their application must expand or contract to meet new and different conditions."²⁹ For an ordinance to survive constitutional scrutiny, it must be promulgated for the public welfare and be grounded in the police power.³⁰ The Court acknowledged that the line between legitimate and illegitimate regulations is not precisely definable, but fluctuates with the facts and circumstances of each situation.³¹

For guidance in determining the validity of a zoning ordinance, the Court suggested consulting the law of nuisance to ascertain whether the uses restricted by the ordinance are within the police power.³² The *Euclid* ordinance survived because it was premised upon "the baseline of common-law nuisance."³³ The Court deferred to the legislative body's construction if the ordinance's constitutionality was disputed.³⁴ Before a zoning ordinance will be declared unconstitutional, the provisions must be shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."³⁵

In short, *Euclid* established that zoning ordinances are presumed to be constitutional.³⁶ *Euclid* found justification in the police power for a

26. *Id.* at 397.

27. Melvyn R. Durchslag, Village of Euclid v. Ambler Realty Co., *Seventy-Five Years Later: This is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 645 (2001). Durchslag reconciles *Euclid* with other cases of the time by arguing that *Euclid* is quite in step with the Court's other substantive due process rulings. "Cases in that era had a common denominator—the perimeters of the Due Process Clause were defined by the common law." *Id.* The common law that the *Euclid* court premised its decision upon was the nuisance doctrine. *Euclid*, 272 U.S. at 387–88.

28. *Id.* at 387.

29. *Id.* However, the Court went on to caution that while a degree of flexibility is allowed, any provisions found not to conform to the Constitution must fall. *Id.*

30. *Id.*

31. *Id.* For example, an ordinance "which would be clearly valid as applied to great cities, might be clearly invalid as applied to the rural communities." *Id.*

32. *Id.* at 388. The Court analogizes the power to impose zoning restrictions to the power to determine whether a particular use is a nuisance. Thus, the prohibited use should be considered "in connection with the circumstances and the locality." *Id.*

33. Durchslag, *supra* note 27, at 646. When examining how *Euclid's* use ordinance is similar to the common law nuisance doctrine in its application, consider district U-6 of the segregated use districts which includes sewage disposal, garbage facilities, penal and correctional institutions, etc. These are the types of uses "no 'right thinking' person would want to reside within a stone's throw of." *Id.* Therefore, on the premise that a nuisance may be the "right thing in the wrong place, like a pig in the parlor instead of the barnyard," *Euclid*, 272 U.S. at 388, the city is justified in planning so these "right things" do not end up in the "wrong place," i.e., next to residential uses.

34. *Euclid*, 272 U.S. at 387.

35. *Id.* at 395.

36. *See id.*

municipality, or other zoning body, to enact zoning ordinances to promote public welfare, health, morals and safety.³⁷ The police power need only bear a rational relation to the purpose for the zoning regulation to withstand constitutional scrutiny.³⁸ *Euclid* also confirmed the authority of municipalities to segregate residential uses, thus validating separate use districts for “residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.”³⁹ In addition, municipalities may segregate uses in order to protect the sanctity of the single-family home.⁴⁰ *Euclid*’s deference to the legislature provides both a presumption of validity, and a reasonable margin of error, to municipalities in drafting zoning ordinances.⁴¹ Perfection is not required as a matter of federal constitutional law. The Court recognized that, because zoning is by nature both overinclusive and underinclusive, courts should be lenient in assessing the constitutionality of municipal zoning practices.⁴² The impact of *Euclid* is two-fold: first, it affirms that local authorities have the power to zone their own territory, and second, it mandates maximum deference to zoning ordinances drafted by local authorities.

B. Limitations on the Application of the Zoning Ordinance

Despite the extreme deference to zoning bodies required by *Euclid*, municipalities must remain attentive to the rights of individual property owners when creating zoning restrictions. In *Nectow v. City of Cambridge*,⁴³ decided just two years after *Euclid*, the Supreme Court curtailed the power of the government to apply a zoning ordinance to the plaintiffs. The City of Cambridge devised an ordinance, similar to the ordinance at issue in *Euclid*, which divided the city into three types of districts.⁴⁴ As a result of the new zoning ordinance, a one-hundred-foot strip of land within the plaintiff’s parcel was erroneously classified as part of the R-3 district.⁴⁵ The ordinance effectively excluded all business and industry within the one hundred foot tract, but allowed the rest of the

37. *See id.*

38. *Id.*

39. *Id.* at 390.

40. *Id.* at 394. The Court discusses in detail the negative external impacts of apartment homes and claims that “the development of detached house sections is greatly retarded by the coming of apartment houses” *Id.* In the eyes of the Court, the “apartment house is a mere parasite” and, for that reason, zoning classifications are justified insofar as they protect the character of the neighborhood of detached residences from total destruction. *Id.*

41. *Id.* at 388–89.

42. *See id.* at 389. The Court addresses the complications that arise when the municipalities engage in line-drawing “in some fields, the bad fades into good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.” *Id.*

43. 277 U.S. 183 (1928).

44. *Id.* at 185.

45. The R-3 district permitted only “dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses and gardening, with customary incidental accessories.” *Id.*

land to be used for business and industry.⁴⁶ Due to the new zoning restrictions, a potential purchaser who had previously entered into contract for the plaintiff's land refused to buy the land.⁴⁷ After the plaintiff filed suit, a special master found that the one hundred foot tract could not be used for residential purposes.⁴⁸ Furthermore, the industrial and railroad districts surrounding the land rendered the land unsuitable for the purposes permitted under the ordinance.⁴⁹ Additionally, the master found that "the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant city"⁵⁰ The plaintiff challenged the ordinance as applied to his land on due process grounds.⁵¹

The Court found the zoning ordinance inapplicable to the plaintiff's one-hundred-foot tract because "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use[] is not unlimited."⁵² The Court held that a zoning restriction is constitutionally impermissible if it does not bear a substantial relation to the public health, safety, morals, or general welfare.⁵³ Furthermore, the Court concluded that Cambridge's line-drawing was fatally flawed because none of the permissible zoning purposes under *Euclid* would be promoted by application of the zoning ordinance to the plaintiff's land.⁵⁴ The Court determined that the zoning authority's actions violated the plaintiff's Fourteenth Amendment rights because the zoning was highly injurious to him, yet the zoning authority lacked the basis necessary to justify such an invasion.⁵⁵

Nectow demonstrated that state and local governments do not have absolute discretion when drafting and applying zoning restrictions. At some point there is a constitutional check on zoning; *Nectow* implicitly suggested this point can be determined by applying a balancing approach. Yet, despite *Nectow*'s pro-property owner holding, adherence to the precedent of *Euclid*'s deference to the municipality is a vital aspect of the opinion. In *Nectow* the Court acknowledged the vitality of *Euclid* by noting that a "court should not set aside the determination of public officers in . . . a matter [such as zoning]" unless the officer's actions are arbitrary or bear no substantial relation to public health, safety, morals or

46. *Id.* at 187.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 185.

52. *Id.* at 188.

53. *Id.* at 187-88.

54. *Id.* at 188. The purposes absent were those of public health, safety, morals, or welfare.

55. *Id.* at 188-89. It is also important to note that the tract of land in question was also destined for road widening and it is possible that the government wanted to devalue the land in order to lower its acquisition costs. *Id.* at 187.

welfare.⁵⁶ The Court recognized that including the disputed one-hundred-foot tract within the desired district would only extend the government's boundary line an additional one hundred feet.⁵⁷ However, the Court declared that if the location of the district line was the only issue in the case, then "[the Court] should not be warranted in substituting [its] judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question."⁵⁸ Through this dictum, the Court reaffirmed *Euclid*'s view that, because precise lines may not be capable of being drawn, deference must be given to the zoning body's decision to draw the line in a particular place.⁵⁹ Only in extreme cases should this presumption of validity be overridden.⁶⁰

C. Zoning Ordinances That Permeate the Four Walls of the Home

As *Euclid* and *Nectow* indicate, government agencies have broad authority to formulate and implement zoning plans. This broad power includes the power to zone for the benefit of the traditional single-family home.⁶¹ Consequently, zoning officials also adopted a view regarding who should occupy the American home: a mother, a father and their biological or adopted children.⁶² Thus, municipalities used the zoning powers recognized by *Euclid* to prohibit the integration of nontraditional living arrangements into single-family neighborhoods.⁶³

The Supreme Court approved this use of zoning power in *Village of Belle Terre v. Boraas*.⁶⁴ In *Belle Terre*, the Court confronted a form of local zoning regulations different from those it found constitutional in *Euclid*. Specifically, the Court examined the validity of an ordinance regulating the number and type of inhabitants that could reside inside a home.⁶⁵ The village crafted a familial ordinance to limit usage of residential land to single-family dwellings. The ordinance defined "family" as:

[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.⁶⁶

56. *Id.* at 187.

57. *Id.* at 188.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

62. *CALLIES ET AL.*, *supra* note 14, at 513.

63. The nontraditional living arrangements these ordinances restricted ranged from homes with groups of college students to homes with foster children to homes for the mentally ill. *Id.* at 514.

64. 416 U.S. 1 (1974).

65. *Id.* at 2.

66. *Id.*

The plaintiffs in *Belle Terre* consisted of the real estate owners and the six college students who leased a house as an alternative to on-campus student housing.⁶⁷ The village served the owners of the home with an "Order to Remedy Violations" of the ordinance because the students were not related by blood, adoption or marriage.⁶⁸ The plaintiffs challenged the ordinance on several grounds. First, it barred people who are dissimilar to the current residents and "expresse[d] the social preferences of the residents for groups . . . congenial to them." Second, the government's claimed interest in social homogeneity was illegitimate. Third, the ordinance trampled upon the inhabitants' right to privacy. Fourth, the municipality should not have been concerned with the inhabitants' marital status. Finally, the ordinance was "antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society."⁶⁹

The Court did not find any of the plaintiffs' arguments persuasive.⁷⁰ When presented with the question of why two unmarried people can constitute a family while other combinations cannot, the Court cited *Euclid's* deference to the zoning body stating that "every line drawn by a legislature leaves some out that might well have been included."⁷¹ The Court did not find that the ordinance violated the right of association because it did not dictate whom the family may entertain in the home.⁷² Furthermore, according to the Court, "a quiet place where yards are wide, people few, and motor vehicles restricted" is a permissible goal for a zoning scheme.⁷³ Structures such as boarding houses and fraternities magnify urban problems by increasing population density, traffic, and noise.⁷⁴ The police power is "ample to lay out zones where family values,

67. *Id.* at 2-3.

68. *Id.* at 3.

69. *Id.* at 7.

70. *Id.*

71. *Id.* at 8. The Court goes on to state that "exercise of discretion, however, is a legislative, not a judicial, function." *Id.*

72. *Id.* at 9. Specifically, the Court held "zoning ordinances having the effect of restricting the number of unrelated persons who may live together in a residential zone are not violative of Fourteenth Amendment equal protection, and do not impermissibly affect associational interests, provided that the zoning ordinance bears a rational relationship to a permissible state objective." Vitauts M. Gulbis, Annotation, *Validity of Ordinance Restricting Number of Unrelated Persons Who Can Live Together in Residential Zone*, 12 A.L.R. 4th 238, § 2[a] (1982). However, it is important to note that in a later decision, the Supreme Court "agreed that due process was violated by a zoning ordinance which restricted the persons entitled to live together to a few categories of related persons, essentially parents and children, and excluded members of an extended family." *Id.* (referring to the holding in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)).

73. *Belle Terre*, 416 U.S. at 9. State objectives that may be legitimately advanced by zoning ordinances regulating the number of unrelated persons who occupy a single residential home include: "control of population density, maintenance of the residential character of the neighborhood, and control of parking and traffic facilities." Gulbis, *supra* note 72.

74. *Belle Terre*, 416 U.S. at 9.

youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”⁷⁵

Finding validity in the constitutional challenges the majority dismissed, Justice Marshall dissented, arguing that while it was proper for zoning authorities to concern themselves with the uses of land, it was improper and unconstitutional for zoning officials to consider the inhabitants, and implicitly their behaviors and lifestyles, when regulating the use of the land.⁷⁶ Marshall asserted that adherence to *Euclid*’s deference “does not mean abdication” and that the “Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of . . . legitimate aims, do not infringe upon fundamental constitutional rights.”⁷⁷ In Marshall’s opinion, the *Belle Terre* familial ordinance infringed upon the First Amendment freedom of association and the constitutionally guaranteed right to privacy.⁷⁸ The ordinance burdened the freedoms of association and privacy by scrutinizing a person’s choices regarding whom to reside with, making distinctions based upon those choices, and using those choices as a basis to exclude him or her from the neighborhood.⁷⁹ In essence, the ordinance acted as a barricade to keep out individuals who deviated from community norms by placing tighter restrictions on those who cohabitated in a way unacceptable to the community.⁸⁰

According to Justice Marshall, because the ordinance infringed upon fundamental rights, it could only pass constitutional muster “upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.”⁸¹ Further, there must be “no less intrusive means [that] will adequately protect the compelling state interest.”⁸² While Justice Marshall noted that the proposed justifications⁸³ for the ordinance were valid, he went on to state that means which did not trample constitutional rights could work just as effectively, if not more effectively, than those employed by the ordinance.⁸⁴

75. *Id.* The police power is broad and is “not confined to elimination of filth, stench and unhealthy places.” *Id.*

76. *Id.* at 14 (Marshall, J., dissenting). Justice Marshall found that a municipality may validly regulate the number of people who can inhabit a home, but zoning authorities cannot consider whether the inhabitants are “Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.” *Id.* at 15.

77. *Id.* at 14.

78. *Id.* at 15. The Constitution protects social and economic association as well as political association. *Id.*

79. *Id.* at 16.

80. The ordinance limited the population density of only those homes occupied by unrelated persons. *Id.* at 17.

81. *Id.* at 18 (citations omitted).

82. *Id.*

83. “It is claimed that the ordinance controls population density, prevents noise, traffic and parking problems, and preserves the rent structure of the community and its attractiveness to families.” *Id.*

84. *Id.* Justice Marshall provides an example of how the regulations chosen to accomplish the aforementioned purposes are “both overinclusive and underinclusive.” *Id.* Under the ordinance, “an extended family of a dozen or more might live in a small bungalow [yet] three elderly and retired per-

D. Sodomy Statutes That Permeate the Four Walls of the Home

In a recent Supreme Court decision overturning *Bowers v. Hardwick*,⁸⁵ the Court in *Lawrence v. Texas*⁸⁶ struck down a sodomy statute that violated the liberty to engage in intimate sexual conduct inside the home.⁸⁷ In *Lawrence*, police officers were dispatched to the residence of one of the complainants in response to a reported weapons disturbance.⁸⁸ When the police officers arrived at the residence, they witnessed the complainants engaged in a sexual act.⁸⁹ The men were arrested and eventually convicted under a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.⁹⁰ The Supreme Court granted certiorari and considered the validity of the statute on three grounds. First, the Court considered whether the statute violated the Fourteenth Amendment guarantee of equal protection by “criminaliz[ing] sexual intimacy of same-sex couples, but not identical behavior by different-sex couples.”⁹¹ Second, the Court examined whether “criminal convictions for adult consensual sexual intimacy in the home violate[d] vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.”⁹² Third, the Court contemplated whether *Bowers v. Hardwick* should be overruled.⁹³ The Court answered questions two and three in the affirmative, overruling *Bowers v. Hardwick* and asserting that “petitioners are entitled to respect for their private lives” because “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”⁹⁴

Although on its face the statute merely prohibited a particular sexual act, the Court recognized that, in reality, “[t]heir penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of

sons could not occupy the large manner next door.” *Id.* at 19. Arguably, an extended family would exacerbate the problems of population density, noise, traffic and parking that the ordinance purports to solve.

85. 478 U.S. 186, 196 (1986) (upholding the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct).

86. 539 U.S. 558 (2003).

87. *Id.* at 578–79.

88. *Id.* at 562.

89. *Id.* at 562–63.

90. *Id.* at 563. The statute provided: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). The statute defined “[d]eviate sexual intercourse” as: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” *Id.* § 21.01(1).

91. *Lawrence*, 539 U.S. at 564.

92. *Id.*

93. *Id.*

94. *Id.* at 578 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992)). *Casey* reaffirmed that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.” 505 U.S. at 851.

places, the home.”⁹⁵ The Court held that the liberty protected by the Constitution allows homosexual persons to choose to enter into relationships “in the confines of their homes and their own private lives and still retain their dignity as free persons.”⁹⁶

III. ANALYSIS

While the Court in *Lawrence* ruled on the validity of a statute criminalizing homosexual conduct, the underlying constitutional and policy rationales adopted by the Court may be applied to strike down zoning ordinances like those in *Belle Terre*. There are a variety of different family types that may use the rationale of *Lawrence* to challenge familial zoning ordinances.⁹⁷ The holding in *Lawrence* can be applied to prevent municipalities from continuing to enforce familial zoning ordinances on two different theories. First, *Lawrence*’s liberal acceptance and protection of nontraditional activities illustrates a change in society’s views on what should be respected by zoning authorities.⁹⁸ Second, *Lawrence*’s protection of the right to privacy with regard to associational matters occurring within the home should not be usurped by zoning ordinances.⁹⁹

A. Who Will Utilize *Lawrence* to Challenge the Validity of Ordinances?

Consider the following scenario. Twenty years after the Court approved of its use, the Village of Belle Terre still employs the same familial ordinance restricting land use to single-family dwellings.¹⁰⁰ There is a vacant home in the village and five families are interested in purchasing it. The vacant home has three bedrooms and two bathrooms. All five families can afford the home and have offered the same purchase price. Family *A* consists of a gay couple with two children. Each of the partners has adopted one of the children independently, but the other partner has no legal relation to the child. The children are ages three and five. Family *B* is similar to family *A* and consists of a husband and wife and their three foster children. The foster children are not legally adopted by the couple and have no relation. The children are ages seven months, two years, and seven years. Family *C* is comprised of three elderly widows who would like to live together for companionship and medical reasons. Family *D* is made up of a husband and wife, their four children, the husband’s mother, and the husband’s cousin and her two children. The couple’s four children are nine-year-old twins, a sixteen year old, and a seventeen year old. The cousin’s children are eight and ten. Family *E*

95. *Lawrence*, 539 U.S. at 567.

96. *Id.*

97. See *infra* text accompanying notes 100–02.

98. See *infra* text accompanying notes 103–46.

99. See *infra* text accompanying notes 147–70.

100. See *supra* note 65 and accompanying text.

consists of a husband and wife and their two children, ages three and five. Recall that the ostensible goal of the *Belle Terre* ordinance is a “quiet place where yards are wide, people are few, and motor vehicles restricted.”¹⁰¹ With this being the rationale and goal behind the ordinance, which family or families should be permitted to inhabit the home? Similarly, which families should be excluded?

Hypothetical Family	Composition
Family A (Four Total Members: Two Adults and Two Children)	<ul style="list-style-type: none"> • Same-sex partner/parent <i>a</i> <ul style="list-style-type: none"> ◦ Adopted child (age three) • Same-sex partner/parent <i>b</i> <ul style="list-style-type: none"> ◦ Adopted child (age five)
Family B (Five Total Members: Two Adults and Three Children)	<ul style="list-style-type: none"> • Husband and wife parents <ul style="list-style-type: none"> ◦ Three foster children (ages seven months, two years, and seven years)
Family C (Three Total Members: Three Adults)	<ul style="list-style-type: none"> • Elderly widow <i>a</i> • Elderly widow <i>b</i> • Elderly widow <i>c</i>
Family D (Ten Total Members: Four Adults and Six Children)	<ul style="list-style-type: none"> • Husband and wife parents <ul style="list-style-type: none"> ◦ Four biological children (ages nine, nine, sixteen, and seventeen) • Husband's mother • Husband's cousin <ul style="list-style-type: none"> ◦ Two biological children (ages eight and ten)
Family E (Four Total Members: Two Adults and Two Children)	<ul style="list-style-type: none"> • Husband and wife parents <ul style="list-style-type: none"> ◦ Two biological children (ages three and five)

The *Belle Terre* ordinance makes selecting the new homeowner easy, the only two families permitted to reside in the home are families *D* and *E*. Family *A* violates the ordinance because it would have more than two persons living in the home who are not related by blood, adoption, or marriage. The gay couple has not entered into marriage and, therefore, they are not related. Under the ordinance, the gay couple alone would be able to legally inhabit the home; however, their children make the inhabitation impermissible. While each partner is related by adoption to one of the children, the children are not related to the other partner or the other child. Thus, under the ordinance, family *A* is not considered a

101. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1973).

“family.” Family *B* also fails to qualify as a family under the ordinance. While the husband and wife are related by marriage, neither are related to any of the foster children. Furthermore, none of the foster children are related to each other. The end result is that family *B* fails to meet the ordinance’s definition of family. Family *C* is also excluded by the ordinance. While two unrelated people can be considered a family under the ordinance, three cannot. This applies even if the elderly women “liv[e] and cook[] together as a single housekeeping unit.”¹⁰² Family *D*, consisting of the largest number of people, ten, is permitted to inhabit the home under the ordinance. Family *D* is also the family that has the largest number of eligible drivers, and as a result, might have the largest number of motor vehicles. Family *E* is also eligible to occupy the home. Note that family *E* has the same arrangement as family *A*, except that the husband and wife are married and the children are biological.

B. What Challenges Could the Families Make Utilizing Lawrence?

The above scenario illustrates two shortfalls of the *Belle Terre* ordinance. First, the ordinance excludes families that would be ideal candidates for the neighborhood. The ordinance arbitrarily limits the number of unmarried or unrelated persons who can constitute a family to two. For example, family *A*, with four members, would be ineligible to live in the residence but family *E*, also with four members, could occupy the home. Despite having the same number of family members and children of the same ages, there are opposite outcomes under the ordinance. Arguably, the families would cause the same external land use effects, so there is no legitimate land use reason for one family to be allowed and the other excluded. Second, the ordinance allows for uses of the residence that patently contradict the ostensible goals of the ordinance. For example, family *C*, with a population of three, is excluded but family *D* and its ten members can live in the neighborhood. This is clearly contrary to the goal of having a residential neighborhood where people are few. Furthermore, the goal of reducing traffic is also thwarted by the ordinance. Families *A* and *B*, excluded by the ordinance, have only two members each who are of driving age. Thus, in theory, they will only need to have two cars. In contrast, family *D*, which the ordinance allows, has six eligible drivers that may, in theory, have six cars parked near their residence.

The above-mentioned hypothetical is not farfetched considering that the make-up of the American family continues to change dramatically.¹⁰³ While it is unclear just how many *Belle Terre* familial ordinances are in effect throughout the United States, their presence is prominent

102. *Id.* at 2.

103. See generally Daniel J. H. Greenwood, *Subversive Legacies: Learning from History/Constructing the Future Workplace and the Family*, 12 TEX. J. WOMEN & L. 323, 326 (2003).

and strongly resented, as evidenced by the continuing challenges to zoning ordinances that contain restrictive definitions of family.¹⁰⁴ While families *D* and *E* can reside in the Village of Belle Terre, the excluded families can challenge the ordinance by utilizing *Lawrence* to compel municipalities to zone in a more appropriate manner. While the *Belle Terre* ordinance has legitimate goals in theory, these goals are not always achieved by the ordinance in practice.

If the ordinance is not always effective in achieving its intended goals, what *is* it doing? First, the ordinance, by restricting the number of unrelated people in the home to two, effectively zones out nontraditional living arrangements. This is illustrated by the comparison of families *A* and *E*. While both of these families would create the same external land use impacts, the family with the alternative lifestyle is not allowed in the neighborhood. Second, the ordinance unconstitutionally inquires into the lifestyles of the inhabitants of the home, interfering with their right to privacy. Overall, familial ordinances cause more harm than good.¹⁰⁵ They are ineffective, highly exclusive, and highly intrusive. But fortunately, there are other, more appropriate ways to achieve the intended goals. These realities, fueled by the *Lawrence* decision, cry out for a new standard for zoning ordinances; one that does not permit familial ordinances.

1. *Lawrence as a Catalyst for Social Change*

The holding in *Lawrence* can be used to challenge familial ordinances like those in *Belle Terre* on the basis that *Lawrence*'s liberal acceptance and protection of nontraditional activities in the home should extend to the realm of zoning. The cases, which at first glance seem quite dissimilar, both address governmental regulation of nontraditional living activities within the privacy of the home. In *Belle Terre*, the regulated activity was a person's right to live in a residence.¹⁰⁶ *Lawrence* addressed a person's right to engage in sexual conduct in a residence.¹⁰⁷ In both *Lawrence* and *Belle Terre*, the activities addressed were permissible if done by traditional families and impermissible if engaged in by nontraditional ones. The ordinance in *Belle Terre* prohibited more than two people from residing in a home if "not related by blood, adoption, or marriage" as traditional families are.¹⁰⁸ The statute invalidated in *Lawrence*

104. Since the Supreme Court's decision in *Belle Terre*, several state courts, including California, Michigan, New Jersey, New York, Indiana, Delaware, Georgia, Hawaii, Maryland, Missouri, New Hampshire, and Pennsylvania, have decided on challenges to familial ordinances. See generally Gulbis, *supra* note 72 (discussing the validity of ordinances that restrict the number of unrelated persons who may live in a residence).

105. See Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1699–1702 (1996).

106. *Belle Terre*, 416 U.S. at 2.

107. *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

108. *Belle Terre*, 416 U.S. at 2.

forbade two persons of the same sex to engage in certain intimate sexual conduct while members of the opposite sex were not similarly restricted by the statute.¹⁰⁹ Clearly, both laws enforced the views of the societal majority. However, after *Lawrence*, single-family zoning laws are unconstitutional even under *Euclid*'s deferential standard because of their arbitrary and irrational nature.

a. America's Newfound Acceptance of Nontraditional Lifestyles

The difference between the two cases is that, while the Court in *Belle Terre* found there was legitimate police power to zone to protect the majority's values,¹¹⁰ the Court in *Lawrence* stated that it was unacceptable for the societal majority to impose its views on the entire society.¹¹¹ For years, the *Lawrence* Court recognized, the denunciation of homosexual conduct was based upon "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."¹¹² However, by overruling *Bowers*, the Court recognized it had a duty to "define the liberty of all, not to mandate [its] own moral code."¹¹³

Opponents of *Lawrence* claim that the Supreme Court, in its decision, abandoned its moral obligation to society.¹¹⁴ In the critics' eyes, "[t]his dereliction of duty represents a major blow to America's Christian Roots, the institution of family and the very foundations of morality and society."¹¹⁵ On the other hand, *Lawrence* is celebrated for many of the same reasons that it is condemned. Despite the fact that "forty-three percent of Americans still believe that being gay is immoral,"¹¹⁶ the majority no longer believes that legal discrimination against gays and lesbians is fair.¹¹⁷ Times are changing and acceptance of alternative lifestyles is increasing. For example, a Gallup poll in June, 2003 revealed that fifty-nine percent of Americans believe that sexual activity between two

109. *Lawrence*, 539 U.S. at 563.

110. *Belle Terre*, 416 U.S. at 9.

111. *See Lawrence*, 539 U.S. at 571-72.

112. *Id.* at 571.

113. *Id.* (citing *Planned Parenthood v. Casey*, 505 U.S. 883, 850 (1992)).

114. *TFP Decries Supreme Court's Decision as America's "Moral 9/11,"* THE AMERICAN SOCIETY FOR THE DEFENSE OF TRADITION, FAMILY AND PROPERTY, June 26, 2003, available at <http://www.sodomylaws.org/lawrence/lwnews080.htm> (last visited Oct. 12, 2004) [hereinafter AMERICAN SOCIETY]. The opposition to the decision did not come as a surprise to Anthony Romero who is the head of the American Civil Liberties Union and who is also gay. He stated "[w]e should fully expect opponents of gay and lesbian equality to also endeavor to chip away at the Supreme Court victory, to try to circumscribe its scope and minimize its application." *Gay in the USA*, THE GUARDIAN, July 15, 2003, available at <http://www.sodomylaws.org/lawrence/lwnews074.htm> (last visited Oct. 12, 2004). At the time the article was written, Senate majority leader Bill Frist, a Republican, had already called for an amendment to the Constitution to define marriage strictly as a union between a man and a woman. *Id.*

115. AMERICAN SOCIETY, *supra* note 114.

116. *Gay in the USA*, *supra* note 114.

117. *Id.*

consenting, homosexual adults should be legal.¹¹⁸ This is a dramatic increase from the thirty-three percent who felt that way in the 1980s.¹¹⁹ While *Lawrence*'s narrow ruling seemed to deal solely with sodomy, "its language conveyed a much more sweeping recognition of what [Justice] Kennedy, using the word's of the nation's founding, called the liberty of gays and lesbians."¹²⁰ Thus, the reasoning behind *Lawrence* can be expanded to apply to other gay and lesbian rights, such as the right to marriage, equal employment opportunities and benefits, adoption, and child custody.¹²¹

Further, it is also plausible that *Lawrence* will expand the rights of other groups. After all, "the ruling corrodes the rational basis for all disparate treatment of gays and lesbians," therefore it may also corrode the rational basis for disparate treatment of all nontraditional families traditionally excluded from the single-family neighborhood.¹²² *Lawrence* concluded that, despite the deep and profound beliefs of the societal majority, it is improper for the State to enforce these views through its laws if liberty would be unconstitutionally infringed.¹²³ In other words, the activities of nontraditional lifestyles are deserving of the same respect and protections as the widely accepted activities.

In light of *Lawrence*'s sweeping protection for nontraditional lifestyles in criminal statutes, it seems reasonable that municipalities be required to follow suit when drafting their zoning ordinances. The rationale for applying the reasoning of *Lawrence* to *Belle Terre* is founded upon statements the Court made in *Euclid*. *Euclid* recognized that, in light of the changing uses and occupations of private lands in urban communities, regulations that a century ago would have been invalidated as arbitrary and oppressive are now valid.¹²⁴ Certainly the inverse is true: previously uniformly sustained ordinances, when evaluated within the

118. *Id.*

119. *Id.* The article goes on to note that "[a] majority of Americans were outraged that the state had fined and briefly send two men to jail in 1998 for having sex in their home. Although the [S]upreme [C]ourt's decision arrived as a shock to Scalia, for most Americans it was long overdue." *Id.*

120. Carolyn Lochhead, *High Court Ruling Likely to Usher in New Era for Gays Decision's Logic to Have Impact on Other Rights*, S.F. CHRON., June 29, 2003, available at <http://www.sodomylaws.org/lawrence/lwnews052.htm> (last visited Oct. 12, 2004). A poll by Harris Interactive found that eighty-two percent of Americans are "opposed to the denial of health benefits to same sex couples" and seventy-four percent are "opposed to barring gays from certain jobs, such as teaching." *Gay in the USA*, *supra* note 114.

121. Lochhead, *supra* note 120. "Gay advocates, galvanized by its decision, are poised to take down the other barriers to full equality with heterosexuals . . . [I]ast week they took on the school district of Lubbock, Texas, which barred students from having a club that would foster tolerance of lesbian and gay teenagers." *Gay in the USA*, *supra* note 114.

122. Lochhead, *supra* note 120.

123. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). It is remarkable that a majority of the *Lawrence* Court was Republican-appointed justices with conservative reputations. Lochhead, *supra* note 120. Through this decision, "the conservative and Republican-dominated Supreme Court recognize[d] gays and lesbians as valued and equal parts of the American family." *Id.*

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

newly accepted uses and occupations of private lands, can be found to be arbitrary and oppressive. This is exactly what the Supreme Court did in *Lawrence*, it took a statute which was once sustained as an acceptable regulation of criminal behavior and found that society's changing views and acceptance of homosexual behaviors rendered the statute arbitrary and oppressive.¹²⁵ Thus, ordinances intending to protect the traditional family by distinguishing between biologically and legally related occupants should now be viewed as arbitrary and oppressive. *Lawrence* mandates a newfound acceptance for alternative lifestyles that should be applied to all areas of the law, including zoning.¹²⁶

b. State Courts' Invalidation of Familial Ordinances

Despite the Supreme Court's decision in *Belle Terre* validating familial ordinances, state courts have liberally protected nontraditional lifestyles by striking down ordinances which unnecessarily trample upon the rights of those with alternative lifestyles.¹²⁷ State courts' rebellion against familial ordinances indicate that antiquated notions of appropriate zoning have already eroded. These notions should continue to disintegrate in light of *Lawrence*. State courts have invalidated familial ordinances on the grounds that they are either violative of state constitutional guarantees or not properly tailored to achieve their intended goals. In *State v. Baker*,¹²⁸ the Supreme Court of New Jersey held unconstitutional "zoning regulations which attempt to limit residency based on the number of unrelated individuals."¹²⁹ The court acknowl-

125. *Lawrence*, 539 U.S. at 575-76.

126. A current trend developing in nontraditional living is called co-housing. Co-housing is "a type of cooperative living that combines 'the autonomy of private dwellings with many of the resource advantages of community living.'" Rebecca M. Ginzburg, *Altering "Family": Another Look at the Supreme Court's Narrow Protection of Families in Belle Terre*, 83 B.U. L. REV. 875, 878 (2003). Co-housing groups are like tailor-made families, designed by each individual group to meet the specific needs of the residence inhabitants. *Id.* Arguably, co-housing serves many of the same purposes of the traditional family and, because of these similarities, it deserves the same protections. *Id.* Co-housing offers amenities such as affordable housing, sharing and conservation of resources, child care along with a sense of belonging and community. Thus, the *Belle Terre* court's distinction "between traditional and voluntary families is unfounded and should be reconsidered" *Id.*

127. See *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831, 844 (Mich. 1984) (holding that an ordinance limiting to two the number of unrelated persons who could live together was not a valid exercise of the police power because the goals of promoting family life and preserving the residential nature of the subdivision were not accomplished by the ordinance); *McMinn v. Oyster Bay*, 488 N.E.2d 1240, 1244 (N.Y. 1985) (holding invalid an ordinance that, defining family through biological and legal relations, restricted occupancy of homes to single families on the ground that the state's legitimate goals could be met through less restrictive means); *City of Santa Barbara v. Adamson*, 610 P.2d 436, 444 (Cal. 1980) (invalidating a single family zoning ordinance that prohibited more than five unrelated persons from living together on the ground that the ordinance's distinction between traditional families related either biologically or legally and nontraditional families violated the California Constitution's right to privacy).

128. 405 A.2d 368 (N.J. 1979).

129. *Id.* at 375. The ordinance at issue in the case defined "family" as: "[o]ne or more persons occupying a dwelling unit as a single nonprofit housekeeping unit. More than four persons [] not related by blood, marriage, or adoption shall not be considered to constitute a family." *Id.* at 370.

edged that while municipalities may designate areas as exclusively residential to maintain family-style living, the power to mold the familial environment is not unlimited.¹³⁰ Zoning may not serve as a means to bar unwanted minorities or the poor from the municipality.¹³¹ It is also impermissible for a municipality to use zoning to control the identity of residents.¹³² The court reasoned that ordinances seeking to achieve an ideal residential neighborhood by utilizing familial relation as criteria are problematic because they result in an inclusion of threatening uses and the exclusion of perfectly suitable uses.¹³³ Acknowledging the fact that such ordinances are unsuccessful in achieving their goals, the court asserted that the relation-based ordinances are maintained because they are fashioned upon “generalized assumptions about the stability and social desirability of households comprised of unrelated individuals—assumptions which in many cases do not reflect the real world.”¹³⁴ The *Baker* court condemned familial-based ordinances as ineffective and impermissible.¹³⁵ *Lawrence* corroborates this finding by emphasizing that nontraditional lifestyles deserve respect and equality under the law.¹³⁶

c. Opposition to the Extension of *Lawrence* to Zoning Ordinances

Those in opposition to extending the *Lawrence* rationale to the realm of zoning will challenge the practicality and validity of doing so on several grounds.¹³⁷ First, they will argue that *Euclid* gives zoning authori-

130. *Id.* at 371.

131. *Id.*

132. *Id.* Studies have been conducted to determine the drive behind local zoning authorities decisions. According to these data, zoning authorities' decisions can be described by two words: “paucity and inconclusive.” Durchslag, *supra* note 27, at 657. Local legislatures are influenced by constituent desires. One study concluded that “a high rate of home ownership encourages exclusionary policies . . . that home values, income levels, and white population size are all significantly associated with exclusionary zoning.” *Id.* Zoning boards respond to community pressure to preserve the rural character of their towns. Furthermore, even if the community is silent, the zoning board will exclude whom-ever they choose, reasoning that the residents of the town could not have possibly wanted this type of use in the community. *Id.* at 658.

133. *Baker*, 405 A.2d at 371. The Court goes on to offer an example to illustrate the irony of the ordinance's workings: the ordinance would disallow five judges from inhabiting a residence while allowing ten distant cousins to occupy the home. *Id.*

134. *Id.* at 372.

135. *Id.*

136. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

137. Opponents of altering the deference given to zoning bodies will argue that the application of *Lawrence* to zoning laws would violate well-established precedent. In 1926, *Euclid* gave zoning authorities broad power to zone as they deemed necessary. See generally *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926). Almost eighty years later, *Euclid* is still good law and it should certainly not be overturned or limited by a decision that does not speak about having any zoning implications or addressing any zoning issues. Thus, *Euclid*'s fundamental importance to zoning law, allowing for preferential treatment of the single family residential zone, should not be altered by *Lawrence* or by *Belle Terre*, which held constitutional ordinances regulating the occupants of the home based on biological and legal distinctions. The Court in *Lawrence*, however, overruled precedent by overturning *Bowers*. 539 U.S. at 578. Activities prohibited by the criminal sodomy statute like the one struck down in *Lawrence* had a history of condemnation “firmly rooted in Judeo-Christian moral and ethical standards.” *Id.* at 571. Despite the fact that disapproval of homosexual practices could be

ties the broad discretion to zone for the health, safety, welfare, and morals of the community. The counter-argument is that *Euclid* acknowledges that acceptable zoning practices, as well as the municipality's police power, will be dependent upon various factors such as time, extenuating circumstances, and changing societal needs and problems.¹³⁸ Also, as the Supreme Court established in *Nectow*, the zoning authority's power is not infinite and the rights of the individual landowner will, at some point, be impermissibly trampled upon.¹³⁹ However, *Nectow* does not provide much guidance as to the exact place where the line should be drawn. Arguably the *Nectow* decision, read in conjunction with the decision from *Lawrence*, supports the inference that, because nontraditional lifestyles are to be afforded protection and acceptance, any zoning ordinance which infringes solely upon them is an impermissible intrusion upon individual landowner rights.

In addition, proponents of familial zoning ordinances will argue that the occupants of the traditional single-family residential areas bought and maintained their households in reliance on the ordinances providing that their area be zoned single-family residential and will be exclusively preserved for such uses. However, ordinances like those in *Belle Terre* have not induced individual or societal reliance that requires adherence to the status quo.¹⁴⁰ To the contrary, the language of *Euclid* and *Nectow*, read in conjunction with the realities of the nature of zoning, illustrate that zoning ordinances are not immutable.¹⁴¹ Thus, reliance on such ordinances is justified, but is also cautionary because these ordinances and their meanings may be altered or adjusted in light of new circumstances. *Euclid* established that new developments and conditions may require

traced back thousands of years, the Court decided to focus on the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" as the relevant standard on which to base its decision. *Id.* at 572. When confronted with the stare decisis argument, the Court declared that "[h]istory and tradition are the starting point but not in all cases the ending point . . ." *Id.* The dissent synthesized the majority's three pronged test which, if satisfied, would allow for the overturning of erroneously decided precedent: "(1) its foundations have been 'ero[ded]' by subsequent decisions . . . (2) it has been subject to 'substantial and continuing' criticism . . . and (3) it has not induced 'individual or societal reliance' that counsels against overturning." *Id.* at 587 (Scalia, J., dissenting). Justice Scalia criticized the majority's opinion not for departing from the doctrine of stare decisis, but for its inconsistent application of the doctrine. *Id.* at 587 (Scalia, J., dissenting). He noted that the majority opinion does not address the praise given to the doctrine in the abortion context. In *Roe*, "when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to reaffirm it." *Id.* (Scalia, J., dissenting). Scalia asserted that the problem with the majority's test "is that *Roe* itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*." *Id.* (Scalia, J., dissenting).

138. *Euclid*, 272 U.S. at 386–87.

139. See *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928).

140. Cf. *United States v. Lopez*, 514 U.S. 549, 573–74 (1995) (Kennedy, J., concurring) (stating that "the Court . . . and the legal system . . . have an immense stake in the stability of our Commerce Clause jurisprudence"). No comparable equitable barrier exists with respect to *Belle Terre*.

141. See also JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 441 (3d ed. 1989) ("The prevailing judicial view . . . is that rezonings should be accorded the deference usually given legislation and upheld unless clearly not rationally related to public interests.").

additional restrictions that may have been condemned before as fatally arbitrary and unreasonable. Indeed, *Euclid* realized that “[i]n a changing world it is impossible that it should be otherwise.”¹⁴² Thus, it may be reasonably inferred from *Euclid* that ordinances can, and will, be changed in light of new circumstances.¹⁴³ Furthermore, the very nature of zoning makes societal reliance on zoning ordinances unfounded. The reality is that municipalities are constantly zoning and rezoning. The changing needs of the municipality, the fluidity of its residents, or state and federal needs may require reassessment of the comprehensive zoning plan. Requiring an original zoning classification to be permanent is impractical and unreasonable.¹⁴⁴

Moreover, the residents in the neighborhood may have ulterior motives for their reliance on the ordinance. If the residents claim to have relied on the *Belle Terre*-type ordinance to preserve the character of the neighborhood by limiting noise and density, their reliance is flawed because these ordinances have been unsuccessful in achieving their goals.¹⁴⁵ The effectiveness of these ordinances falters because in some cases they allow more intensive uses while excluding less intensive uses. Residents also may have relied upon these ordinances to exclude from the neighborhood personally undesirable uses. Perhaps they do not like college students or foster families. However, the legitimate state goal behind the *Belle Terre*-type ordinances is to prevent negative external land use impacts that accompany more intensive uses. The goal of the *Belle Terre* ordinance cannot be manipulated to create a neighborhood full of inhabitants with lifestyles that are palatable to the current residents.¹⁴⁶ Despite how much the residents would like to keep out certain alternative families, if the goal of curtailing negative land use impacts is not achieved by the current ordinance, the ordinance should be replaced by one that effectuates the legitimate goal.

142. *Euclid*, 272 U.S. at 387.

143. The *Euclid* Court gave the example of traffic regulations “which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable” now are sustained. *Id.* Under this rationale, it could be argued that ordinances such as those in *Belle Terre* were sustainable under *Euclid* because, until *Lawrence*, the exclusion and nonacceptance of alternative life choices was not seen as oppressive or arbitrary because it represented the popular view. However, the opinion in *Lawrence* recognized a change in circumstances and conditions, mandating acceptance of and respect for alternative living arrangements, which should be applied to zoning ordinances. After *Lawrence*, ordinances making distinctions on the basis of legal or biological relations should now be “condemned as fatally arbitrary and unreasonable.” *Id.*

144. There are many zoning tools and techniques that reaffirm the notion that zoning is susceptible to change. For example, an amortization clause was found to be a permissible exercise of police power and could be used to dissimilate nonconforming uses from a recently rezoned district. *City of Los Angeles v. Gage*, 274 P.2d 34, 44 (Cal. Ct. App. 1954). Thus, if zoning authorities have tools by which to rid areas of nonconforming uses, this implicitly affirms the notion that zoning districts are not immutable.

145. See *supra* text accompanying notes 126–34.

146. *Id.*

2. *Lawrence as a Reinforcement of the Right to Privacy in the Home*

The holding in *Lawrence* can also be employed to challenge familial ordinances, such as those in *Belle Terre*, by arguing that *Lawrence's* extreme concern for and protection of activities that occur within the privacy of the home should be extended to the area of zoning. The *Lawrence* Court recognized that while the manifest function of the statute was to regulate sexual activity, the statute had the latent consequence of permitting the government an unfettered eye into private associations occurring within the four walls of the home.¹⁴⁷ The statute, as applied, allowed the government to regulate not only sexual behavior, but also the types of relationships formed and if such relationships were permissible in the home.¹⁴⁸ The Court acknowledged that adults should be able to choose to enter into these relationships in the confines of their home, free from government scrutiny, and the liberty protected by the Constitution gives them the right to make this choice.¹⁴⁹ Similar to the sodomy statutes, familial ordinances have the effect of regulating human relationships that occur within the privacy of the home. Proponents of familial ordinances will assert that the ordinances regulate conduct that occurs outside the home, mainly in the form of the external land use impacts produced by the inhabitants of the home. However, these ordinances have been ineffective in regulating external land use impacts, leaving the residents of the home as the only target of regulation.¹⁵⁰ Therefore, the deference to the individual's right to privacy in the home, mandated in *Lawrence*, should be respected by municipalities constructing zoning ordinances.

a. Constitutional Presence and Scope of the Right to Privacy

The existence of a constitutional right to privacy, and the scope of that right if it exists, has been the subject of much debate. While privacy is not specifically listed as a fundamental right, it is sometimes regarded as an "implied fundamental right."¹⁵¹ According to one scholar, the holding in *Lawrence* is "a powerful affirmation of a right to privacy under the Constitution."¹⁵² Courts have been able to utilize the Constitution to

147. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

148. *Id.*

149. *Id.*

150. See *supra* text accompanying notes 122–29.

151. Erwin Chemerinsky, *Implied Fundamental Rights*, 700 PLI/Lit 167, 171 (2003).

152. *Id.* at 173. Chemerinsky notes that, "[a]fter *Lawrence* was decided, some in the media minimized its significance on the ground that few are ever prosecuted under state sodomy laws. This tremendously undervalues the importance of the value choices made by the majority of the Court." *Id.* *Lawrence* is important because, "more than any other case in American history, [it] recognizes that sexual activity is a fundamental aspect of personhood and that it is entitled to constitutional protection." *Id.* Chemerinsky concludes that "*Lawrence* involved a value choice by the Court. The majority clearly and unequivocally said that if privacy means anything, surely it protects what consenting adults do in their own bedrooms." *Id.* at 174.

recognize evolving definitions of privacy and privacy rights.¹⁵³ Some critics adamantly denounce a right to privacy, claiming that “the right does not exist because it has no basis in the Constitution.”¹⁵⁴ These critics challenge the efficacy of a constitutional right to privacy by claiming that because the right is so indefinitely defined, there is no feasible way to determine which liberties it protects.¹⁵⁵ However, the absence of specific wording in the Constitution has not prevented the Supreme Court from finding and sustaining privacy rights in the area of family autonomy, contraception, and abortion.¹⁵⁶

If privacy is a fundamental right, then heightened scrutiny would be applied by the Court when analyzing the constitutionality of single-family zoning ordinances.¹⁵⁷ However, the Court’s opinion in *Lawrence* was unclear whether privacy is to be considered a fundamental right.¹⁵⁸ Further, the Court failed to identify clearly the level of scrutiny that should be provided to the implicated privacy interest, regardless of whether the right is fundamental.¹⁵⁹ In any event, those challenging single-family zoning ordinances would argue that, after *Lawrence*, their privacy interests are so important that a single-family zoning ordinance is unconstitutional even under rational basis review.

b. Three Conceptions of the Right to Privacy

Case law and commentary has lead to the identification of three broad conceptions of the right to privacy: zonal, relational, and decisional.¹⁶⁰ These three concepts of the right to privacy are protected by *Lawrence* and should be extended to protect individual rights in the realm of zoning. First, under the zonal paradigm of privacy, *Lawrence* protects the sanctity of the home. The zonal paradigm “focuses on the constitutional significance of the home, recognized in the text of the Third and Fourth Amendments and in a number of the Court’s deci-

153. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). Marshall states that “[he] do[es] not believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention. . . . [W]hen contemporary Americans cite ‘The Constitution,’ they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.” *Id.*

154. Andrew Koppelman, *The Right to Privacy?*, 2002 U. CHI. LEGAL F. 105, 106 (2002).

155. *Id.*

156. Chemerinsky, *supra* note 151, at 173.

157. Laws that burden fundamental rights are typically given strict scrutiny. However, in the context of family privacy cases, the Supreme Court has applied a less stringent standard. David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 444, 448 (2004).

158. *Id.* at 448.

159. *Id.*

160. These three broad conceptions of the constitutional right to privacy were first articulated by Kendall Thomas in his analysis of *Bowers v. Hardwick*. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443–49 (1992); *see also* Koppelman, *supra* note 154, at 109. Critics of *Bowers* wanted to identify the more abstract interests at stake in the case. Koppelman, *supra* note 154, at 109.

sions.”¹⁶¹ *Lawrence* recognizes that “the State is not omnipresent in the home” and that “liberty protects the person from unwarranted government intrusions into a dwelling or other private places.”¹⁶² Thus, *Lawrence*, in part, struck down the sodomy statute because the ordinance regulated conduct within the four walls of the home.¹⁶³ Under the zonal paradigm, familial ordinances like those in *Belle Terre* should be impermissible as well. As implied by the Third and Fourth Amendments and the *Lawrence* decision, there is something fundamentally different about the home. The home is a private place, a place where people can go to take refuge away from societal judgment. People retreat to the comfort of their homes after long days filled with societal interaction, intending to relax and leave their worries behind. The sanctuary of the home should not be disturbed by governmental regulation.

The second concept of the constitutional right to privacy is the relational paradigm which “focuses on persons rather than places.”¹⁶⁴ The relational paradigm “holds that certain associations are specially protected from state interference, because of ‘the fundamental interest all individuals have in controlling the nature of their intimate associations with others.’”¹⁶⁵ Certainly *Lawrence* mandated respect for individual privacy when it held that the state could not interfere with the right to engage in sodomy.¹⁶⁶ Similar respect should be given to the inhabitants of a home when choosing with whom they would like to reside. The government should not be able to interfere with a person’s choice of family. If three elderly women would like to operate as a familial unit and reside in the single-family residential zone under the *Belle Terre* ordinance, they should be entitled to do so. The government is formulating its own definition of family and perpetuating its idea of the permissible family make-up through the vehicle of a zoning ordinance. Thus, familial ordinances send a message to potential residents that they have two options: either fit into one of the ordinance’s compartmentalized associational relationships or conduct associations elsewhere because they are unwelcome in the neighborhood. By zoning in this manner, the government undertakes the role of a disgruntled parent, monitoring the relationships of its child. But instead of sending the disobedient child to its room, the government punishes by excluding from the neighborhood. After *Lawrence*, it is clear that this type of governmental regulation is an impermissible restriction on a person’s right to choose who is included in their family make-up.

161. Koppelman, *supra* note 154, at 109.

162. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

163. *Id.* at 578.

164. Thomas, *supra* note 160, at 1446.

165. Koppelman, *supra* note 154, at 110 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting)).

166. *Lawrence*, 539 U.S. at 578.

The final concept of privacy is the decisional paradigm, which “holds that individuals are entitled to ‘freedom to choose how to conduct their lives.’”¹⁶⁷ *Lawrence* averred the decisional paradigm by recognizing that the Constitution guarantees a realm of personal liberty with which the government may not interfere.¹⁶⁸ The idea behind this liberty is that “certain rights are protected . . . ‘because they form so central a part of an individual’s life.’”¹⁶⁹ On this basis, *Lawrence* held that intimate relationships are so central a part of an individual’s life that they warrant a protected status. Arguably, an individual’s choice of coinhabitants should be deemed a central part of an individual’s life as well. While living arrangements may span the spectrum, each living arrangement was made for specific, deliberate reasons that should be respected by and free from interference by a zoning body. Inhabitants of a home should be free to share that home with whomever they choose, so long as they do not cause negative external land impacts which negatively interfere with the rights of others. The choice of cohabitants is too important to be governed by biological or legal relations. Instead, persons’ rights to choose with whom they live should be protected equally and objectively by using alternate criteria.¹⁷⁰

IV. RECOMMENDATION

After *Lawrence*, municipalities have a constitutional obligation to abandon familial ordinances and protect legitimate state interests by using other means of regulation. The holding in *Lawrence* illustrates a legally emerging societal acceptance of nontraditional activities that zoning authorities must respect. Furthermore, *Belle Terre*-type familial ordinances do not work. Fortunately, there are other, more effective ways that municipalities can protect legitimate state interests in a way that is consistent with respect for alternative lifestyles and the more expansive right to privacy that *Lawrence* articulates.

167. Koppelman, *supra* note 154, at 110 (quoting *Bowers*, 478 U.S. at 205–06 (Blackmun, J., dissenting)).

168. *Lawrence*, 539 U.S. at 578.

169. Koppelman, *supra* note 154, at 110 (quoting *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting)). Justice Blackmun argued that, because an individual has the right to choose the form and nature of personal relationships, they should not be discriminated against because of their choice. *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting). The counter-argument to this, however, is that the mere importance of a choice does not entitle it to immunity from governmental scrutiny. Koppelman, *supra* note 154, at 110. In response, advocates of gay relationships would argue that “gay relationships are acceptable and valuable” and the law’s interference with them is an unjust and unwarranted display of prejudice against civil and proper conduct. *Id.*

170. If *Lawrence* is interpreted to have expanded the right to privacy to private living arrangements, there is a possible spectrum as to the breadth of the expansion. The holding may be narrowly applied to protect only the living arrangements of homosexuals. On a broader level, the Constitution may be seen to protect family-like intimate living arrangements. Or, extending the *Lawrence* rationale to the furthest extreme, the Constitution protection may be defined to give special protection to *all* living arrangements.

Recall the legitimate state interests sought to be protected in *Belle Terre*: “a quiet place where yards are wide, people few, and motor vehicles are restricted”¹⁷¹ The village was also concerned with urban problems such as density and noise which accompany boarding houses and other similar uses.¹⁷² The village’s solution to these problems was to exclude from their neighborhood inhabitants of homes who were not biologically or legally related. However, a more efficient and effective ordinance would regulate the household activity directly responsible for the external land use impact that the municipality is trying to mitigate.

While every municipality will have different interests and goals, achieving the Village of Belle Terre’s zoning goals with alternative zoning measures provides a good example of the other types of zoning mechanisms that a municipality can use to mitigate external land use impacts successfully. Arguably, the Village of Belle Terre tried to take a short-cut when creating its zoning ordinance. Instead of looking at each individual negative land use impact and regulating that particular problem, it decided to implement a single regulation based on biological and legal distinctions as the blanket cure-all for all of the negative impacts. In light of *Lawrence*, this short-cut should be closed. In reality, as illustrated by the aforementioned hypothetical, the short-cut was ineffective—it failed to meet the village’s purportedly legitimate zoning objectives.

The zoning authority’s main goal in *Belle Terre* was a residential neighborhood that was quiet, not overpopulated, and had restricted vehicle usage. By breaking down the goals into manageable pieces, the city has a plethora of ways to achieve its interests. Keep in mind, however, that the village is already constructed and established, and there are different regulations which zoning authorities can apply to neighborhoods which are not yet built.¹⁷³ First, an effective way for a zoning authority to address neighborhood noise concerns is to impose a limitation on the number of decibels that can be emitted from each household. A criminal statute may already impose this type of decibel restriction, but a civil or

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

172. *Id.*

173. There are many zoning techniques which municipalities can utilize as density control mechanisms by applying them to residential neighborhoods before the neighborhoods are ever constructed. The zoning authority would create guidelines instructing anyone who wishes to build in the neighborhood how their house must be built. A principal device used to restrict density in land development is a minimum lot size. 2 KENNETH H. YOUNG, *ANDERSON’S AMERICAN LAW OF ZONING* § 8.05 (4th ed. 1996). Because land is a finite resource, the effect of mandating larger lot sizes results in fewer homes constructed in the neighborhood, which in turn causes less population density and prevents overcrowding of the land. Minimum lot size requirements also protect property values and preserve the aesthetics of the community. *Id.* Because the minimum size of the lots is usually at least one acre, another effect of the minimum lot size is to increase the cost of the dwellings and thereby exclude classes of people from inhabiting the neighborhood. *Id.* § 8.13. Thus, minimum lot size requirements have been the subject of constitutional challenge on the grounds that they are exclusionary. *Id.* Other techniques used by zoning authorities to regulate neighborhoods not yet constructed include a minimum floor area and a limitation on the number of bedrooms allowed. *Id.* §§ 8.06, 8.09.

criminal statute regulating noise maximums can be enforced by local law officials to effectively tailor noise pollution to achieve the goal of a “quiet neighborhood.”

Second, there are alternative ways for municipalities to regulate population density. One way is to require a certain amount of habitable square footage per each occupant of the home. Another way to regulate density is to tie occupancy limits to the number of bathrooms or bedrooms in the home.¹⁷⁴ On their faces, these regulations seem reasonable because people choose their homes by assessing the number of people who are to reside in the home and then comparing this number to the size of the house. However, the municipality must ensure that such restrictions are reasonable and do not unconstitutionally exclude potential inhabitants from the neighborhood.

Third, there are more effective ways for municipalities to regulate the negative effects of vehicle usage. Some problems may be alleviated by proper and effective population density regulations: less inhabitants usually means less vehicles. If these measures are not effective enough, the municipality may limit the number of vehicles allowed for each household.¹⁷⁵ If the municipality would like the street to be less congested, it can place a “No Through Traffic” sign at the entrances of the street to try to deter unnecessary use of the street.

V. CONCLUSION

Justice Scalia, in his *Lawrence* dissent, chastised the majority for writing an opinion that would have such boundless effects and applications.¹⁷⁶ Justice Scalia may be right in his observation that *Lawrence* has the potential to influence and change countless areas of the law, but he is wrong that that would be a bad thing. This note has suggested just one of the possible implications of the *Lawrence* decision: applying it to invalidate familial zoning ordinances. *Lawrence* recognizes that society has developed a newfound acceptance for nontraditional activities; it is only proper that society's laws and statutes reflect this acceptance. The Constitution requires that these laws and statutes be reconstructed to protect the expansive definition of the right to privacy recognized by *Lawrence*. Therefore, zoning authorities need to draft new ordinances that are in line with *Lawrence's* dictates.

174. *State v. Baker*, 405 A.2d 368, 373 (N.J. 1979).

175. *Id.*

176. *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).