Chapter 1

Fundamental Rights

1.1 Racially Restrictive Covenants

Shelley v. Kraemer
334 U.S. 1 (1948)

Mr. Chief Justice Vinson delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

> . . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to

> restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.

. . . On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

. . . Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.

. . . It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more."

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Court has given specific recognition to the same principle.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary.

. . . But the present cases . . . do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so

defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases*, 1883, 109 U.S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters . . . .

III.

. . . We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose

such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State . . . . The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. . . .

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers

sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Mr. Justice REED, Mr. Justice JACKSON, and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

Notes and Questions

1.1. Racially restrictive covenants were widespread in the United States in the first half of the twentieth century. *See generally* Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541 (2001). Indeed, just two decades prior to its decision in *Shelley*, in the case of *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Supreme Court had affirmed the enforcement of such a covenant (against the original covenantor) in the District of Columbia (on grounds that the Equal Protection Clause of the 14th Amendment was inapplicable to the federal government—a proposition the Court retreated from in *Bolling v. Sharpe*, 347 U.S. 497 (1954)). And in the years leading up to *Shelley* it was federal government policy to encourage mortgage lenders to insist on the inclusion of racially restrictive covenants in the deeds to homes that were to serve as collateral for federally-insured loans.

Note that three justices recused themselves from consideration of *Shelley*. Justice John Paul Stevens, in his memoir, surmises that they had to do so because they owned homes burdened (and, in the view of many white Americans of the day, benefited) by racially restrictive covenants. JUSTICE JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 69 (2011).

1.2. Does *Shelley* provide useful guidance on what types of privately agreed restrictions will be enforced and what types will go unenforced on constitutional or public policy grounds? Does the Restatement do any better?

1.3. Like racism, racially restrictive covenants have not gone away. Though unenforceable in court, they remain in the chain of title of much residential real estate today, and linger in historical title records. Several universities and public interest organizations have undertaken the work of identifying these lingering covenants in the hopes of removing them from title records. Examples include the University of Minnesota's Mapping Prejudice project (*link*), the University of Washington's Seattle Civil Rights & Labor History Project (*link*), and Prologue DC's Mapping Segregation project (*link*).

In the wake of white supremacist violence in Charlottesville, Virginia, in August of 2017, Charlottesville resident and legal commentator Dahlia Lithwick recounted:

> Our lawyer once told us, when we purchased our home in Charlottesville, that the house to this day carries a racially restrictive covenant. No blacks, no Jews. That covenant is illegal and unenforceable. And so I have a house in Charlottesville that could once have been taken from me by the force of law.

Dahlia Lithwick, *They Will Not Replace Us*, SLATE (Aug. 13, 2017), *link*. The white supremacists had descended on Charlottesville as a show of force centered on an equestrian statute of Confederate general Robert E. Lee, which the city had voted to remove. Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), *link*. In recent years, the law's treatment of racially restrictive covenants has come to take on some of the features of the culture war over the removal of Jim-Crow-era monuments to the Confederacy.

As we will see in the next section, removing a restrictive covenant from a chain of title can be quite difficult. In recent years, as attention has been drawn to the perpetuation of unenforceable racially restrictive covenants in title records, a number of states have enacted laws to make it easier—and in some cases mandatory—to file replacement deeds and other title documents with such covenants removed or stricken. *See, e.g.*, CAL. GOV'T CODE § 12956.2; CAL. CIV. CODE § 4225; MD. CODE ANN., REAL PROP. §§ 3-112, 11B-113.3; MINN. STAT. § 507.18; NEV. REV. STAT. § 111.237(3); VA. CODE ANN. § 36-96.6. Note that under such statutes, the original instrument containing the covenant is not *removed* from the title records; the new document is simply *added* to the record with a reference to the location of the original, while the index is amended to point to the modified instrument rather than (or in addition to) the original instrument.

In the absence of such statutory intervention, however, it can be a challenge to remove racially restrictive language from title documents, even though—and perhaps even *because*—such language is unenforceable. In *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (6th Cir. 2018), a suit seeking to compel county recorders in Ohio to "stop printing and publishing historical documents that contain racially restrictive covenants, to remove all such records from public view, and to permit the inspection and redaction of such documents" had been dismissed for lack of standing. In an opinion by Judge Boggs, the Court of Appeals affirmed the dismissal, explaining:

> In ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed on felons whose very existence, including destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants that we now find offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoriae*, as those documents are part of our living history and witness to the evolution of our cultural norms. Mason's feeling of being unwelcomed may be real. A feeling cannot be unfelt. But Mason's discomfort at the expression of historical language does not create particularized injury. The language in question is purely historical and is unenforceable and irrelevant in present-day land transactions.

901 F.3d at 757 (footnote omitted). In a concurrence, Judge Clay agreed that the plaintiff had not adequately pleaded a particularized injury, but held open the possibility that he *could* do so:

> Justice may require us to repudiate or revise elements of our "living history" if those elements—whether they be public records, flags, or statutes—are shown to encourage or perpetuate discrimination or the badges and incidents of slavery; indeed, racial epithets that were once accepted as commonplace have not been preserved, and they have sometimes been stricken from our modern vernacular. We apply an even stricter standard where, as here, the government is the source of, or has ratified, language that has the purpose or effect of encouraging racial animus. We need not erase our history in order to disarm its harmful legacy, but victims of invidious discrimination who

> have suffered particularized injury as a result of the application of historical language should be able to seek redress, consistent with the context and the factual circumstances of their cases.

Id. at 758 (Clay, J. concurring). The debate between these two opinions—over the nature and gravity of the harms caused by the persistence of racist symbols, the appropriate response to those harms, and the nature of our obligations to preserve historical memory—is strikingly (and probably intentionally) similar to the debate over the removal of Confederate monuments. Is this debate helpful in determining what to do about title records? Are the issues presented by title records the same as those presented by statues of Confederate generals? If not, how do they differ?

1.4. Precisely because they remain in the chain of title for many parcels of real property, these types of discriminatory covenants still occasionally lead to disputes, particularly where residents continue to believe they are a good idea. For example, the Long Island, NY village of Yaphank, founded in the 1930s as "Camp Siegfried," owes its origin to the expression of Nazi sympathies. This German-American community started as a summer camp for would-be Hitler Youth, and was financed by the German-American Bund party (a pro-Nazi organization). *See* Nicholas Casey, *Buyers' Rule in L.I. Town Is Relic of Its Nazi Past*, N.Y. Times, Oct. 20, 2015, at A1, *link*. The land comprising village's residential subdivision of about 50 homes is actually owned by the "German American Settlement League, Inc." whose bylaws restricted residency to League members, and restricted League membership "primarily" to people "of German extraction." Yaphank residents owned, and could sell, the *structures* on their lots, but in order to take possession the buyer needed a lease to the underlying land, which the League controlled.

In 2015, the nonprofit advocacy organization Long Island Housing Services sued the German American Settlement League on behalf of two homeowners (both of German extraction) who were having difficulty selling their home subject to the restrictions. In 2016, the plaintiffs secured a settlement in which the League agreed to remove the racial restrictions from its bylaws and to comply with fair housing laws. LIHS's complaint is available here, *link* and the settlement is available here, *link*.

Figure 1.1: Robin Hutton, Shaved Head Family stickers 2 (Sept. 25, 2012), available under a Creative Commons Attribution, Non-Commercial, No-Derivatives 2.0 Generic License *link*.

1.2 Family Status Zoning

Any zoning scheme which creates a single-family zoning district, or even a standard for what single-family homes must look like, must contain a definition of family.

City of Ladue v. Horn

720 S.W.2d 745 (Mo. Ct. App. 1986)

Defendants, Joan Horn and E. Terrence Jones, appeal from the judgment of the trial court in favor of plaintiff, City of Ladue (Ladue), which enjoined defendants from occupying their home in violation of Ladue's zoning ordinance and which dismissed defendants' counterclaim. We affirm.

The case was submitted to the trial court on stipulated facts. Ladue's Zoning Ordinance No. 1175 was in effect at all times pertinent to the present action. Certain zones were designated as one-family residential. The zoning ordinance defined family as: "One or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individual housekeeping organization." The only authorized accessory use in residen-

tial districts was for "[a]ccommodations for domestic persons employed and living on the premises and home occupations." The purpose of Ladue's zoning ordinance was broadly stated as to promote "the health, safety, morals and general welfare" of Ladue.

In July, 1981, defendants purchased a seven-bedroom, four-bathroom house which was located in a single-family residential zone in Ladue. Residing in defendants' home were Horn's two children (aged 16 and 19) and Jones's one child (age 18). The two older children attended out-of-state universities and lived in the house only on a part-time basis. Although defendants were not married, they shared a common bedroom, maintained a joint checking account for the household expenses, ate their meals together, entertained together, and disciplined each other's children. Ladue made demands upon defendants to vacate their home because their household did not comprise a family, as defined by Ladue's zoning ordinance, and therefore they could not live in an area zoned for single-family dwellings. When defendants refused to vacate, Ladue sought to enjoin defendants' continued violation of the zoning ordinance. Defendants counterclaimed, seeking a declaration that the zoning ordinance was constitutionally void. They also sought attorneys' fees and costs. The trial court entered a permanent injunction in favor of Ladue and dismissed defendants' counterclaim. Enforcement of the injunction was stayed pending this appeal.

. . . In Missouri, the scope of appellate review in zoning matters is limited; and the reviewing court may not substitute its judgment for that of the zoning authority. A zoning ordinance is presumed valid. The legislative body is vested with broad discretion and the appellate court cannot interfere unless it is shown that the legislative body has acted arbitrarily. "If the council's action is fairly debatable, the court cannot substitute its opinion."

. . . Capsulated, defendants' attack on Ladue's ordinance is three-pronged. First, the zoning limitations foreclose them from exercising their right to associate freely with whomever they wish. Second, their right to privacy is violated by the zoning restrictions. Third, the zoning classification distinguishes between related persons and unrelated persons. Defendants allege that the United States and Missouri Constitutions grant each of them the right to share his or her residence with whomever he or she chooses. They assert that Ladue has not demonstrated a compelling, much

less rational, justification for the overly proscriptive blood or legal relationship requirement in its zoning ordinance.

Defendants posit that the term "family" is susceptible to several meanings. They contend that, since their household is the "functional and factual equivalent of a natural family," the ordinance may not preclude them from living in a single-family residential Ladue neighborhood. Defendants argue in their brief as follows:

> The record amply demonstrates that the private, intimate interests of Horn and Jones are substantial. Horn, Jones, and their respective children have historically lived together as a single family unit. They use and occupy their home for the identical purposes and in the identical manners as families which are biologically or maritally related.

To bolster this contention, defendants elaborate on their shared duties, as set forth earlier in this opinion. Defendants acknowledge the importance of viewing themselves as a family unit, albeit a "conceptual family" as opposed to a "true non-family," in order to prevent the application of the ordinance.[3]

The fallacy in defendants' syllogism is that the stipulated facts do not compel the conclusion that defendants are living as a family. A man and woman living together, sharing pleasures and certain responsibilities, does not per se constitute a family in even the conceptual sense. To approximate a family relationship, there must exist a commitment to a permanent relationship and a perceived reciprocal obligation to support and to care for each other. Only when these characteristics are present can the conceptual family, perhaps, equate with the traditional family. In a traditional family, certain of its inherent attributes arise from the legal relationship of the family members. In a non-traditional family, those same qualities arise in fact, either by explicit agreement or by tacit understanding among the parties.

While the stipulated facts could arguably support an inference by the trial court that defendants and their children comprised a non-traditional

[3]The distinction between "conceptual" or "non-traditional" families and true non-families may well be a distinction without a difference, the distinction resting in speculation and sterotypical presumptions. Further, recognition of the conceptual family suffers from the defect of commanding inquiry into who are the users rather than focusing on the use itself. *See generally* Note, *City of Santa Barbara v. Adamson: An Associational Right of Privacy and the End of Family Zones*, 69 Calif. L. Rev. 1052, 1068–70 (1981).

family, they do not compel that inference. . . . We assume, arguendo, that the sole basis for the judgment entered by the trial court was that defendants were not related by blood, marriage or adoption, as required by Ladue's ordinance.

We first consider whether the ordinance violates any federally protected rights of the defendants. Generally, federal court decisions hold that a zoning classification based upon a biological or a legal relationship among household members is justifiable under constitutional police powers to protect the public health, safety, morals or welfare of the community.

More specifically, the United States Supreme Court has developed a two-tiered approach by which to examine legislation challenged as violative of the equal protection clause. If the personal interest affected by the ordinance is fundamental, "strict scrutiny" is applied and the ordinance is sustained only upon a showing that the burden imposed is necessary to protect a compelling governmental interest. If the ordinance does not contain a suspect class or impinge upon a fundamental interest, the more relaxed "rational basis" test is applied and the classification imposed by the ordinance is upheld if any facts can reasonably justify it. Defendants urge this court to recognize that their interest in choosing their own living arrangement inexorably involves their fundamental rights of freedom of association and of privacy.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the United States Supreme Court also established the due process parameters of permissible legislation. The ordinance in question must have a "foundation in reason" and bear a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

In the *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the court addressed a zoning regulation of the type at issue in this case. The court held that the Village of Belle Terre ordinance involved no fundamental right, but was typical of economic and social legislation which is upheld if it is reasonably related to a permissible governmental objective. The challenged zoning ordinance of the Village of Belle Terre defined family as:

> One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or] a number of persons but not exceeding two (2) living and cook-

> ing together as a single housekeeping unit though not related by blood, adoption, or marriage . . . .

The court upheld the ordinance, reasoning that the ordinance constituted valid land use legislation reasonably designed to maintain traditional family values and patterns.

The importance of the family was reaffirmed in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), wherein the United States Supreme Court was confronted with a housing ordinance which defined a "family" as only certain closely related individuals. Consequently, a grandmother who lived with her son and two grandsons was convicted of violating the ordinance because her two grandsons were first cousins rather than brothers. The United States Supreme Court struck down the East Cleveland ordinance for violating the freedom of personal choice in matters of marriage and family life. The court distinguished *Belle Terre* by stating that the ordinance in that case allowed all individuals related by blood, marriage or adoption to live together; whereas East Cleveland, by restricting the number of related persons who could live together, sought "to regulate the occupancy of its housing by slicing deeply into the family itself." The court pointed out that the institution of the family is protected by the Constitution precisely because it is so deeply rooted in the American tradition and that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."

Here, because we are dealing with economic and social legislation and not with a fundamental interest or a suspect classification, the test of constitutionality is whether the ordinance is reasonable and not arbitrary and bears a rational relationship to a permissible state objective. "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."

Ladue has a legitimate concern with laying out guidelines for land use addressed to family needs. "It is ample 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." The question of whether Ladue could have chosen more precise means to effectuate its legislative goals is immaterial. Ladue's zoning ordinance is rationally related to its expressed purposes and violates no provisions of the Constitution of the United States. Further, defendants' assertion that they have a constitutional right to share their

residence with whomever they please amounts to the same argument that was made and found unpersuasive by the court in *Belle Terre*.

. . . The essence of zoning is selection; and, if it is not invidious or discriminatory against those not selected, it is proper. There is no doubt that there is a governmental interest in marriage and in preserving the integrity of the biological or legal family. There is no concomitant governmental interest in keeping together a group of unrelated persons, no matter how closely they simulate a family. Further, there is no state policy which commands that groups of people may live under the same roof in any section of a municipality they choose.

The stated purpose of Ladue's zoning ordinance is the promotion of the health, safety, morals and general welfare in the city. Whether Ladue could have adopted less restrictive means to achieve these same goals is not a controlling factor in considering the constitutionality of the zoning ordinance. Rather, our focus is on whether there exists some reasonable basis for the means actually employed. In making such a determination, if any state of facts either known or which could reasonably be assumed is presented in support of the ordinance, we must defer to the legislative judgment. We find that Ladue has not acted arbitrarily in enacting its zoning ordinance which defines family as those related by blood, marriage or adoption. Given the fact that Ladue has so defined family, we defer to its legislative judgment.

The judgment of the trial court is affirmed.

Notes and Questions

1.5. **Further background on the Supreme Court cases.** *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), was primarily concerned with the Village's attempts to exclude groups of unrelated college students from living together. The Supreme Court cited *Euclid* and similar cases in support of its holding that the legislature can decide what kinds of uses are detrimental to the peaceful and attractive character of the area:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is

> ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Are college students nuisance-like? The *Belle Terre* Court said the ordinance in that case showed no animosity towards unmarried couples, as proven by its inclusion of two unmarried people in its definition of "family." But what about an unmarried couple with children, as in *Ladue*?

1.6. Justice Marshall's vigorous dissent in *Belle Terre* would have distinguished between "uses of land . . . , for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings," which zoning authorities could validly regulate, and "who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried," which he would have found they could not. In Justice Marshall's view, a neutral ordinance regulating density, noise, etc. could accomplish all the town's goals. "The burden of such an ordinance would fall equally upon all segments of the community. It would surely be better tailored to the goals asserted by the village than the ordinance before us today, for it would more realistically restrict population density and growth and their attendant environmental costs."

1.7. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), Justice Marshall joined the plurality opinion of the Court striking down East Cleveland's more limited definition of "family," over several dissents.[1] In that case, Inez Moore lived with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys were first cousins, rather than brothers; John came to live with his grandmother and the elder and younger Dale Moores after his mother's death. This caused the household to violate East Cleveland's family ordinance, resulting in criminal charges against Mrs. Moore. The Court distinguished *Belle Terre* by reasoning that East Cleveland "has chosen to regulate the occupancy of its housing by slicing deeply into the family itself."

The doctrine of substantive due process, which protects fundamental rights against government intrusion, could not stop at the "first convenient, if arbitrary boundary—the boundary of the nuclear family." Justices Brennan and Marshall, in concurrence, specifically pointed out that the "nuclear family" was really the pattern of "white suburbia," which could not impose its preference on others, and

[1] The relevant ordinance defined "family" as "a number of individuals related to the nominal head of the household or to the spouse" thereof, and further enumerated specific relatives that could qualify as part of the statutorily defined family.

noted traditions among immigrants and African-Americans of living together in multigenerational arrangements as a matter of survival. The concurrence touted multigenerational families as stronger and more beneficial for children than isolated nuclear families. Ultimately, the plurality wrote, "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."

Justice Stewart, joined by then-Justice Rehnquist, would have upheld the ordinance, rejecting the theory that "that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated person." The interests of a grandmother in living with her grandchildren were simply not sufficient, in the dissenters' view, to justify invalidating a zoning ordinance. If the city was required to include grandchildren, why not longtime friends? A line had to be drawn somewhere, and this one was rational, especially since the grandmother could seek a variance if the application of the ordinance to her wouldn't further its goals.

1.8. Given this further detail about *Belle Terre* and *Moore*, do you think *Ladue v. Horn* reached the right conclusion? Consider Paul Boudreaux, The Housing Bias: Rethinking Land Use Laws for a Diverse New America (2011):

> [Restrictive single family] regulations provide a fascinating perspective into the unique powers that America gives to laws governing "land use." Government cannot, of course, tell you what kind of car to drive, what to cook for dinner, whether to watch reality TV, whether to fill the living room with ceramic gnomes or tchotchkes, or whether to pay for your kid's college education. All these things are considered, and rightly so, within the realm of human privacy and basic human freedom. But under the label of land use law, governments are able to tell you who to consider your family and who can live in your house. . . . Why can government be so intrusive? Because the neighbors might not like how you live and because they have pushed the local government, through civic local democracy, into passing a law regulating your household. It's an accepted exercise of the police power.

1.9. **More recent events**. Ladue's current (as of 2023) ordinance allows "[o]ne or more persons related by blood, marriage or legal adoption, or any number of persons so related plus one unrelated person, or two unrelated persons, occupying a dwelling unit as an individual housekeeping organization." Is it constitutional to

force an unmarried couple to leave if they each have a child from a prior relationship, or a married couple after they take foster children into their home? In 2006, a lesbian couple with a child was excluded from Ladue because of its family composition ordinance, and the same year an unmarried couple with two children was told they had to leave the home they'd bought in Black Jack, Missouri, another St. Louis suburb.[2]

The American Civil Liberties Union sued Black Jack. Discovery revealed that at least four other couples had been denied occupancy permits to live in Black Jack because they were unmarried and living with children, including a couple who were the parents of triplets. *Dispatch From Black Jack, MO*, L.A. TIMES A12 (May 21, 2006). Black Jack agreed to change its ordinance to settle the litigation.

Now that the lesbian couple in Black Jack can legally marry, can Black Jack go back to requiring couples to be married if they want to live in Black Jack with their children?

1.10. **States' varying treatment of family composition rules**. A number of other states, either on federal or state constitutional grounds, have instead drawn the line at "single housekeeping units" or "functional families." *See, e.g.*, *Delta Charter T'ship v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984) (no rational basis to preclude four childhood friends from living together). The Court of Appeals of New York has been particularly protective of individual choice of living arrangements. *See, e.g.*, *Group House of Port Washington v. Board of Zoning and Appeals*, 380 N.E.2d 207 (N.Y. 1978) (a house consisting of two surrogate parents and seven emotionally disturbed children was "the functional and factual equivalent of a natural family, and to exclude it from a residential area would be to serve no valid purpose"). Many New York municipalities now presume that a group of individuals smaller than four is a functional family, and presume that a larger group is not but allow it to rebut that presumption. *See, e.g.*, *Unification Theological Seminary v. City of Poughkeepsie*, 607 N.Y.S.2d 383 (N.Y. App. Div. 1994) (upholding this practice, where the ordinance provided that the zoning administrator should consider whether the group shares the entire house; lives and cooks together as a single housekeeping unit; shares expenses for food, rent, utilities or other household expenses; and is permanent and stable).

However, a number of states still follow *Belle Terre* when a jurisdiction's family composition ordinance is challenged. The litigated cases tend to be older, and

[2] *See, e.g.*, Nancy Larson, *Gay Couples Keep Out!*, ADVOCATE 34 (Jul. 18, 2006) (discussing lesbian couple and daughter who were warned by real estate agents that Ladue would prevent them from living together); Eun Kyung Kim, *Law Means Unwed Couple, 3 Kids May Be . . . Booted From Black Jack*, ST. LOUIS POST-DISPATCH A1 (Feb. 22, 2006).

even in the 1990s enforcement often drew incredulous media coverage, but there are a few recent cases upholding restrictive definitions of family. *See, e.g.*, *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 145 So. 3d 320 (La. 2014) (upholding single-family ordinance that allowed (1) an unlimited number of related people or (2) no more than four unrelated people in a single housekeeping unit, if the owner occupied the premises). Some jurisdictions have even tightened their definitions. *See, e.g.*, Stephanie McCrummen, *Manassas Changes Definition of Family*, Wash. Post A1 (Dec. 28, 2005) (newly enacted Manassas, VA zoning law prevented couple from living with woman's nephew; opponents attributed enactment to discrimination against immigrants); *see generally* Rigel C. Oliveri, *Single Family Zoning, Intimate Association, and the Right To Choose Household Companions*, Fla. L. Rev. (2015); Adam Lubow, *" . . . Not Related by Blood, Marriage, or Adoption": A History of the Definition of "Family" in Zoning Law*, 16 J. Afford. Hous. & Comm. Dev. Law 144 (2007). In other instances, zoning authorities have focused on excluding groups of college students, not others. *See, e.g.*, *Rosenberg v. City of Boston*, 2010 WL 2090956 (Mass. Land. Ct. 2010) (upholding the constitutionality of excluding only "five or more persons who are enrolled as full-time undergraduate students at a post-secondary educational institution" from living together in a dwelling unit).

1.11. The Supreme Court, in *Obergefell v. Hodges*, rejected arguments that bans on same-sex marriage protected children, because of the numerous children living with same-sex couples whose interests were harmed by discrimination against their parents. Does the same rationale apply here to invalidate family composition ordinances, at least as applied to households with children?

1.12. **The Fair Housing Act and the Americans with Disabilities Act**. The FHA and the ADA may also limit family composition rules, as applied to group homes for people with disabilities. Disability-related zoning litigation often involves residents of group homes, who routinely experience discrimination, either overt or simply through indifference, usually in the form of bans on group living arrangements. *See, e.g.*, *Oxford House v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (finding that town's family composition ordinance discriminated against individuals recovering from drug or alcohol addition because of their handicap). While pure density regulations capping the number of occupants per dwelling are exempt from the FHA, family definitions are not pure density regulations and thus reasonable accommodations to them may be required. *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995).

In order to deal with repeated FHA litigation around group homes, Missouri amended its zoning authorization statute, providing comprehensive definitions and limiting localities' power to exclude group homes:

> For the purpose of any zoning law, ordinance or code, the classification single family dwelling or single family residence shall include any home in which eight or fewer unrelated mentally or physically handicapped persons reside, and may include two additional persons acting as house parents or guardians who need not be related to each other or to any of the mentally or physically handicapped persons residing in the home. In the case of any such residential home for mentally or physically handicapped persons, the local zoning authority may require that the exterior appearance of the home and property be in reasonable conformance with the general neighborhood standards. Further, the local zoning authority may establish reasonable standards regarding the density of such individual homes in an specific single family dwelling neighborhood.

Section 89.020.2. Does this adequately address problems of potential discrimination, including the obligation to provide reasonable accommodation?

1.3 The Fair Housing Act

The Fair Housing Act of 1968

42 U.S.C. §§ 3601–3619

§ 3601. DECLARATION OF POLICY.—It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§ 3602. DEFINITIONS.—As used in this subchapter . . .

(c) "Family" includes a single individual. . . .

(h) "Handicap" means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance* . . . .

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices.—[Subject to certain exceptions], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin [hereinafter RCRSFSNO].

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of [RCRSFSNO].

(c) To [publish an] advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on [RCRSFSNO or handicap], or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of [RCRSFSNO or handicap] that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular [RCRSFSNO or handicap].

*"Controlled substance" is defined generally to include regulated drugs but not alcohol. —Eds.

§ 3603(b). Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

> (1) any single-family house sold or rented by an owner [so long as the owner meets a variety of tests intended to distinguish a "private individual owner" from a commercial real estate dealer]; or
>
> (2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

Notes and Questions

1.13. You may have noticed the omission of "handicap" from § 3604(a) and (b). Paragraph (f) fills this gap, making it also unlawful to "discriminate in the sale or rental" of a dwelling, or the terms thereof, "because of on a handicap of the buyer or renter," or someone related to the buyer or renter. Discrimination includes a refusal to make policy accommodations or to permit modifications to the premises, if those accommodations or modifications are "reasonable" and "necessary" to afford "full enjoyment of the premises." Certain newly-constructed multifamily dwellings must also be designed according to accessibility standards, per § 3604(f)(3)(C).

1.14. There are several exceptions, such as for religious organizations and "housing for older persons." § 3607(a), (b)(1). The most controversial of these, colloquially known as the "Mrs. Murphy exemption," is in § 3603(b) above. What does this exemption allow? If the act is intended to root out pernicious discrimination, why include this provision?

It is crucial to note that the plain text of the Mrs. Murphy exemption states that it does not apply to § 3604(c)—the subsection that prohibits discriminatory advertising. Thus, although certain categories of landlords are exempted from the statute's basic framework, they are still not allowed to post discriminatory advertisements.

1.15. The Civil Rights Act of 1866, codified at 42 U.S.C. § 1982, "bars all racial discrimination, private as well as public, in the sale or rental of property." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Unlike the Fair Housing Act, it has no exceptions or limitations, but it "deals only with racial discrimination," and not other forms. *Id.*

For Rent Seeking tenant for 1 bed apt. $500/m. I only rent to black people.	**For Rent** New apartment building. $650/m. Walking distance to synagogue. Great amenities.
For Rent Great deal! Apt. in exclusive Danbury area. Very selective. Contact ASAP. $700/m	**For Rent** Perfect apt. for rent. Near park. $400/m. Absolutely no pets.
For Rent Snazzy digs near downtown! Looking for muscular football players to rent rooms. 500/m	**For Rent** Looking for tenants. Absolutely no lawyers. Only couples. Must show income 3x monthly rent.
For Rent Seeking new tenants for 2 br. Pref for women—I'm female & want female tenants!	**For Rent** Great place by University. $600/m. Kids ok, but must pay 2x security dep. Kids = trouble

Figure 1.2: Hypothetical classified advertisements.

An Exercise in Advertising

Imagine that you are a lawyer for a newspaper in a large metropolitan area. The local chapter of the ACLU has raised concerns that some advertisements in the classifieds section of your paper violate the Fair Housing Act.[3] Your boss has asked you to review the ads in Figure 1.2 for any offending language. Which of the following would you feel comfortable printing?[4]

What about this ad for a roommate on Craigslist? Is it objectionable to you? Does it violate the FHA? Does it matter that the poster is looking for a *roommate*? Would your answers change if the advertisement read, "Have a room available for an able-bodied white man with no children?"

[3]Would any of these ads violate the Civil Rights Act of 1866?

[4]The government does provide some guidance to landlords worried about triggering FHA liability through their advertisements. There are, for example, published lists of "words to avoid" and "acceptable language." Although context is important, landlords can generally use these phrases: good neighborhood, secluded setting, single family home, quality construction, near public transportation, near places of worship, and assistance animals only.

$650 / 1010 sq. ft. – Have a room available for female Christian elderly woman none smoker

Nice comfortable furnished room available access to patio, backyard, 1/2 bath & full bath available, wyfi available, cable TV available, This is all for that special Christian elderly none smoking or drinking church going female. Thank you

Serious inquiries only!!!

Fair Housing Council v. Roommate.com, LLC

666 F.3d 1216 (9th Cir. 2012)

KOZINSKI, Chief Judge:

There's no place like home. In the privacy of your own home, you can take off your coat, kick off your shoes, let your guard down and be completely yourself. While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent. When that happens, can the government limit whom we choose? Specifically, do the anti-discrimination provisions of the Fair Housing Act ("FHA") extend to the selection of roommates?

Roommate.com, LLC ("Roommate") operates an internet-based business that helps roommates find each other. Roommate's website receives over 40,000 visits a day and roughly a million new postings for roommates are created each year. When users sign up, they must create a profile by answering a series of questions about their sex, sexual orientation and whether children will be living with them. An open-ended "Additional Comments" section lets users include information not prompted by the questionnaire. Users are asked to list their preferences for roommate characteristics, including sex, sexual orientation and familial status. Based on the profiles and preferences, Roommate matches users and provides them a list of housing-seekers or available rooms meeting their criteria. Users can also search available listings based on roommate characteristics, including sex, sexual orientation and familial status. The Fair Housing Councils of San Fernando Valley and San Diego ("FHCs") sued Roommate in federal court, alleging that the website's questions requiring disclosure of sex, sexual orientation and familial status, and its sorting, steering and matching of users based on those characteristics, violate the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq. . . .

Analysis

If the FHA extends to shared living situations, it's quite clear that what Roommate does amounts to a violation. The pivotal question is whether the FHA applies to roommates.

I

The FHA prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the "sale or rental *of a dwelling*." 42 U.S.C. § 3604(b) (emphasis added). The FHA also makes it illegal to:

> make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental *of a dwelling* that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id. § 3604(c) (emphasis added). The reach of the statute turns on the meaning of "dwelling."

The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." Id. § 3602(b). A dwelling is thus a living unit designed or intended for occupancy by a family, meaning that it ordinarily has the elements generally associated with a family residence: sleeping spaces, bathroom and kitchen facilities, and common areas, such as living rooms, dens and hallways.

It would be difficult, though not impossible, to divide a single-family house or apartment into separate "dwellings" for purposes of the statute. Is a "dwelling" a bedroom plus a right to access common areas? What if roommates share a bedroom? Could a "dwelling" be a bottom bunk and half an armoire? It makes practical sense to interpret "dwelling" as an independent living unit and stop the FHA at the front door.

There's no indication that Congress intended to interfere with personal relationships inside the home. Congress wanted to address the problem of landlords discriminating in the sale and rental of housing, which deprived protected classes of housing opportunities. But a business transaction between a tenant and landlord is quite different from an arrangement between two people sharing the same living space. We seriously

doubt Congress meant the FHA to apply to the latter. Consider, for example, the FHA's prohibition against sex discrimination. Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s.

While it's possible to read dwelling to mean sub-parts of a home or an apartment, doing so leads to awkward results. . . . Nonetheless, this interpretation is not wholly implausible and we would normally consider adopting it, given that the FHA is a remedial statute that we construe broadly. Therefore, we turn to constitutional concerns, which provide strong countervailing considerations.

II

The Supreme Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). Courts have extended the right of intimate association to marriage, child bearing, child rearing and cohabitation with relatives. *Id.* While the right protects only "highly personal relationships," *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting *Roberts*, 468 U.S. at 618), the right isn't restricted exclusively to family, *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545. The right to association also implies a right not to associate. *Roberts*, 468 U.S. at 623.

To determine whether a particular relationship is protected by the right to intimate association we look to "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 546. The roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces. Aside from immediate family or a romantic partner, it's hard to imagine a relationship more inti-

mate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

Because of a roommate's unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. . . .

Equally important, we are fully exposed to a roommate's belongings, activities, habits, proclivities and way of life. This could include matter we find offensive (pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers). When you invite others to share your living quarters, you risk becoming a suspect in whatever illegal activities they engage in.

Government regulation of an individual's ability to pick a roommate thus intrudes into the home, which "is entitled to special protection as the center of the private lives of our people." *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). . . . Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.

For example, women will often look for female roommates because of modesty or security concerns. As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy. She might also worry about unwanted sexual advances or becoming romantically involved with someone she must count on to pay the rent.

An orthodox Jew may want a roommate with similar beliefs and dietary restrictions, so he won't have to worry about finding honey-baked ham in the refrigerator next to the potato latkes. Non-Jewish roommates may not understand or faithfully follow all of the culinary rules, like the use of different silverware for dairy and meat products, or the prohibition against warming non-kosher food in a kosher microwave. . . .

It's a "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). "[W]here an otherwise acceptable construction of a statute would raise se-

rious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). Because the FHA can reasonably be read either to include or exclude shared living arrangements, we can and must choose the construction that avoids raising constitutional concerns. . . . Reading "dwelling" to mean an independent housing unit is a fair interpretation of the text and consistent with congressional intent. Because the construction of "dwelling" to include shared living units raises substantial constitutional concerns, we adopt the narrower construction that excludes roommate selection from the reach of the FHA. . . .

As the underlying conduct is not unlawful, Roommate's facilitation of discriminatory roommate searches does not violate the FHA.

Notes and Questions

1.16. **What's a dwelling?** The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." Id. § 3602(b). Do you think the FHA applies to college dormitories? Is it illegal to reserve some dormitories for women or to have ethnic-themed dorms?

1.17. **A broader Craigslist problem.** It's not unusual to stumble across advertisements for apartments (as opposed to just roommate ads) on Craigslist that violate the FHA. If a local newspaper published similar ads they would be liable under the FHA for publishing discriminatory material. Why doesn't anyone sue Craigslist? The answer is that section 230(c) of the Communications Decency Act provides internet service providers and website owners with broad immunity from liability for content posted by third parties. Craigslist and other similar sites may voluntarily remove offending posts, but they are not required to do so.