

## THE DEFINITION OF “FAMILY” IN MISSOURI LOCAL ZONING ORDINANCES: AN ANALYSIS OF THE JUSTIFICATIONS FOR RESTRICTIVE DEFINITIONS

### INTRODUCTION

In January 2006, Fondray Loving and his fiancée, Olivia Shelltrack, purchased a five-bedroom, 2,300 square foot, single-family home in Black Jack, Missouri.<sup>1</sup> Loving and Shelltrack intended to live in the home with their three children.<sup>2</sup> Like many municipalities, Black Jack requires a homeowner to apply for and receive an occupancy permit in order to legally occupy a home.<sup>3</sup> Accordingly, Loving and Shelltrack applied for a permit.<sup>4</sup> However, their application was denied because they did not meet Black Jack’s definition of “family” as outlined in the city’s zoning ordinance.<sup>5</sup> Loving, Shelltrack, and their three children did not meet Black Jack’s definition of “family” because they are not married and, although two of their children are the biological offspring of both Loving and Shelltrack, one child is the biological offspring of only Shelltrack.<sup>6</sup> In response to the denial of their application, Loving and Shelltrack appealed the decision but were once again denied.<sup>7</sup>

During the months of March, April, and May 2006, the Black Jack Planning and Zoning Commission recommended to the Black Jack City Council a revised definition of “family” to eliminate the adverse impact to Loving and Shelltrack and those similarly situated.<sup>8</sup> However, the city council

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1. Petition at 7, *Loving v. City of Black Jack*, No. 06CC-003157 (Mo. Cir. Ct. dismissed Sept. 29, 2006).

2. *Id.*

3. CITY OF BLACK JACK, MO., CODE OF ORDINANCES ch. 6, art. II, § 6-18, 118.1.6(a) (2007).

4. Petition, *supra* note 1.

5. *Id.* at 3. Black Jack defined “family” as: “An individual or two (2) or more persons related by blood, marriage or adoption, or a group of not more than three (3) persons who need not be related by blood, marriage or adoption, living together as a single non-profit housekeeping unit in a dwelling unit.” *Id.* (citing CITY OF BLACK JACK, MO., CODE OF ORDINANCES app. c, § 0.30(27) (2006)); *see also* Martha T. Moore, *Parents, Kids Not Necessarily ‘Family’ Everywhere*, USA TODAY, May 16, 2006, at 6A.

6. Petition, *supra* note 1, at 4.

7. *Id.* at 9.

8. *Id.* The proposed revised definition of “family” included “[t]wo . . . unrelated individuals . . . plus any other persons related directly to either such individual by blood,

voted 5-3 to reject the proposed revised definition.<sup>9</sup> It appeared Loving and Shelltrack had three choices: (1) do not occupy the home; (2) continue to occupy the home and be subject to enforcement action and sanctions (fines and/or eviction);<sup>10</sup> or (3) get married in order to meet Black Jack's definition of "family." Loving and Shelltrack chose another option—they instituted suit against Black Jack claiming deprivation of due process, violation of equal protection, and violation of the Federal Fair Housing Act.<sup>11</sup>

As a result of the impending lawsuit coupled with negative nationwide media treatment of the situation,<sup>12</sup> Black Jack again put the matter in front of their city council.<sup>13</sup> This time the council voted unanimously to revise Black Jack's definition of "family."<sup>14</sup> The new definition of "family" allows Loving, Shelltrack, and their children, as well as other similarly composed families, to occupy single-family homes in Black Jack, Missouri.<sup>15</sup>

The situation in Black Jack illustrates a dilemma that local governments across the country face when promulgating land use legislation. Local governments bear the responsibility to implement and enforce land use legislation that preserves the integrity of neighborhoods and communities (i.e.

marriage, adoption or foster care relationship, living together as a single non-profit housekeeping unit in a dwelling unit." *Id.*

9. *Id.*

10. *Id.* at 10.

11. Petition, *supra* note 1, at 12–22.

12. Joel Currier, *Unwed Parents Still Not Welcome*, ST. LOUIS POST-DISPATCH, May 17, 2006, at B1; P.J. Huffstutter, *Unwed Couple, Kids Barred by Town Law*, SEATTLE TIMES, May 23, 2006, at A4; Eun Kyung Kim, *Law Means Unwed Couple, 3 Kids May Be . . . Booted from Black Jack*, ST. LOUIS POST-DISPATCH, Feb. 22, 2006, at A1; Moore, *supra* note 5; Rigel Oliveri, *When Zoning Rules Hurt Children*, ST. LOUIS POST-DISPATCH, May 25, 2006, at D11.

13. Press Release, City of Black Jack, Missouri, *City of Black Jack Changes Definition of "Family,"* (Aug. 16, 2006) [hereinafter Press Release, City of Black Jack], available at <http://cityofblackjack.com/default.asp?sectionID=42&pageID=10121&showMenu=2>.

14. *Id.*; see also Norm Parish, *Black Jack Revises Housing Regulation*, ST. LOUIS POST-DISPATCH, Aug. 16, 2006, at A1.

15. As amended on August 15, 2006, Black Jack's CODE OF ORDINANCES now defines "family" as:

1. An individual living as a single nonprofit housekeeping unit in a dwelling unit;
2. Two (2) or more persons related by blood, marriage, adoption or foster care relationship living together as a single nonprofit housekeeping unit in a dwelling unit;
3. A group of not more than three (3) persons who need not be related by blood, marriage, adoption or foster care relationship, living together as a single nonprofit housekeeping unit in a dwelling unit; or
4. Two (2) unrelated individuals having a child or children related by blood, adoption or foster care relationship to both such individuals, plus the biological, adopted or foster children of either such individual, living together as a single nonprofit housekeeping unit in a dwelling unit.

CITY OF BLACK JACK, MO., CODE OF ORDINANCES app. c, § 0.30(27) (2007).

ensure residents of the community are safe, provide adequate public services, etc.). In order to meet these broader societal goals, local governments must make distinctions between what is permissible and impermissible. As a result of making distinctions, local governments run the risk of being over- or under-inclusive. The difficulty of promulgating land use legislation that is neither over- or under-inclusive is especially acute in a local government's determination of how many "families" may occupy a given residence, and more importantly for the purposes of this Comment, what constitutes a "family." No matter what definition of "family" is adopted, it is likely some living arrangements that do not impair the broader societal goals for which local governments are responsible will be excluded, while living arrangements that do in fact threaten these goals will be permitted.<sup>16</sup>

Since 1970, the American family has undergone significant changes. "Traditional family"<sup>17</sup> households have decreased as a proportion of all households.<sup>18</sup> Further, "alternative family forms . . . are proliferating."<sup>19</sup> Given these changes in the social landscape of America, potential issues with the definition of "family" are becoming especially prominent<sup>20</sup> and will likely occur with increasing frequency in the future.

A non-traditional family adversely affected by a restrictive definition of "family" in a local zoning ordinance can challenge the ordinance in multiple ways, four of which will be discussed here. First, a non-traditional family can rely on the political process, seeking relief by lobbying the legislature to

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16. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 n.5 (1974); *Town of Durham v. White Enters.*, 348 A.2d 706, 709 (N.H. 1975); DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 251 (6th ed. 2005) [hereinafter MANDELKER ET AL., *PLANNING AND CONTROL*].

17. The term "traditional family," as used in this Comment, refers to family members related by blood, marriage, or adoption.

18. 1 PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* § 3.06 n.1 (Eric Damian Kelly ed., 2006). According to the U.S. Census Bureau, while "family households" made up 81% of all households in 1970, they only accounted for 68% in 2003. JASON FIELDS, U.S. CENSUS BUREAU, *CURRENT POPULATION REPORTS: AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003*, at 2 (2004). Although the definition of "family household" provided by the U.S. Census Bureau does not comport exactly with the term "traditional family" as used in this Comment, these statistics are indicative of the decline of the traditional family and the proliferation of the non-traditional family.

19. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 397 (2d ed. 2002).

20. Local legislatures in Manassas, Virginia; Knoxville, Tennessee; and Provo, Utah have recently struggled with how to define "family" in their local zoning ordinances. Stephanie McCrummen, *Manassas Defends New Rule on Who Can Live Together*, WASH. POST, Dec. 30, 2005, at B4; Moore, *supra* note 5; see also Thomas F. Coleman, *More Cities Grapple with Definition of 'Family,' UNMARRIED AMERICA, COLUMN ONE*, Mar. 27, 2006, <http://www.unmarriedamerica.org/column-one/3-27-06-cities-grapple-with-definition-of-family.htm>.

amend its definition or voting for different legislators. Second, a non-traditional family can challenge the ordinance on constitutional grounds, such as due process or equal protection. Third, a non-traditional family can challenge the ordinance under the Fair Housing Act (FHA). Lastly, a non-traditional family can challenge a local government's authority to define "family" in the first place and, further, challenge a specific definition of "family" as being outside that authority.

This Comment focuses on the last of the options discussed above, namely judicial review of a local legislature's authority to define "family" and the limitations on that authority. This approach is appropriate for two reasons. First, analyzing restrictive definitions of "family" in this context offers distinct advantages over other possible challenges. Second, the policy discussion that plays a central role in Part III of this Comment is equally applicable to the political process or, alternatively, to a constitutional or FHA challenge.

Approaching restrictive definitions of "family" in the chosen context provides distinct advantages over other possible challenges. First, although the political process played a central role in the relief obtained by Shelltrack and Loving in Black Jack,<sup>21</sup> reliance on this method takes the judiciary completely out of the picture, thereby reducing any consistency in the expected result. Rather, the outcome will depend on the stubbornness of the local legislature. Reliance on the political process may have worked in Black Jack, but another local government might not be so quick to discard a definition of "family" that has been part of its zoning code for years.<sup>22</sup>

Second, judicial review of a local government's authority to define "family" allows for more constructive dialogue between the judiciary and multiple legislative bodies.<sup>23</sup> This is a significant advantage over constitutional challenges based on due process or equal protection, where dialogue between the judiciary and state or local legislatures is severely

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21. See *supra* notes 12–14 and accompanying text.

22. In fact, Black Jack faced a similar challenge to its definition of "family" in 1999. Theresa Tighe, *Unwed Parents of 3-Year-Old Triplets May Have to Move out of Black Jack*, ST. LOUIS POST-DISPATCH, Aug. 9, 1999, at N1. However, in that instance, Black Jack refused to back down. *Black Jack Council Takes No Steps to Resolve Pair's Occupancy Problem*, ST. LOUIS POST-DISPATCH, Aug. 23, 1999, at N6; see also Petition, *supra* note 1, at 10–11 (noting the 1999 instance as well as another documented instance occurring in 2005).

23. For example, if a court were to find that a local government was never granted the power to provide a definition of "family," the *state* legislature would then have the opportunity to amend the state zoning enabling statute to grant this power to the local government. Alternatively, if a court were to find that a local government has the power to define "family" but that the specific definition of "family" is arbitrary and unreasonable, the *local* legislature would have the opportunity to amend its definition to withstand judicial review. See discussion *infra* Part II (detailing how states empower local governments to promulgate land use legislation).

hampered.<sup>24</sup> By invalidating a zoning ordinance on constitutional grounds, state and local legislatures are unable to amend their zoning enabling acts to address the situation how they see fit, as representatives of the people.<sup>25</sup> Moreover, because courts may be more willing to invalidate a local zoning ordinance on non-constitutional grounds,<sup>26</sup> a judicial review challenge may have a higher likelihood of success. Federal and Missouri precedent also suggests that a constitutional challenge would likely be unsuccessful.<sup>27</sup>

Third, the context chosen for this Comment is superior to a challenge based on the Federal Fair Housing Act.<sup>28</sup> The power to zone, since its inception in the early twentieth century, has been deemed part of the police power vested in the states.<sup>29</sup> Moreover, family issues have traditionally been considered a state concern.<sup>30</sup> Although a federal remedy may be appropriate to address some issues, a state remedy should be preferred when dealing with traditional state issues. This sentiment is reinforced by the treatment of local zoning issues by the federal courts.<sup>31</sup>

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24. Illinois is an excellent example of this premise. The Illinois Supreme Court invalidated a definition of "family" in *City of Des Plaines v. Trotter* on the basis that the city's definition of "family" went beyond the general authority delegated by the Illinois legislature rather than due process or equal protection. 216 N.E.2d 116, 118–20 (Ill. 1966). The Illinois state legislature then responded by amending the zoning enabling act to empower local governments "to classify, to regulate and restrict the use of property on the basis of family relationship, which family relationship may be defined as one or more persons each related to the other by blood, marriage or adoption and maintaining a common household." 65 ILL. COMP. STAT. 5/11-13-1 (2004).

25. See, e.g., *State v. Baker*, 405 A.2d 368, 376 (N.J. 1979) (Mountain, J., dissenting) (arguing that the majority erred in striking down the zoning ordinance on constitutional grounds as it forecloses any possibility for the legislature to respond).

26. Deciding a case on statutory grounds is "always preferable" to deciding a case on constitutional grounds. *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 837 n.4 (Mich. 1984). "Normally, where [a zoning issue] arises, a court will rest its decision upon a statutory rather than constitutional ground. It has been suggested that this rule is absolute and unyielding." *Baker*, 405 A.2d at 377 (Mountain, J., dissenting) (citing *State v. Saunders*, 381 A.2d 333, 347 (N.J. 1977) (Clifford, J., dissenting)). "[T]he whole point is that the legislators and the people whom they represent *should* have the right to the final word. This is what democracy is all about." *Id.* at 378.

27. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2, 9–10 (1974) (holding constitutionally valid a definition of "family" more restrictive than the definition at issue in *Black Jack*). Precedent in Missouri indicates success on constitutional challenges would be unlikely. See *City of Ladue v. Horn*, 720 S.W.2d 745, 747, 752 (Mo. Ct. App. 1986) (upholding definition of "family" more restrictive than the definition in *Black Jack*).

28. 42 U.S.C. §§ 3601–3619 (2000).

29. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

30. See *U.S. v. Morrison*, 529 U.S. 598, 615–16 (2000).

31. MANDELKER ET AL., *PLANNING AND CONTROL*, *supra* note 16, at 250 ("[F]ederal courts are quite reluctant to be drawn into 'garden variety' zoning disputes, and have fashioned a variety of procedural and substantive rules to avoid doing so.").

Approaching this issue in the context of judicial review of a local government's authority to define "family" is also not exclusive of the other possible challenges discussed above. The policy issues that are central to an analysis in this context are equally relevant to the political process or a challenge based on due process, equal protection, or the FHA. In fact, different avenues for relief are often blurred by the courts so that, at times, it is difficult to determine which legal premise provided the basis for the decision.<sup>32</sup>

This Comment will argue the following: (1) local governments in Missouri have the power to define "family"; (2) restrictive definitions<sup>33</sup> of "family" will withstand judicial review in Missouri; and (3) relief for individuals adversely affected by restrictive definitions must come from local and state legislatures, not the judiciary. In order to set the stage for this argument, Part I will briefly discuss the historical origins of single-family zoning, focusing specifically on the evolution of the definition of "family." Part II will determine whether it is within the power of local governments to define "family" in the zoning context by examining statutory authority and relevant case law. Part III, broken down into four sections, will analyze the validity of a restrictive definition of "family." The first section will establish the proper standard of judicial review for a specific definition of "family." The second section will examine justifications for restrictive definitions of "family" based both on the practical goals of local governments as well as the preservation of the traditional family. The third section will review social science data and commentary to determine if additional support for restrictive definitions of "family" exists. Lastly, the fourth section will argue that restrictive definitions of "family" will likely withstand judicial review and that relief for those adversely impacted should come from state and local legislatures.

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32. *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 839–40 (Mich. 1984) (after stating the test for judicial review of zoning legislation, the court decided to analyze the issue under due process standards in order to lessen the "extraordinary deference given to the line drawing in traditional zoning matters"); *see also* *Dinan v. Bd. of Zoning Appeals of Town of Stratford*, 595 A.2d 864, 867 (Conn. 1991) ("[W]e conclude that the ultra vires question of whether [the ordinance] exceeds the grant of authority contained in [the enabling statute] depends upon our resolution of the issue of the reasonableness of the distinction made between a traditional family and any other group occupying a residence, which is similar to the constitutional question of equal protection of the law."); ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS: CASES AND MATERIALS* 62 (1981) ("[T]he constitutional law of landowner rights is exasperatingly untidy. Different constitutional doctrines seem designed to serve identical purposes. Judges often neglect to reveal on which clauses (or even to which constitution) they base their holdings.").

33. The use of the term "restrictive definition(s)" in this Comment is meant to encompass all definitions of "family" that are limited, at least in part, to those related by blood, marriage, or adoption.

## I. HISTORY OF SINGLE-FAMILY ZONING AND THE DEFINITION OF "FAMILY"

A. *Historical Origins of Zoning and Use Districts*

The rise of modern zoning began in the early twentieth century. Although examples of zoning can be found as early as 1904,<sup>34</sup> the first comprehensive zoning plan was enacted in New York City in 1916.<sup>35</sup> At the foundation of the New York plan was the division of the city into three separate districts: residential, business, and unrestricted.<sup>36</sup> This system laid the groundwork for dividing areas of land into different use districts.<sup>37</sup> The concept behind use districts is that land in a district will be allocated for a certain use while all other uses will be excluded.<sup>38</sup> For example, a residential district will only allow residential uses, while all other uses, such as commercial or industrial, will be excluded.<sup>39</sup> Subsequent to the enactment of the New York plan, comprehensive zoning spread rapidly across the country. By the beginning of 1926, "there were at least 425 zoned municipalities, comprising more than half the urban population of the country."<sup>40</sup> This rapid proliferation of zoning can be attributed in large part to the efforts of the federal government. The Federal Department of Commerce proposed the Standard State Zoning Enabling Act (SSZEA) in the mid-1920s.<sup>41</sup> The SSZEA became the model on which most state zoning enabling acts were based.<sup>42</sup> Although there was initial reluctance, the Missouri legislature adopted the Missouri Zoning Enabling Act (MZEA) in 1925.<sup>43</sup> The MZEA, as adopted in 1925, was based on the SSZEA.<sup>44</sup>

Despite its widespread proliferation, the constitutionality of comprehensive zoning plans, like the SSZEA and MZEA, remained in doubt until 1926, when

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34. MANDELKER ET AL., PLANNING AND CONTROL, *supra* note 16, at 209 n.\*.

35. *Id.* at 209.

36. *Id.*

37. "Control of land use through zoning is essential to avoid the hodgepodge and chaotic pattern with residential, commercial, industrial, and public and semi-public uses all intermingled—that is the inevitable result when there is no public control." HARLAND BARTHOLOMEW AND ASSOCIATES, A FINAL REPORT UPON LAND REGULATIONS: JEFFERSON COUNTY, MISSOURI I (1969).

38. DANIEL R. MANDELKER, LAND USE LAW § 5.02 (5th ed. 2003) [hereinafter MANDELKER, LAND USE LAW].

39. *Id.*

40. Herbert Hoover, *Foreword to* ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE: A STANDARD STATE ZONING ENABLING ACT at III n.2 (rev'd ed. 1926) [hereinafter STANDARD STATE ZONING ENABLING ACT].

41. MANDELKER, LAND USE LAW, *supra* note 38, § 4.15.

42. MANDELKER ET AL., PLANNING AND CONTROL, *supra* note 16, at 212.

43. Michael T. White, *History of Land Use Law*, LAND USE PLANNING AND EMINENT DOMAIN IN MISSOURI 33–34 (2000).

44. *Id.*

the United States Supreme Court decided *Village of Euclid v. Ambler Realty*.<sup>45</sup> In *Euclid*, the Court upheld the Village of Euclid's comprehensive zoning system and found the power to zone within the inherent police power of the states to promote the "health, safety, morals and general welfare of the community."<sup>46</sup> With newfound endorsement from the United States Supreme Court, zoning was on a path it would travel with little impediment into the twenty-first century.

### B. Family as a Classification

Although the New York plan of 1916 only included one broad "residential" use district, it was widespread "from the earliest days of zoning [to provide] for two or more residential use classifications, one of which was a 'single-family residential use' classification."<sup>47</sup> In fact, the zoning ordinance in *Euclid* included a single-family residential use classification.<sup>48</sup> Single-family use districts were at the pinnacle of the use district system discussed above.<sup>49</sup> Local governments made it a priority to protect this district,<sup>50</sup> excluding all other uses.<sup>51</sup> The protection of this district played a large part in the rationale of the Court in *Euclid*, where apartment buildings and other multi-family dwellings were viewed as "mere parasite[s]" on the single-family residential neighborhood.<sup>52</sup>

Given the prevalence of the "single-family" use district (or other use districts utilizing the term "family" such as "two-family" or "multi-family"), it became necessary to define "family."<sup>53</sup> Most early definitions of "family" did

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45. 272 U.S. 365 (1926).

46. *Id.* at 392 ("The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community.").

47. MANDELKER ET AL., PLANNING AND CONTROL, *supra* note 16, at 286; *see also* EDWARD M. BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 63–64 (1940).

48. *Euclid*, 272 U.S. at 379–80; MANDELKER ET AL., PLANNING AND CONTROL, *supra* note 16, at 286.

49. SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 879 (2d ed. 1998); *see also* MORTON GITELMAN ET AL., CASES AND MATERIALS ON LAND USE 1107 (6th ed. 2004) ("Zoning, from the point of view of the average citizen, created a hierarchy of districts, culminating in the single-family residential district. This 'highest' district was to be protected, not only from commercial and industrial incursions, but also from structures which might house more than one family, such as duplexes, townhouses, and apartments.").

50. GITELMAN ET AL., *supra* note 49.

51. *Id.*; JOHNSON ET AL., *supra* note 49.

52. *Euclid*, 272 U.S. at 394.

53. *See* 2 JAMES METZENBAUM, THE LAW OF ZONING 1359 (2d ed. 1955) ("In view of the fact that the yard stick in many zoning ordinances, is 'Family per acre,' it may be well briefly, at



not require any legal or biological relationship between the residents.<sup>54</sup> Rather, "[t]he essential element was that the occupants be living together as a single housekeeping unit."<sup>55</sup> It was not until the 1960s that definitions of "family" started resembling what is thought of as the "traditional family," namely those related by "blood, marriage, or adoption."<sup>56</sup> Some authority suggests that early use of the term "single-family" was meant to refer to "nothing more than the physical structure of the dwelling" and "was never intended to regulate the composition of a household."<sup>57</sup>

### C. Current Definitions of "Family"

A survey of the different definitions of "family" utilized in modern zoning ordinances reveals a broad spectrum of possibilities. At the most restrictive end, there are definitions that include only an individual or group of individuals related by blood, marriage, or adoption.<sup>58</sup> In this most restrictive example, only those related by blood, marriage, or adoption can reside in a single-family residence. This definition would exclude an unmarried couple or a group of friends. At the other end of the spectrum, there are definitions that

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least, to treat with the connotation of the word 'family.' The interpretation of the word 'family,' in a zoning ordinance does not usually agree with that in dictionaries.").

54. 2 ANDERSON'S AMERICAN LAW OF ZONING § 9:30 (4th ed. 1996); Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1237–61 (2005); see, e.g., BASSET, *supra* note 47 at 188–89. As an example of a "good" definition, "family" was defined as "any number of individuals living together as a single housekeeping unit and doing their cooking on the premises." *Id.*

55. 2 ANDERSON'S AMERICAN LAW OF ZONING, *supra* note 54.

56. MANDELKER ET AL., PLANNING AND CONTROL, *supra* note 16, at 288. Some argue that definitions requiring biological or legal relationships between the residents were "motivated by the desire of local authorities to prevent establishment of 'counter-culture' or 'hippy' communes in single-family residential neighborhoods." *Id.*; see also 1 ROHAN, *supra* note 18 ("Zoning ordinances that seek to exclude on the basis of family definition were originally based upon fear of intrusions by newcomers who were perceived to have divergent life styles that conflict with the traditional American notion of 'family.'"); THE TEXT OF A MODEL ZONING ORDINANCE § 18 (American Society of Planning Officials, 3d ed. 1966) ("Family" means "[o]ne or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage, no such family shall contain over five persons . . .").

57. 24 AM. JUR. 3D *Proof of Facts* § 2 (1994).

58. See, e.g., *City of Ladue v. Horn*, 720 S.W.2d 745, 747 (Mo. Ct. App. 1986) ("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 U.S. Census Bureau also restrictively defines "family" as "a group of two people or more (one of whom is the householder) related by birth, marriage, or adoption and residing together." BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION SURVEY (CPS)—DEFINITIONS AND EXPLANATIONS, <http://www.census.gov/population/www/cps/cpsdef.html>.

only require the residents live together as a “single housekeeping unit”<sup>59</sup> or meet the definition of a “functional family.”<sup>60</sup> In this situation, there is no requirement of any legal or biological relationship.<sup>61</sup> Between these two extremes, one can find countless possibilities. Most definitions of “family” include those related by blood, marriage, or adoption as well as some fixed number of unrelated individuals residing as a single housekeeping unit.<sup>62</sup> The definition of “family” challenged by Loving and Shelltrack in Black Jack would fall within this intermediate category.<sup>63</sup> Having established the origins of single-family zoning and the definition of “family,” this Comment will now focus on the authority of local governments to define “family.”

## II. LOCAL GOVERNMENTS IN MISSOURI HAVE THE AUTHORITY TO DEFINE “FAMILY” IN THE ZONING CONTEXT

As discussed above, *Euclid* established that the power to zone is included in the police power of the states.<sup>64</sup> However, it is the states that have this power, not local governments. “In the United States, local governments . . . possess no inherent right of self government.”<sup>65</sup> As such, local governments have “no inherent legislative power of [their] own” and must have legislative authority delegated to them by the state.<sup>66</sup> For a local government to promulgate zoning legislation, there must have been prior delegation on the part of the state.<sup>67</sup> There are two ways a state can confer the power to legislate to local governments. First, the state may include a “home rule” provision in its constitution.<sup>68</sup> A “home rule” provision “allows [a] municipalit[y] to act

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59. See, e.g., *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 889 (N.J. 1990) (challenged statute defined “family” as “one or more persons occupying a dwelling unit as a single non-profit housekeeping unit, who are living together as a stable and permanent living unit, being a traditional family unit or the functional equivalency [sic] thereof”).

60. See, e.g., *Stegeman v. City of Ann Arbor*, 540 N.W.2d 724, 725 (Mich. Ct. App. 1995) (challenged ordinance’s definition of “family” included “a functional family living as a single housekeeping unit which has received a special exception use permit”). Factors to consider when determining if a living arrangement is a “functional family” or “single housekeeping unit” are permanency, stability, presence of shared activities and responsibilities, sharing of meals and recreational activities, and the presence of a relationship of nurture and support. *Alexander*, *supra* note 54, at 1264; see also *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758 (N.Y. 1974) (focusing on the intention of the residents to live together permanently).

61. *City of Santa Barbara v. Adamson*, 610 P.2d 436, 446 (Cal. 1980) (in bank) (Manuel, J., dissenting).

62. See, e.g., *id.* at 442 (majority opinion).

63. See *supra* note 5 and accompanying text.

64. See *supra* notes 45–46 and accompanying text.

65. MANDELKER ET AL., *PLANNING AND CONTROL*, *supra* note 16, at 211.

66. *Id.*

67. *County of Platte v. Chipman*, 512 S.W.2d 199, 202 (Mo. Ct. App. 1974).

68. MANDELKER ET AL., *PLANNING AND CONTROL*, *supra* note 16, at 211.

with respect to local matters without a delegation of authority from the state legislature.”<sup>69</sup> This is a broad grant of power to the local government and does not require the state to enumerate by statute the specific areas in which the local government can legislate.<sup>70</sup> Alternatively, a state may enable a local government to legislate in a specific area through an enabling act.<sup>71</sup> This is a limited grant of power and, therefore, the local legislators cannot act outside the specific grant of authority. With respect to zoning, this is accomplished through a zoning enabling act. The sections below will analyze and interpret this type of enabling act in Missouri. Part II.A will review the text and history of the MZEA to determine if it confers the power to define “family.” Part II.B will then review case law from Missouri and other states to see if additional guidance is available for interpreting the MZEA.

A. *Is the Power to Define “Family” Conferred by the Missouri Zoning Enabling Act?*

In Missouri, the power to promulgate zoning legislation is provided through the MZEA.<sup>72</sup> The MZEA is the sole source of zoning power vested in Missouri local governments<sup>73</sup> and local governments may not exceed the power provided.<sup>74</sup> If a local government attempts to exceed the powers specifically delegated (i.e., acts *ultra vires*), the zoning legislation will be invalid.<sup>75</sup> Therefore, prior to an analysis of whether a local government’s specific definition of “family” will withstand judicial review, it must be established that local governments are empowered to promulgate a definition of “family” in the first place.

The MZEA has been amended several times since its adoption in 1925. However, the original language mirrored that of the SSZEA.<sup>76</sup> Absent from either the original MZEA or the SSZEA is any express grant of authority to define “family” in the zoning context. In fact, the word “family” is not used in the original MZEA or the text of the SSZEA. Therefore, if the drafters of the

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69. *Id.*

70. *Id.* at 211–12.

71. *Id.* at 212.

72. MO. REV. STAT. §§ 89.010–89.140 (2000). The power of Missouri counties to regulate land use is promulgated in sections 64.001 through 64.975. MO. REV. STAT. §§ 64.001–64.975 (2000).

73. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 838 (Mo. 1963); *City of Louisiana v. Branham*, 969 S.W.2d 332, 336 (Mo. Ct. App. 1998).

74. *McCarty v. City of Kansas City*, 671 S.W.2d 790, 793 (Mo. Ct. App. 1984); *Despotis v. City of Sunset Hills*, 619 S.W.2d 814, 822 (Mo. Ct. App. 1981).

75. *City of Des Plaines v. Trottner*, 216 N.E.2d 116, 120 (Ill. 1966) (invalidating a zoning ordinance on the grounds that it exceeds the authority granted by the state legislature); *Allen v. Coffell*, 488 S.W.2d 671, 678–79 (Mo. Ct. App. 1972).

76. *See supra* note 44 and accompanying text.

original MZEA intended local governments to have the power to define “family,” it must be implicit in the other powers conferred.

In order to determine if the power to define “family” is implicit in the other powers conferred, consideration must be given both to the express powers conferred by the MZEA as well as the enumerated purposes for which those powers are given. The express powers conferred to local governments can be found in section 89.020 of the Missouri Revised Statutes.<sup>77</sup> “For the purpose of promoting health, safety, morals or the general welfare of the community,” section 89.020 empowers “all cities, towns and villages” of Missouri

to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.<sup>78</sup>

Looking at the express language of section 89.020, there are two portions that could arguably support the contention that local governments have the power to define “family.” First, local governments have the power to “regulate and restrict . . . the density of population.”<sup>79</sup> Second, local governments have the power to “regulate and restrict . . . the use of buildings [and] structures . . . for residence.”<sup>80</sup>

For the power to “regulate and restrict the density of population” to authorize local governments to define “family,” one would have to argue that grouping individuals into “families” (no matter how restrictively the term is defined) is a more effective and efficient way to regulate the density of population than simply regulating the number of individuals that can occupy a residence. In other words, it seems apparent that the most “direct” way to regulate the density of population would be to restrict the number of individuals that can reside in a fixed area (e.g. 5 individuals per residence, 50 individuals per square block, or 500 individuals per square mile).<sup>81</sup> However, if a local government can demonstrate that grouping individuals into “families” allows more people to reside in a fixed area without increasing the negative externalities associated with a higher population density, it would be apparent that the local government is adopting a more effective way to “regulate and

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77. MO. REV. STAT. § 89.020 (2000). Section 89.030 also includes powers conferred to local governments, namely the power to divide a municipality into districts with varying uses. MO. REV. STAT. § 89.030.

78. *Id.* § 89.020.

79. *Id.*

80. *Id.*

81. “Area or facility-related ordinances not only bear a much greater relation to the problem of overcrowding than do legal or biologically based classifications, they also do not impact the composition of the household. They thus constitute a more reasoned manner of protecting the public health.” *State v. Baker*, 405 A.2d 368, 373 (N.J. 1979).

restrict . . . the density of population." Therefore, a local government would have the implicit power to define "family."

The second express power that could arguably include the power to define "family" is the power to "regulate and restrict . . . the *use of buildings [and] structure . . . for . . . residence.*"<sup>82</sup> Construing this power narrowly, it appears to only grant a local government the power to limit buildings or structures to residential use, as opposed to commercial or industrial use. However, a broad construction of this power would allow the residential use to be further broken down into subcategories, such as single-family, two-family, and multi-family. If this broad construction is adopted, this portion of the statute could arguably authorize local governments to define "family."

Looking past the express powers conferred by section 89.020, further insight into the scope of these powers can be ascertained by the purposes outlined in the MZEA. Two portions of the MZEA, sections 89.020 and 89.040, discuss the purposes for which local governments should use their zoning powers. First, section 89.020 states that the powers conferred should be used for "the purpose of promoting health, safety, morals or the general welfare."<sup>83</sup> These purposes mirror the purposes for which the general police power is to be used by the states.<sup>84</sup> According to the notes of the SSZEA, this "statement of purpose . . . define[s] and limit[s] the powers created by the legislature to the municipality under the police power."<sup>85</sup>

The promotion of "health, safety, morals, and the general welfare" sheds little light on whether a local government is acting within its authority when it provides a definition for "family."<sup>86</sup> These are broad categories and, as such, most government action can easily fit within their bounds. One could argue the division of a municipality into use districts based on the number of families that can occupy a residence helps serve these broad purposes. First, health and safety are furthered by limitations on the number of people that can occupy a

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82. MO. REV. STAT. § 89.020 (emphasis added). The power to regulate the use of buildings and structures is echoed in section 89.030. *Id.* § 89.030.

83. *Id.* § 89.020.

84. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389–90 (1926).

85. STANDARD STATE ZONING ENABLING ACT, *supra* note 40, at 6 n.21.

86. BASSETT, *supra* note 47.

When Greater New York was zoned there was no segregation of residence districts according to the number of families in a dwelling. It was feared that courts would not uphold districting on that basis because of the difficulty of showing that the number of families, apart from space requirements per family, was substantially related to the health and safety of the community . . . . But the demand throughout the country for the segregation of detached, one-family houses from multi-family houses was so great, and the proof so clear that there were health and safety considerations that justified such a separation that courts generally recognized as valid the gradations of residence districts according to the number of families per unit building.

*Id.*

residence. Although these goals are served somewhat indirectly through limiting the number of families rather than the number of individuals, this would likely fall within these broad categories. For example, in defense of its ordinance, Black Jack stated that “[m]aintaining the quality of the City’s housing stock and preventing overcrowding and misuse of residences are important functions of the Housing Code.”<sup>87</sup> Black Jack also provided examples of misfortunes that might result if these purposes are not met, such as four deaths in Michigan City, Indiana due to the overcrowding of a house.<sup>88</sup> Second, the general welfare is also furthered by limiting the number of families that can occupy a residence. The use of “families” as a classification helps maintain the residential aspects of neighborhoods and promotes family values, both of which can be considered part of the “general welfare.” The promotion of family values (i.e., the preservation of the traditional family) will be discussed in detail in Part III, *infra*. Given the potential broad meaning of “promoting health, safety, morals or the general welfare,” defining “family” is most likely within the powers conferred by the MZEA.

Section 89.040 reinforces the purpose detailed in section 89.020, but also includes other more specific purposes:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.<sup>89</sup>

These more specific purposes make it even clearer that using “family” as the unit of classification helps further the goals of the MZEA. As stated above, the MZEA, including the purposes listed in section 89.040, was based on the SSZEA. As such, the notes to the SSZEA, which provide further insight into the actual text, were presumably read and considered by the Missouri legislators who promulgated the MZEA. Therefore, the notes to the SSZEA are valuable in interpreting section 89.040. The notes to the SSZEA indicate that the purposes in section 89.040 “contain . . . practically a direction from the legislative body as to the purposes in view in establishing a zoning ordinance and the manner in which the work of preparing such an ordinance shall be done.”<sup>90</sup>

Logically speaking, a group of individuals sharing living space most likely use less resources and produce less negative externalities than individuals with

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87. Press Release, City of Black Jack, *supra* note 13.

88. *Id.*

89. MO. REV. STAT. § 89.040 (2000).

90. STANDARD STATE ZONING ENABLING ACT, *supra* note 40, at 6 n.21.

separate living quarters. More often than not, individuals sharing living space also share public resources such as water and electricity. Further, automobiles or other transportation might be shared. If this is the case, the purposes in section 89.040 are clearly furthered as less public resources will be used and the streets will be less congested.

Other notes included in the SSZEA also clarify the intention of the original drafters of the MZEA. According to note 12:

It may be more desirable to limit the number of families to the acre or the number of families to a given house, etc. The expression "number of people to the acre" is therefore more limited in its meaning and describes only one way of reducing congestion of population, while the phrase "limiting density of population" is all- embracing. It is believed that, with proper restrictions, this provision will make possible the creation of one-family residence districts.<sup>91</sup>

From a reading of this note, it is clear the drafters of the SSZEA intended residential districts to be further divided based on the number of families that could occupy a residence. If the original drafters of the MZEA read and embraced the notes to the SSZEA, it appears they intended for residential districts to be divided into smaller districts based on the number of families. As such, the power to define "family" is implicit.

Based on the foregoing analysis, it is apparent that although the original version of the MZEA did not include an express power to subdivide residential districts into smaller districts based on the number of families and, therefore, define "family," local governments are arguably acting within the language of the statute when they take this approach. The 1985 and 1989 amendments to section 89.020 somewhat clarify this issue. In these amendments, the Missouri legislature added subsections (2) through (6) to section 89.020.<sup>92</sup> Although the purpose of these new subsections was wholly separate from the issues examined in this Comment,<sup>93</sup> they shed light on whether local governments have the power to define "family." For the first time in the history of the MZEA, the term "family" was used in these statutory subsections.<sup>94</sup> Although the word "family" was only used as part of the terms "single family residence" and "single family dwelling," its use bolsters an argument that the powers conferred by the MZEA include the implicit authority to define "family."

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91. *Id.* at 5 n.12.

92. 1985 Mo. Legis. Serv. 159–60 (West); 1989 Mo. Legis. Serv. 932–40 (West).

93. Subsections (2) through (6) were added to protect group homes and foster homes as well as clarify the zoning powers of local governments situated on a lake. *See* MO. REV. STAT. § 89.020(2)–(6).

94. The word "family" is used in subsections (2), (5), and (6) as a part of the terms "single family residence" or "single family dwelling." *Id.* It is also used in subsection (6) to refer to the division of family services, *id.*, however, this use does not further the argument presented in this Comment.

Stated plainly, if the determination is made that local governments have the power to use “family” as a unit of classification, which based on the amendments they clearly do, the power to define “family” is implicit. This concept was supported by the United States Supreme Court in *City of Edmunds v. Oxford House, Inc.* when the Court said, “[t]o limit land use to single-family residences, a municipality must define the term ‘family’; thus family composition rules are an essential component of single-family residential use restrictions.”<sup>95</sup>

In conclusion, the text of the MZEA appears to allow a local government to define “family.” The next section will review case law from Missouri and other states to see if additional guidance is available for interpreting the MZEA.

#### B. Case Law From Missouri and Other States

A review of Missouri case law reveals a complete lack of analysis by Missouri courts regarding whether local governments have the power to define “family.” However, Missouri courts have discussed the powers conferred in section 89.020:

[A] [c]ity’s legislative body has the duty and right to determine for itself what plan, classification and regulations are necessary to promote the health, safety, general welfare, morality or other named purpose of the enabling statute; to determine the use classification to be given to any particular area, and to provide for suitable and lawful changes in such classifications and regulations thereafter.<sup>96</sup>

Therefore, substantial latitude and deference is given to local legislatures with respect to the promulgation of land use legislation. Other state courts have echoed this thought: “The statutory authority of the city to provide for a single-family use district as a ‘specified . . . residential’ use classification seems clear enough . . . .”<sup>97</sup>

Although the power to define “family” is not addressed by Missouri courts, the Michigan Supreme Court analyzed a local government’s authority to define “family” in *Charter Township of Delta v. Dinolfo*.<sup>98</sup> In *Dinolfo*, the court determined that the local government was not acting outside its authority in defining “family.”<sup>99</sup> Although the Michigan enabling statute did not expressly confer the power to define “family,” the court found this power to be

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95. 514 U.S. 725, 733 (1995).

96. *Deacon v. City of Ladue*, 294 S.W.2d 616, 624 (Mo. Ct. App. 1956).

97. *City of Des Plaines v. Trottner*, 216 N.E.2d 116, 118 (Ill. 1966).

98. 351 N.W.2d 831, 833 (Mich. 1984). Michigan appears to be the only state that has approached this issue directly. See 24 AM. JUR. 3D *Proof of Facts* § 9 (1994).

99. *Dinolfo*, 351 N.W.2d at 835–36.



implicit.<sup>100</sup> In doing so, the court reasoned that because the enabling statute used the term "families," the legislature implicitly authorized the local legislatures to define what constitutes a "family."<sup>101</sup> In contrast, the original MZEA did not use the word "family."<sup>102</sup> Therefore, it is not totally clear if the original drafters of the MZEA intended for local governments to define "family." However, following the reasoning of the Michigan Supreme Court, the inclusion of the word "family" in the 1985 and 1989 amendments to section 89.020 grants local legislatures the power to define "family."<sup>103</sup> This argument is further bolstered by the use of the word "family" in the notes of the SSZEA, which were presumably considered by the promulgators of the original MZEA.<sup>104</sup>

From a practical standpoint, it is highly unlikely a challenge to a local government's power to define "family" would be successful today. The concept of "family" as a basis for classification in residential districts is now deeply rooted in the history and tradition of zoning. Further, many local zoning ordinances in Missouri define the term "family," and therefore, a successful challenge to the power to define "family" would invalidate numerous local ordinances. Moreover, despite substantial litigation over acceptable definitions of "family," no Missouri court has questioned the power of local governments to define "family." It would be unlikely for a court to now question this power.

In light of the above analysis, it is clear that local governments in Missouri have the power to provide a definition of "family" based on the text and history of the MZEA as well as case law from Missouri and other states. This Comment will next analyze the limitations on this power.

### III. GIVEN LOCAL GOVERNMENTS IN MISSOURI HAVE THE POWER TO DEFINE "FAMILY," WHAT ARE THE LIMITATIONS ON THIS POWER?

Having established that local governments in Missouri do have the power to define "family," it is now necessary to identify what definitions of "family" are permissible. The first step in this analysis, addressed in Part III.A below, is to determine the appropriate standard of judicial review of a definition of "family" in local zoning legislation. The next step is to determine if a definition of "family" that distinguishes between related and unrelated individuals (such as the definition in Black Jack) will survive judicial review under the appropriate standard. In order to do this, Part III.B will review justifications for restrictive definitions based both on the practical concerns of

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100. *Id.* at 836.

101. *Id.* at 835–37.

102. *See supra* Part II.A.

103. *See Dinolfo*, 351 N.W.2d at 835–36.

104. *See supra* Part II.A.

local governments as well as justifications based on the preservation of the traditional family. Part III.C will then examine social data and commentary supporting the preservation of the traditional family to demonstrate that additional evidence is available to local governments. Lastly, Part III.D will present the author's analysis of the appropriate remedy for those adversely impacted by restrictive definitions.

A. *What Is the Appropriate Standard of Judicial Review for Local Zoning Legislation?*

In determining the appropriate standard of judicial review for local zoning legislation, the threshold determination is whether the local government action is legislative or administrative (i.e., quasi-judicial). Missouri case law clearly indicates that “[z]oning, rezoning, and refusals to rezone are legislative acts.”<sup>105</sup> In contrast, decisions by a local government that apply to a single individual with a particular set of facts (such as the approval or denial of an occupancy permit) are generally considered to be administrative acts.<sup>106</sup> Therefore, would a local government's definition of “family” as applied to individuals such as Loving and Shelltrack be considered legislative or administrative? Because the definition of “family” applies evenly to all single-family use districts, and the promulgation of a definition of “family” was not intended to be a decision with respect to any individual case with a particular set of facts, it would likely be considered a legislative act in Missouri courts.<sup>107</sup>

Legislative acts are an exercise of the state's police power, and therefore, the scope of judicial review of zoning legislation is limited.<sup>108</sup> Moreover, those challenging a zoning ordinance must overcome a presumption of validity.<sup>109</sup> Given this limited scope and presumption of validity, there is

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105. *Erigan Co. v. Grantwood Vill.*, 632 S.W.2d 495, 496 (Mo. Ct. App. 1982) (citing *Vatterott v. City of Florissant*, 462 S.W.2d 711, 713 (Mo. 1971)).

106. *McDonald v. City of Brentwood*, 66 S.W.3d 46, 49 (Mo. Ct. App. 2001) (“Missouri case law holds that an issuance of an occupancy permit is an administrative act.”).

107. This does not mean, however, that Loving and Shelltrack could not challenge the denial of their occupancy permit application as a separate avenue of judicial relief. If they were to make this challenge, the court would likely apply a less deferential standard of review. Although the standard of review of administrative decisions is typically less deferential than that for legislative decisions, the standards are remarkably similar in the zoning context. See *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644, 646 (Mo. Ct. App. 1975) (“[L]imitations upon the scope of judicial review of matters related to zoning stem from the fact that the exercise of the right to control the use of property is basically and historically a legislative exercise of police power by the sovereign.”). Therefore, even when zoning action is administrative, much of the deference accorded to legislative action carries over. For this reason, this Comment will only focus on judicial review of legislative decisions.

108. *City of Ladue v. Horn*, 720 S.W.2d 745, 747 (Mo. Ct. App. 1986) (“[T]he reviewing court may not substitute its judgment for that of the zoning authority.”).

109. *Despotis v. City of Sunset Hills*, 619 S.W.2d 814, 820 (Mo. Ct. App. 1981).

broad discretion vested in the legislature, and courts can only interfere if the legislature has acted arbitrarily and unreasonably.<sup>110</sup> In determining if the action of the legislature is arbitrary and unreasonable, the court will assess whether the action is "fairly debatable."<sup>111</sup> An action is "fairly debatable" if reasonable minds can differ as to its validity.<sup>112</sup> If a local government is able to meet this deferential standard, or conversely, if a challenger is unable to overcome this standard, the legislative action will be upheld.

While not binding precedent in Missouri, the rationale behind the deference exhibited in the zoning context was best set forth by Justice Smith, writing for the Michigan Supreme Court:

[T]his Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises.<sup>113</sup>

Therefore, the hurdle for local governments to overcome with respect to their zoning legislation is low. If the local government can put forth an argument that its legislation furthers the purposes detailed in the MZEA, discussed at length in Part II, courts will be unlikely to interfere.

In order to determine if local zoning legislation is "arbitrary and unreasonable," the analysis must again focus on the purposes outlined in the MZEA. If a specific definition of "family" furthers the broad purposes of the police power, namely "health, safety, morals or general welfare," it is not arbitrary and unreasonable.<sup>114</sup> With respect to the "general welfare," some guidance has been provided by Missouri courts:

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110. *Wrigley Prop., Inc. v. City of Ladue*, 369 S.W.2d 397, 400 (Mo. 1963); *Erigan Co.*, 632 S.W.2d at 496; *Deacon v. City of Ladue*, 294 S.W.2d 616, 624 (Mo. Ct. App. 1956).

111. *Despotis*, 619 S.W.2d at 820.

112. MANDELKER, LAND USE LAW, *supra* note 38, § 1.12.

113. *Robinson v. City of Bloomfield Hills*, 86 N.W.2d 166, 169 (Mich. 1957); *see also* *Zavala v. City and County of Denver*, 759 P.2d 664, 669 (Colo. 1988) ("Implicit in this constitutional delegation of authority is the recognition that the City possesses broad legislative discretion to determine how best to achieve declared municipal objectives.").

114. MO. REV. STAT. § 89.020 (2000).

Zoning is lawful only when it bears a substantial relation to the public welfare. If the public welfare is not served by the zoning or if the public interest served by the zoning is greatly outweighed by the detriment to private interests, the zoning is considered to be arbitrary and unreasonable . . . .<sup>115</sup>

Thus, there is some indication that “the determination whether a zoning ordinance is arbitrary and unreasonable requires the weighing of the detriment to private interests against the benefit to the general public.”<sup>116</sup> The next section will analyze whether restrictive definitions of “family” in local zoning ordinances are arbitrary and unreasonable under the standard established above.

*B. A Definition of “Family” That Distinguishes Between Related and Unrelated Individuals Is Not Arbitrary and Unreasonable*

In order to establish whether a definition of “family” that distinguishes between related individuals and unrelated individuals is arbitrary and unreasonable, it is necessary to examine the different justifications put forth by various local governments in support of their legislation. These justifications can be grouped into two categories. First, there are the practical justifications. These justifications are premised on the idea that distinguishing between related and unrelated individuals helps manage practical government concerns such as density of population, traffic congestion, health, safety, etc. Second, there are the justifications premised in moral virtues such as the sanctity of the family and the promotion of traditional family values. Although these two categories are often intertwined, Part III.B.1 will analyze the practical justifications, while Part III.B.2 will analyze the justifications based on the preservation of the traditional family.

*1. Practical Justifications for Distinguishing Between Related and Unrelated Individuals Are Arguably Arbitrary and Unreasonable*

The concept that groups of cohabitating individuals are a lesser burden on society than the same number of individuals living separately was discussed at length in Part II.A. To briefly reiterate, it is logical that groups of cohabitating individuals produce less negative externalities (in the form of traffic, use of public services and resources, etc.) than the same number of individuals living separately. By sharing resources, less are used overall. However, when dealing with restrictive definitions of “family,” this premise must be stretched to say that a group of *related* cohabitating individuals produce less negative externalities than a group of *unrelated* cohabitating individuals.

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115. *Loomstein v. St. Louis County*, 609 S.W.2d 443, 447 (Mo. Ct. App. 1980).

116. *Id.*

A local government would most likely be successful in making this argument with respect to certain types of living arrangements of unrelated cohabitating individuals, such as fraternity houses or boarding houses.<sup>117</sup> In the words of Justice Gerrard of the Nebraska Supreme Court, these types of groups share a residence

not to function as a family, but for convenience and economics over a limited period of time. A houseful of unrelated adults, unlike a typical family, lead lives separate from one another. This means separate automobiles, separate jobs, separate comings and goings, and separate friends, all with their separate automobiles. Limiting this sort of household in what the city intends to be a residential neighborhood bears a real and substantial connection to the city's objectives of quiet neighborhoods, few motor vehicles, and low transiency.<sup>118</sup>

The practical justifications for distinguishing between related and unrelated individuals were also found persuasive in *City of Brookings v. Winker*.<sup>119</sup> In *Winker*, the court upheld the definition of "family" based on the local government's justification that the definition promulgated helped control population density.<sup>120</sup> The court reasoned that because "Brookings is a college town and has unavoidable problems with population density. . . . It is neither arbitrary nor capricious to draw this line at the number of unrelated persons who may reside in the same household to maintain control over population density problems."<sup>121</sup>

To be sure, a local government seeking to avoid fraternity and boarding houses would be able to make a "fairly debatable" argument that the ordinance is not arbitrary and unreasonable. However, the rationality of this argument expressed by Justice Gerrard and reiterated in *Winker* becomes less viable when it is applied to living arrangements that more closely resemble a traditional family. For example, it is doubtful if Loving and Shelltrack, discussed in the Introduction, do any more to threaten the "objectives of quiet neighborhoods, few motor vehicles and low transiency" than they would if they were married. Can it possibly be argued that because they are not married

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117. See, e.g., *Town of Durham v. White Enters.*, 348 A.2d 706, 708 (N.H. 1975) (acknowledging the prevention of the "overcrowding of land" and "insuring against undue concentration of population" as legitimate purposes of zoning regulations); *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 889 (N.J. 1990) (stated purpose of restrictive definition of "family" in zoning ordinance was to "prevent groups of unrelated college students from living together in the Borough's residential districts," "preservation of 'family style living,'" and the "preservation of the character of residential neighborhoods").

118. *State v. Champoux*, 566 N.W.2d 763, 770 (Neb. 1997) (Gerrard, J., concurring).

119. 554 N.W.2d 827 (S.D. 1996).

120. *Id.* at 829.

121. *Id.* at 831.

they make more noise and have more cars? An argument along these lines does not even appear to meet a “fairly debatable” standard.<sup>122</sup>

The goal of local governments to have “low transiency,” cited by Justice Gerrard above, carries more weight in both the example of fraternity and boarding houses as well as groups that more closely resemble a traditional family. Low transiency is cited often by courts, but is often couched in terms such as “permanence”<sup>123</sup> or “stability.”<sup>124</sup> One could possibly argue that without the legal obligation of marriage, there is a lower exit cost if Loving or Shelltrack want to leave the “family.” Stated differently, if Loving or Shelltrack do not need to worry about the consequences of a divorce, would it make the decision to leave the “family” that much easier and, therefore, adversely impact the goal of “low transiency”?<sup>125</sup> It makes sense that as barriers to exit are removed, exit becomes easier and more probable. This logic is supported by legal commentary, which indicates that the lack of a legal or biological relationship does reduce the exit costs for individuals leaving a living arrangement and, as such, does make it easier for one to leave.<sup>126</sup>

However, if we apply this argument to Loving and Shelltrack, it is less persuasive. Loving and Shelltrack have been together for thirteen years and have two children of their own. Therefore, the exit costs if one of them were to leave do not appear to be significantly different than if they were married. The “low transiency” argument put forth by cities also does not fully account for the high divorce rate in the United States,<sup>127</sup> which suggests that traditional

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122. See J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 774–75 (1982) (reviewing courts’ reliance on practical concerns such as traffic, noise, protection of property values, and aesthetics when justifying restrictive definitions of “family”).

123. See, e.g., *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 889 (N.J. 1990); *State v. Baker*, 405 A.2d 368, 371, 375 (N.J. 1979); *McMinn v. Town of Oyster Bay*, 482 N.Y.S.2d 773, 778, 787 (N.Y. App. Div. 1984).

124. See, e.g., *City of Santa Barbara v. Adamson*, 610 P.2d 436, 441 (Cal. 1980) (in bank) (“The [restrictive definition] might reflect an assumption that an unrelated group will be . . . less stable . . .”).

125. This argument can also be extended to non-traditional families where one of the adults is not the biological parent of one of the children. The lack of a biological relationship might make it easier for an adult to exit a living arrangement.

126. David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L.Q. 15, 19 (1996) (“There does exist a probabilistic difference between *family*, as that term is ordinarily understood, and *non-family*, and it has to do with the relative probabilities of exit, emotional as well as physical, from the household.”); see also *Adamson*, 610 P.2d at 447 (Manuel, J., dissenting). Alternative living arrangements are labeled as “voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation.” *Id.* Additionally, “they are in no way subject to the State’s vast body of domestic relations law.” *Id.*

127. Although sources vary, the national divorce rate is between 40% and 50%. Maureen Fan, *Stigma of Divorce Lessens in China*, ST. LOUIS POST-DISPATCH, Apr. 9, 2007, at A8 (placing U.S. divorce rate at 50%); Art Golab, *Divorce Rate an Exact Science—Almost*, CHICAGO SUN-TIMES, Apr. 16, 2006, at A19 (divorce rate between 40% and 50%); Ctr. for Marriage and

families often fall apart as well. Further, divorce laws have been evolving for quite some time to make it easier to obtain a divorce (e.g., no-fault divorce).<sup>128</sup> As these laws evolve, the exits costs for traditional families fall more in line with those for non-traditional families.

Therefore, practical justifications for a definition of "family" that distinguishes between related and unrelated individuals appear tenuous at best. Although restrictive definitions of "family" could arguably reduce transiency, other practical justifications, such as traffic and use of public resources, are persuasive only when applied to limited non-traditional living arrangements, such as fraternity and boarding houses. Is this sufficient to meet the "fairly debatable" test in determining if the definition is arbitrary and unreasonable in light of the fact that restrictive definitions will likely be, as established above, over-inclusive?

Although it is to be expected that any zoning legislation will be somewhat arbitrary (i.e., it will be over- and/or under-inclusive),<sup>129</sup> the level of arbitrariness is contingent on how far the zoning legislation strays from its stated purpose. Stated differently, at some point the means used are so remote when compared with the legitimate ends, that it is no longer "fairly debatable" and, therefore, arbitrary and unreasonable. This idea has been expressed by multiple courts, finding that a distinction between related and unrelated individuals is simply too attenuated from the stated practical justifications to not be considered arbitrary and unreasonable.<sup>130</sup> In the words of the California

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Families, Inst. for Am. Values, *Fact Sheet No. 1: What is America's Most Serious Social Problem?*, Feb. 2006, at 1, available at <http://www.americanvalues.org/pdfs/factsheet1.pdf> (divorce rate of 45%).

128. Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325, 325 (1998); Nancy Moore Clatworthy, *The Non-Traditional Family and the Child*, 12 CAP. U. L. REV. 345, 347 (1983).

129. As the Supreme Court noted in *Village of Belle Terre v. Boraas*:

When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

416 U.S. 1, 8 n.5 (1974) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)). "The essence of zoning is selection and if it is not invidious or discriminatory against those not selected it is proper." *Town of Durham v. White Enters.*, 348 A.2d 706, 709 (N.H. 1975); see also MANDELKER ET AL., *PLANNING AND CONTROL*, *supra* note 16, at 251.

130. See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 281 A.2d 513, 518 (N.J. 1971) (holding the challenged ordinance would "preclude so many harmless dwelling uses . . . that they must be held to be so sweepingly excessive, and therefore legally unreasonable, that they must

Supreme Court, “density control is achieved quite indirectly, if at all, by regulating only the size of unrelated households.”<sup>131</sup> The Illinois Supreme Court used similar logic in striking down a restrictive definition of “family”:

... [A] group of persons bound together only by their common desire to operate a single housekeeping unit, might be thought to have a transient quality that would affect adversely the stability of the neighborhood . . . . And it might be considered that a group of unrelated persons would be more likely to generate traffic and parking problems than would an equal number of related persons.

But none of these observations reflects a universal truth.<sup>132</sup>

Further, there are other options available for cities to achieve the same goals without being as over- and/or under-inclusive. For example, local governments can employ all or some combination of the following actions in order to meet their practical goals: (1) vigorous use of police power and application of criminal statutes; (2) single-family zoning ordinances which specifically exclude boarding houses, fraternity houses, etc.; (3) definitions of “family” which include bona fide single housekeeping units or functional families; and (4) regulations regarding the maximum number of individuals per square foot or per available sleeping and bathroom facilities.<sup>133</sup>

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fall in their entirety”); *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758 (N.Y. 1974) (“Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings.”). In *Charter Twp. of Delta v. Dinolfo*, the Michigan Supreme Court stated:

Unrelated persons are artificially limited to as few as two, while related families may expand without limit. Under the instant ordinance, twenty male cousins could live together, motorcycles, noise, and all, while three unrelated clerics could not. A greater example of over- and under-inclusiveness we cannot imagine. The ordinance indiscriminately regulates where no regulation is needed and fails to regulate where regulation is most needed.

351 N.W.2d 831, 841–42 (Mich. 1984). The court, noting that the defendants in *Dinolfo* were members of a religious community, further noted that “[t]he plight of the defendants in this case—who certainly defy the plaintiff’s stereotype of the unrelated family—represents the best evidence of the perniciousness of allowing unexamined assumptions to become the basis of regulatory classification.” *Id.* at 843.

131. *Adamson*, 610 P.2d at 441 (majority opinion).

132. *City of Des Plaines v. Trottner*, 216 N.E.2d 116, 119 (Ill. 1966).

133. *State v. Baker*, 405 A.2d 368, 373 (N.J. 1979) (citing area- or facility-related ordinances, limitation on the number of cars, and use of the general police power as more appropriate ways to deal with overcrowding, traffic, and obnoxious personal behavior, respectively). This argument was persuasive in *Santa Barbara v. Adamson* where the court, after establishing how each of the city’s stated goals could be met by less restrictive means such as use restrictions, police enforcement, and floor space or facility requirements, stated “zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users.” 610 P.2d at 441–42 (emphasis omitted).



However, if a restrictive definition of "family" is going to be struck down on the basis that the practical justifications are too attenuated from the means utilized, there would need to be some consideration of the administrative impact on local governments. In other words, local governments can argue that by including a restrictive definition of "family" in their zoning ordinances, they are not trying to pass judgment on the composition of households, but rather are simply trying to provide a definition that is administratively feasible. Individuals related by blood, marriage, or adoption have government documentation (in the form of marriage certificates, birth certificates, and adoption certificates) and can easily prove these relationships. The same cannot be said (at least consistently) for non-traditional families. Therefore, if a local government prescribes to the theory that groups of inter-connected individuals (to the exclusion of individuals residing in a fraternity or boarding house) pose less of a burden on society than groups that are not so connected, limiting their definition of "family" to related individuals is administratively manageable. If they expand their definition past the traditional family and into the "functional family" or "bona fide single housekeeping unit," local governments will find themselves having to make subjective case-by-case determinations every time there might be an issue regarding compliance with the statute. It would undoubtedly be more time efficient and cost effective to limit their definitions to related individuals and some limited number of unrelated individuals. This argument is bolstered by courts that have recognized that the traditional family will usually not exceed the numerical limits placed on unrelated individuals.<sup>134</sup> However, it is questionable if administrative efficiency would save a restrictive definition from being arbitrary and unreasonable.

This subsection has established that the practical justifications for a local government's restrictive definition of "family" are arguably arbitrary and unreasonable. This conclusion is based on the lack of connection between the ends, which are clearly legitimate, and the means employed, which tend to be over-inclusive. The next subsection will analyze justifications based on the preservation of the traditional family.

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134. See Richards, *supra* note 122, at 774 ("[I]t is argued that traditional-family ordinances will prevent overcrowding because traditional families tend to be self-limiting and unrelated groups do not."). But see Adamson, 610 P.2d at 441 (city's presentation of data on the average size of traditional families coupled with the argument that "related groups tend to have a natural limit, making a legal limit unnecessary" was found unpersuasive).

2. Justifications for Distinguishing Between Related and Unrelated Individuals Based on the Preservation of the Traditional Family Are Not Arbitrary and Unreasonable

Having established that the practical justifications offered by local governments for distinguishing between related and unrelated individuals in zoning definitions of “family” are arguably arbitrary and unreasonable, justifications based on the preservation of the traditional family must now be examined. As will be discussed below, restrictive definitions of “family” are often justified on concepts such as “sanctity of the family” and “preserving traditional family values.” Concern over the deterioration of the “traditional family” is not a new phenomenon. As early as the 1960s, there was “considerable debate over what government could do to ‘shore up’ the ‘fragile’ family.”<sup>135</sup> Even in the last couple years, there has been considerable debate over preserving the traditional family through preserving the traditional notion of marriage.<sup>136</sup> A review of opinions from the United States Supreme Court, Missouri courts, and other state courts in Parts III.B.2.a, b, and c respectively, will shed light on these justifications.

a. United States Supreme Court Decisions

The United States Supreme Court first considered a local government’s ability to distinguish between related and unrelated individuals in the zoning context in *Village of Belle Terre v. Boraas*.<sup>137</sup> In *Boraas*, the Court upheld a definition of “family” which was restricted to persons related by blood, adoption, or marriage or to two unmarried and unrelated individuals.<sup>138</sup> Justice Douglas, writing for the majority, found a “quiet place where yards are wide, people few, and motor vehicles restricted” as “legitimate guidelines in a land use project addressed to family needs.”<sup>139</sup> He went on to say: “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.”<sup>140</sup>

In *Boraas*, there is some discussion of the practical justifications discussed above (noise, limited density, and automobiles); however, there is also

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135. RICHARD J. GELLES, CONTEMPORARY FAMILIES: A SOCIOLOGICAL VIEW 24 (1995).

136. See, e.g., Bronwen McShea, IMAPP POLICY BRIEF: THE SENATE MARRIAGE DEBATE: A SUMMARY (2004) (providing excerpts of speeches from senators both for and against the Federal Marriage Amendment), available at <http://www.marriedebate.com/pdf/SenateDebatePB.pdf>.

137. 416 U.S. 1 (1974).

138. *Id.* at 2, 10. The definition at issue in *Boraas* is even more restrictive than that in *Black Jack*. Compare *id.* at 2 (Village of Belle Terre ordinance), with *Petition*, *supra* note 1, at 3.

139. *Boraas*, 416 U.S. at 9.

140. *Id.*

consideration of "family needs," "family values," and "youth values."<sup>141</sup> The Supreme Court's protection of the traditional family was confirmed three years later in *Moore v. City of East Cleveland*.<sup>142</sup> In *Moore*, the Court struck down a zoning ordinance that limited the definition of "family" to relatives within a certain degree of kinship.<sup>143</sup> The Court, in striking down the statute, rejected the local government's practical justifications, namely "preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burden on the city's school system," as being too attenuated from the means employed.<sup>144</sup> Rather, the Court stated that the "sanctity of the family" (here, the extended family) is protected "because the institution of the family is deeply rooted in this Nation's history and tradition."<sup>145</sup> The Court went on to state that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."<sup>146</sup> Like *Boraas*, protection of the traditional family is evident.

b. Missouri Decisions

The desire of Missouri courts to protect the traditional family was made overwhelmingly clear in *City of Ladue v. Horn*.<sup>147</sup> In *Horn*, an unmarried couple had purchased a seven-bedroom home in the City of Ladue, Missouri, a suburb of St. Louis.<sup>148</sup> The couple resided in the home with their three children,<sup>149</sup> however, the city demanded they vacate because "their household did not comprise a family, as defined by Ladue's zoning ordinance."<sup>150</sup> Ladue's zoning ordinance defined "family" as "[o]ne or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individual housekeeping unit."<sup>151</sup> In upholding the definition, the court stated:

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

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141. *Id.*

142. 431 U.S. 494 (1977).

143. *Id.* at 499–500.

144. *Id.*

145. *Id.* at 503.

146. *Id.* at 503–04.

147. 720 S.W.2d 745 (Mo. Ct. App. 1986).

148. *Id.* at 747.

149. None of the children were the biological offspring of both parents. *Id.* Two of the children were in college and only lived in the home part-time. *Id.*

150. *Id.*

151. *Id.*

state policy which commands that groups of people may live under the same roof in any section of a municipality they choose.<sup>152</sup>

Missouri courts have indicated some willingness to adopt a more functional definition of “family,” but only in cases involving handicapped individuals. In *Blevins v. Barry-Lawrence County Association for Retarded People*, the Missouri Supreme Court adopted a functional definition of “family” to allow eight mentally handicapped individuals and two functional “parents” to be considered a “family,” none of whom were related.<sup>153</sup> The court in *Blevins* relied heavily on a decision from the Oklahoma Supreme Court where the court was “loathe to restrict a family unit to that composed of persons who are related, one to another, by consanguinity or affinity.”<sup>154</sup> However, in the case of handicapped individuals, there is a well-recognized competing policy interest, namely the protection of such individuals. The same policy interest is not present in the non-traditional family.

c. Decisions from Other States

There are many decisions from other states evaluating the validity of restrictive definitions of “family.” Although these decisions are not controlling authority in Missouri, they are illustrative of the justifications based on the preservation of the traditional family. Further, due to the limited Missouri case law available, decisions in other states may prove persuasive in Missouri courts. Given the substantial case law among the states on this issue, the review of state decisions below is meant only to highlight some of the justifications based on the preservation of the traditional family. Some states, like Missouri, have upheld restrictive definitions of “family” when applied to non-traditional families while other states have invalidated definitions on various grounds.

New Hampshire and Nebraska are among the states that have upheld restrictive definitions of “family.” Further, these states are illustrative of the type of justifications based on the preservation of the traditional family that are utilized when upholding these definitions. For example, in upholding a restrictive definition of “family,” the New Hampshire Supreme Court said: “There is no doubt that the State has an interest in marriage and the welfare of family members.”<sup>155</sup> The court continued:

If an unrelated household group exceeds the designated density requirement it is by voluntary action of the group. The blood related family by its natural growth may become in excess of the density limit. The State has no particular interest in keeping together a certain group of unrelated persons. The State has

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152. *Horn*, 720 S.W.2d at 752.

153. 707 S.W.2d 407, 410–11 (Mo. 1986).

154. *Id.* at 410 (quoting *Jackson v. Williams*, 714 P.2d 1017, 1023 (Okla. 1985)).

155. *Town of Durham v. White Enters.*, 348 A.2d 706, 709 (N.H. 1975).

a clear interest, however, in preserving the integrity of the biological or legal family. The promotion of this legitimate government purpose justifies the exclusion of a blood related family from the density requirements of the ordinance which applies to an unrelated household. Hence the classification is not invidious or arbitrary and is constitutional. It is to be noted that many blood related families by their natural composition will meet the density requirements placed on unrelated groups.<sup>156</sup>

The Nebraska Supreme Court expressed similar rationale for their decision to uphold a restrictive definition of "family" in *State v. Champoux*.<sup>157</sup> In *Champoux*, the local government argued its restrictive definition of "family" preserved the "sanctity of the family."<sup>158</sup> The court agreed, however, with little discussion of its rationale, simply stating "the city . . . enacted a zoning ordinance clearly within the ambit of its police power and defined 'family' in a way that is rationally related to its legitimate objective of preserving the sanctity of the family . . . ."<sup>159</sup> The concurrence by Justice Gerrard provides more insight into the "sanctity of the family" being a legitimate government interest. In response to an argument that "the lack of a biological or a marital relationship between residents of a dwelling does not necessarily lead to the creation of problems in a residential neighborhood or a predisposition to transiency," Justice Gerrard replied by saying "the fact that some families and certain individuals differ with respect to their habits and conduct in relation to the community does not render invalid the overall legislative judgment on how this type of occupancy will affect family life in residential neighborhoods as a whole."<sup>160</sup>

Even states that have been at the forefront of invalidating restrictive definitions of "family," such as California, New Jersey, and Michigan, have recognized that preservation of the traditional family is a legitimate state concern. For example, in response to the local government's argument that its restrictive definition of "family" was intended to "preserve the 'family' character of [certain] neighborhoods," the New Jersey Supreme Court conceded in *State v. Baker* that "governments are free to designate certain areas as exclusively residential and may act to preserve a family style of living."<sup>161</sup> However, the court went on to hold that the means utilized to meet this legitimate goal were too attenuated.<sup>162</sup> In his dissent, Justice Mountain

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156. *Id.* (citations omitted).

157. 566 N.W.2d 763 (Neb. 1997).

158. *Id.* at 767.

159. *Id.* at 768; *see also* Charter Twp. of Delta v. Dinolfo, 351 N.W.2d 831, 843 (Mich. 1984) ("That government can classify, draw lines around, and support the biological family is well settled, as evidenced by our tax and inheritance laws.").

160. *Champoux*, 566 N.W.2d at 770 (Gerrard, J., concurring).

161. 405 A.2d 368, 371 (N.J. 1979).

162. The court stated:

also acknowledged the traditional family calling it “one of the greatest and finest of our institutions,” continuing that “[t]he family should be entitled—as until now it has been—to stand on its own in a distinctively *preferred* position.”<sup>163</sup> Similarly, in Michigan the state supreme court recognized the importance of the family, however, it also recognized functional families.

[T]he family, while undergoing dramatic changes in the last half-century, remains a fundamental building block of society. This is true whether we speak of the traditional family or the modern concept of a functional family . . . . To say that a family is so equivalent to a ragtag collection of college roommates as to require identical treatment in zoning decisions defies the reality of the place of the family in American society, despite any changes that institution has undergone in recent years. Only the most cynical among us would say that the American family has devolved to the point of no greater importance or consideration in governmental decision making than a group of college roommates.<sup>164</sup>

Lastly, in a dissenting opinion to *Santa Barbara v. Adamson*, Justice Manuel of the California Supreme Court observed:

[T]here is a long recognized value in the traditional family relationship which does not attach to the “voluntary family”. The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being “voluntary”, is often compulsory. Finally, it has been a means, for uncounted millennia, of satisfying the deepest emotional and physical needs of human beings.<sup>165</sup>

The above survey of opinions from the United States Supreme Court, Missouri courts, and other state courts serves to highlight the importance of the “family” in American jurisprudence. Even when invalidating a statute, courts often concede that the preservation of the traditional family is a legitimate interest of state and local governments. Therefore, even if the practical justifications discussed in Part III.B.1 above are found arbitrary and

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[Z]oning [may not] be used as a tool to regulate the internal composition of housekeeping units . . . . A municipality must draw a careful balance between preserving family life and prohibiting social diversity.

The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal.

*Id.*

163. *Id.* at 380 (Mountain, J., dissenting) (emphasis in original).

164. *Stegeman v. City of Ann Arbor*, 540 N.W.2d 724, 727 (Mich. Ct. App. 1995).

165. 610 P.2d 436, 446 (Cal. 1980) (Manuel, J., dissenting) (quoting *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 911 (N.D. Cal. 1970)).

unreasonable, local governments can bolster their argument with justifications based on the preservation of the traditional family. However, case law justifying restrictive definitions based on the preservation of the traditional family rarely goes beyond a discussion of the history and tradition of the "family" in America. The next section will examine available social data and commentary, which suggests that the local governments can offer additional justifications for a restrictive definition of "family."

*C. Should the Preservation of the Traditional Family Be a Valid Justification for Restrictive Definitions of "Family"?*

Although the language varies with respect to the preservation of the traditional family, the message is the same. Protection of the traditional family is a valid concern of local governments.<sup>166</sup> Not only does this contention garner wide support from the history and tradition of the family in American society, but local governments can also point to substantial social data and commentary indicating the preservation of the traditional family confers other benefits on society.

1. Social Data and Commentary Which Indicate the Traditional Family Is Worth Preserving

As stated above, courts do not generally discuss social science data and commentary that could potentially bolster a local government's argument that a restrictive definition of "family" is in the best interests of the community. However, social data and commentary exist that indicate the preservation of the traditional family would reduce violence, crime, and drug use, or, alternatively, would positively impact the lives of children through increased emotional stability and better academic performance. Reference to this social data and commentary would greatly enhance a local government's argument that it is justified in protecting traditional families through zoning legislation.

There has long been concern that the traditional family is deteriorating.<sup>167</sup> Further, concern regarding the deterioration of the traditional family and the attendant adverse impact on society is recognized worldwide.<sup>168</sup> Social scientists and other observers have produced a wide array of social data and

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166. See *supra* Part III.B.2.

167. See *supra* notes 135–36 and accompanying text.

168. REBECCA O'NEILL, CIVITAS, EXPERIMENTS IN LIVING: THE FATHERLESS FAMILY 7–9 (2002) (identifying emotional and mental problems, trouble in school, trouble getting along with others, health problems, increased drug use, and increased crime and violence as consequences from children being raised without a father in the United Kingdom); Jessica Hardung, *The Proposed Revisions to Japan's Juvenile Law: If Punishment is Their Answer, They Are Asking the Wrong Question*, 9 PAC. RIM L. & POL'Y J. 139, 150 (2000) (citing the breakdown of the traditional family as a cause of the increase in juvenile crime rates in Japan).

other commentary supporting the premise that the preservation of the traditional family helps contribute to a stable society.<sup>169</sup> A sampling of this data and commentary, discussed below, establishes a connection between the deterioration of the traditional family and an increase in crime, violence, drug use, emotional instability of youth, uninsured individuals, and bankruptcy.

Many experts argue that the decline of the traditional family is a major cause of high crime rates.<sup>170</sup> Statistics such as the percentage of the population divorced<sup>171</sup> and percentage of unattached individuals have a strong correlation to crime rates.<sup>172</sup> Further, the breakdown of the traditional family has been identified as one of the root causes of violence among children.<sup>173</sup> Indicative of this social data is *The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family and Community* produced by the Heritage Foundation.<sup>174</sup> This report establishes the connection between crime (specifically violent crime and juvenile crime) and the breakdown of the traditional family, particularly abandonment by fathers.<sup>175</sup> Another commentator, Bridget Maher, also argues that the breakdown of the traditional family contributes to crime, drug use, and delinquency among children.<sup>176</sup> Maher cites a 1999 study of more than 4,000 youth finding that “those who experience one or more changes in family structure during adolescence were at much greater risk for

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169. The social data and commentary discussed in this Comment admittedly do not cover the full spectrum of data available. They do, however, indicate that data exist that local governments can use to meet the fairly debatable standard.

170. NORVAL GLENN, COUNCIL ON FAMILIES, INST. FOR AM. VALUES, CLOSED HEARTS, CLOSED MINDS: THE TEXTBOOK STORY OF MARRIAGE 11 (1997).

171. This is not to say, however, that just because an individual is single or divorced or, alternatively, a father has abandoned a family, that the resulting family structure would not meet a local government’s definition of “family.” Rather, this social data and commentary is presented only to establish that a local government is justified in promulgating legislation that preserves the traditional family.

172. GLENN, *supra* note 170.

173. See JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING 2–3 (1996) (citing the breakdown of the traditional family as one of the causes of juvenile violence); Thomas F. Geraghty & Steven A. Drizin, *Charting a New Course for Juvenile Justice: Listening to Outsiders*, 90 J. CRIM. L. & CRIMINOLOGY 363, 370 (1999) (book review).

174. Patrick F. Fagan, *The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family, and Community*, THE HERITAGE FOUNDATION BACKGROUNDER, Mar. 17, 1995, at 1–2.

175. *Id.* “[A]t the heart of the explosion of crime in America is the loss of the capacity of fathers and mothers to be responsible in caring for the children they bring into the world.” *Id.* at 2. Marriage also “curbs social problems such as domestic violence, which is much more common among cohabitants than among spouses.” Bridget Maher, *Why Marriage Should be Privileged in Public Policy*, INSIGHT, Apr. 23, 2003, available at <http://www.frc.org/get.cfm?i=IS03D1>.

176. Maher, *supra* note 175 (citing TERRENCE P. THORNBERRY ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, FAMILY DISRUPTION AND DELINQUENCY, JUV. JUST. BULL. (Sept. 1999)).



drug use and delinquency.”<sup>177</sup> Maher also cites a 1998 Department of Justice report which “reveals that six out of ten jail inmates in the U.S. were raised by a single parent or neither parent.”<sup>178</sup> Other commentators also point to “recent research [which] strongly suggests that family structure is an important predictor of crime and delinquency.”<sup>179</sup>

Statistics also indicate that the preservation of the traditional family has a positive impact on children.<sup>180</sup> For example, data show that children from divorced families have nearly a forty percent chance of being moderately or severely depressed.<sup>181</sup> Examining children ten years after a divorce, males “were found to be generally unhappy and lonely” and females were “overcome by fear and anxiety at the prospect of making an emotional commitment to a man.”<sup>182</sup> Furthermore, and somewhat related to the issues with crime and violence discussed above,

[t]he common belief that parental divorce poses long-term hazards for the children involved is supported by [an] analysis of longitudinal data from . . . a nationally representative sample of American youth . . . . Effects of marital discord and family disruption were visible twelve to twenty-two years later in poor relationships with parents, and [there is] an increased likelihood of dropping out of high school and receiving psychological help.<sup>183</sup>

Lastly, “current research suggests that an intact marriage in itself appears to make a positive difference in a child’s well-being.”<sup>184</sup> Recent academic research indicates that “[t]he weakening of [the] U.S. family structure in recent decades, driven primarily by high and rising rates of unwed childbearing and divorce, has almost certainly weakened the educational prospects and achievements of U.S. children.”<sup>185</sup> Other commentators contend that the

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177. *Id.*

178. *Id.*

179. INST. FOR MARRIAGE AND PUB. POL’Y, IMAPP POLICY BRIEF: CAN MARRIED PARENTS PREVENT CRIME? RECENT RESEARCH ON FAMILY STRUCTURE AND DELINQUENCY 2000–2005, at 4 (2005), available at <http://www.marriedebate.com/pdf/imapp.crimefamstructure.pdf>.

180. Better emotional and physical health, longer life spans, and greater incomes are also cited as benefits for adults from marriage. Maher, *supra* note 175.

181. GELLES, *supra* note 135, at 410.

182. *Id.*

183. Glenn T. Stanton, *The Broken Promises of Divorce: How Divorce Hurts Children and Adults*, <http://www.divorcereform.org/mel/apsychdivorce.html> (quoting Nicholas Zill et al., *Long-Term Effects of Parental Divorce on Parent Child Relationships, Adjustment and Achievement in Young Adulthood*, 7 J. FAM. PSYCHOL. 91, 99–100 (1993)).

184. GLENN, *supra* note 170, at 12; see also O’NEILL, *supra* note 168; Reni Winter, *A Strengthening of Vows: Vancleave Church to Consider New Idea*, SUN HERALD, Mar. 18, 2002, at A2 (discussing Louisiana state representative’s assertion that violent crimes committed by children and teen suicide are symptoms of the breakdown of the traditional family).

185. CTR. FOR MARRIAGE AND FAMILIES, INST. FOR AM. VALUES, RESEARCH BRIEF NO. 1: FAMILY STRUCTURE AND CHILDREN’S EDUCATIONAL OUTCOMES 5 (2005) (linking college

“overwhelming amount of social science data shows that children raised by their biological married parents have the best chance of becoming happy, healthy, responsible, morally-upright citizens.”<sup>186</sup> Further, “children with married parents fare better economically and experience greater educational success than do those with unmarried parents.”<sup>187</sup>

Social data and commentary also demonstrate that the preservation of the traditional family helps communities in various other ways. For example, social data indicate that unmarried couples are more likely to lack medical insurance.<sup>188</sup> This could arguably correspond to greater public assistance (in the form of state medical care) for these individuals. Additionally, “[m]arried adults are more likely to engage in civic activities, such as voting and community involvement,” especially volunteer work in social service projects.<sup>189</sup> Lastly, divorce is also a main cause of bankruptcy.<sup>190</sup>

As a final point, some commentators argue that the broken family is self-perpetuating.<sup>191</sup> That is, those coming from a broken family are more likely to breed broken families in their adult lives. Maher cites a 2001 study positing “children from divorced homes are twice as likely to divorce as are children from intact homes.”<sup>192</sup>

In conclusion, social data and commentary exist that arguably justify local governments in making the preservation of the traditional family a legislative goal: crime is reduced; children are emotionally happier; more individuals are insured and engaged civically; fewer individuals are filing for bankruptcy; and the health, safety, morals, and general welfare of the community are enhanced.

#### b. Counter Arguments

Valid counter arguments can be made in response to the discussion above. First, by excluding non-traditional families from single-family zoning districts, children are being punished for their parents’ decisions. The welfare of children is, therefore, a competing policy interest and is one that has received

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attendance, misbehavior at school, drug use, illegal activities and psychological problems with the weakening of the U.S. family structure), *available at* <http://www.americanvalues.org/pdfs/researchbrief1.pdf>.

186. Maher, *supra* note 175.

187. *Id.*

188. Kristen Gerencher, *Unmarried Couples More Likely to Be Without Health Insurance*, WALL ST. J., Nov. 15, 2006, at D4.

189. Maher, *supra* note 175.

190. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 120 (5th ed. 2006) (citing divorce and medical problems as the leading causes of consumer bankruptcy behind income loss).

191. Maher, *supra* note 175.

192. *Id.*

endorsement from the United States Supreme Court.<sup>193</sup> However, it is not uncommon to treat a small segment of society in a way that may seem unfair to effectuate broader societal goals.

Second, like the counter argument to the practical justifications of restrictive definitions of zoning discussed above, the use of zoning ordinances is a very indirect way of preserving the traditional family. How effective is a restrictive definition of "family" to the preservation of the traditional family? Is the exclusion of non-traditional families really supporting "family values"? As the Michigan Supreme Court stated in *Charter Township of Delta v. Dinolfo*:

Our decision here is not in derogation of the cultural, economic, and moral value of the traditional family and its essential and unique role in our society, but rather is based on the fact that the exclusion of groups such as defendants from a residential neighborhood is not in any way supportive of "family values". Ironically, the enforcement of this ordinance prohibits the two defendant nuclear families from adding to their numbers in a way they choose pursuant to the highest possible motives.<sup>194</sup>

Therefore, preservation of traditional family values might not be best effectuated through the zoning code. After all, the denial of housing for all residents, at least with respect to a certain district, is seemingly a steep price to pay to preserve the traditional family.

#### D. Author's Analysis

This Comment has established the following: (1) local governments have the power to define "family"; (2) the standard of judicial review for a local government's definition of "family" is very deferential to the government; (3) local governments can refer to both practical justifications and justifications based on the preservation of the traditional family to support a restrictive definition of "family"; and (4) significant social data and commentary exist which support the government's justifications. In light of what has been established, it is unlikely those adversely affected in Missouri by a restrictive definition of "family" will be able to obtain judicial relief. The standard of review is simply too deferential toward local governments for a restrictive definition to not be considered "fairly debatable." As such, those adversely

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193. One of the important distinctions between the Court's decision in *Moore* when compared to *Boraas* is that "[t]he customary family structure of adults and children, with the adults in a supervisory role, was absent in *Boraas*." *Developments in the Law of Zoning*, 91 HARV. L. REV. 1427, 1572 (1978) (footnote omitted). Additionally, "in a case decided shortly after *Moore*, the Court indicated that even if there is no biological or marital bond, relationships involving close emotional attachments and the nurturing of children are entitled to some protection." *Id.* (citing *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 842–45 (1977)).

194. 351 N.W.2d 831, 843 (Mich. 1984).

affected are limited to the political solutions that proved successful in Black Jack. Despite this being unfortunate for those in living arrangements that closely resemble a traditional family, it does place the burden of social decisions on the legislature, where it belongs. This is the way it should be. In the words of Justice Mountain, “[T]he whole point is that the legislators and the people whom they represent *should* have the right to the final word. This is what democracy is all about.”<sup>195</sup>

Over time, the views of local communities, and America as a whole, evolve. If courts step in and are too willing to overturn legislative decisions, they preempt this evolution. With respect to restrictive definitions of “family” in local zoning ordinances, courts should be especially hesitant to get involved. Not only are there practical justifications for restrictive definitions, there is widespread judicial agreement that the preservation of the traditional family is a legitimate goal of local governments. Moreover, local governments can rely on substantial social data and commentary further supporting this justification. It must be kept in mind that local legislators have a tough job. It is unlikely they can promulgate any land use legislation that will please everyone. The best they can do is promulgate land use legislation that best reflects the desires of their constituents while fulfilling their responsibilities as legislators. When change is needed, it will come through the political process as it did in Black Jack. Legislators must be able to do their job without fear of being preempted or overturned by activist courts implementing their personal views.

Further, those adversely impacted by restrictive definitions of “family” do not need judicial protection. First, they are not being denied housing generally or even housing in a specific city. They are only being denied housing in a specific district within a city. Second, those adversely impacted by a restrictive definition are a diverse group with distinct characteristics. They are not a discrete group whose needs can be easily addressed. Rather, they are a hodgepodge of all those who fall outside the definition. As such, providing judicial relief would be difficult, requiring courts to analyze various factual scenarios and make case-by-case determinations. Third, there is no reason to think local legislators cannot be responsible and responsive to the plight of those adversely affected. As demonstrated in Black Jack, non-traditional families can generate substantial popular support, which in turn generates legislative responses. Legislators may even be part of non-traditional families themselves.

#### CONCLUSION

One does not need to look wide or far in today’s world to find examples of living arrangements that do not comport with the concept of a traditional

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195. *State v. Baker*, 405 A.2d 368, 378 (N.J. 1979) (Mountain, J., dissenting).

family. As such, debate and litigation over what constitutes a “family” will occur with increasing frequency in the future. At the forefront of this debate is the definition of “family” in local zoning ordinances. Restrictions in zoning ordinances literally hit close to home, by limiting the choice of individuals with respect to where they live. This Comment has established that providing a definition of “family” is well within the power of local governments. Additionally, local governments have numerous arguments, supported by social data and commentary, which justify the use of restrictive definitions of “family.” Therefore, in light of the above, success in Missouri courts is unlikely for those adversely affected. A political solution, attained by pressure on the local legislatures, is the best, if not the only, remedy for those excluded.

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