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Moore v. City of East Cleveland

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COMMENTS

MOORE V. CITY OF EAST CLEVELAND

ZONING—*Due Process and Restrictive Definitions of "Family"—A municipal ordinance limiting residential occupancy to a restricted family unit comprised of certain categories of related individuals violates the due process clause of the fourteenth amendment.* 97 S. Ct. 1932 (1977).

In May 1977, the Supreme Court decided *Moore v. City of East Cleveland*,[1] invalidating an Ohio zoning ordinance which limited occupancy of residential housing to members of a restricted family unit.[2] The *Moore* decision, symptomatic of the judicial schizophrenia surrounding this issue, fractured the nine-member

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1. 97 S. Ct. 1932 (1977).

2. Section 1351.02 of the Codified Ordinances of the City of East Cleveland, Ohio restricted occupancy of a dwelling unit to one "family." Section 1341.08 defined the term "family" as used in the ordinance:

> 1341.08 FAMILY.
>
> 'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
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> (a) husband or wife of the nominal head of the household.
>
> (b) unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
>
> (c) father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
>
> (d) notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.
>
> (e) a family may consist of one individual.

EAST CLEVELAND, OHIO MUNICIPAL ORDINANCES § 1341.08 (1966), *reprinted in* Brief for the Appellant at 2-3, Moore v. City of East Cleveland, 97 S. Ct. 1932 (1977). Section 1351.02 limited occupancy as follows: "1351.02 LIMITATION ON OCCUPANCY. The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family." *Id.* § 1351.02, Brief for the Appellant at 3.

Court: Six separate opinions were published.[3] The extent to which personal lifestyle choices may be regulated through zoning restriction has remained elusive in recent years. The relative paucity of zoning challenges to reach the Supreme Court has rendered "case-by-case development of constitutional limits on zoning power"[4] impossible. In his concurrence in *Moore*, Justice Stevens noted: "With one minor exception, between the *Nectow* [*v. City of Cambridge*] decision in 1928 and the 1972 decision in *Village of Belle Terre v. Boraas*, this Court did not review the substance of any zoning ordinances."[5] Indeed, the Supreme Court examined the constitutionality of zoning restrictions on who may lawfully reside together only once prior to *Moore*.[6] Constitutional challenges based on the equal protection clause[7] and on the fundamental rights of privacy and association were rejected in *Village of Belle Terre v. Boraas* by a majority opinion joined by seven members of the Court.[8] In the short line of zoning decisions, the full import of *Moore* is yet to be determined. To the extent that *Moore* may be viewed as a legal barometer of the times, the Court appears to be moving, however haltingly, toward greater recognition of a limited right to choice of lifestyle. The position of the appellees in *Village of Belle Terre v. Boraas*,[9] which the Court rejected in that case, "that social homogeneity is not a legitimate interest of the government . . . [but] is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society,"[10] may now have captured the attention of the Court.[11]

3. Justice Powell delivered the opinion of the Court, joined by Justices Brennan, Marshall, and Blackmun. Justice Brennan also wrote a separate concurrence, joined by Justice Marshall. A separate concurring opinion was written by Justice Stevens. Chief Justice Burger, Justice White, and Justice Stewart joined by Justice Rehnquist wrote separate dissents.

4. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1944 (1977) (Stevens, J., concurring).

5. *Id.* (Stevens, J., concurring) (footnote omitted) (citation omitted). *See also* Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199 (1955), citing 21 cases involving local ordinances or action by local officials denied review by the Supreme Court during the six terms between 1949-1950 and 1954-1955. *Id.* at 208.

6. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

7. U.S. CONST. amend. XIV, § 1.

8. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974).

9. 416 U.S. 1 (1974).

10. *Id.* at 7.

11. *See* text accompanying notes 69-76 *infra*.

THE PRE-*Moore* DECISIONS

Although the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[12] firmly established the validity of zoning procedures under state police power,[13] it was not until *Village of Belle Terre v. Boraas*[14] that the constitutionality of restricting one's choice of household companions first arose.[15] The Belle Terre ordinance restricted land use solely to one-family dwellings. "Family" was defined as:

> One or more persons related by blood, adoption, or marriage living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons *but not exceeding two* (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.[16]

Six college students, unrelated by "blood, adoption, or marriage," leased a home in the suburban New York village of Belle Terre for a period of eighteen months. Both the owners of the home and the college students were found in violation of local zoning ordinances and were served with an "Order to Remedy Violations."[17] The *Belle Terre* case was the first Supreme Court review of an ordinance that regulates the persons who may occupy a home rather than housing density, physical structure, or safety. The opinion by Justice Douglas began with a broad reaffirmation of the deference traditionally afforded local zoning regulations.[18] Indeed, Justice Douglas discussed only two instances in which zoning regulations were deemed unconstitutional: when based solely on race, and when placed on philanthropic homes so as to subject such homes to

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12. 272 U.S. 365 (1926). *Euclid* involved a challenge to local zoning ordinances on the basis that restricted-use ordinances had diminished the value of the landowner's property and therefore constituted a taking of liberty and property without due process within the meaning of the fourteenth amendment. The Court in *Euclid* concluded with an oft-quoted phrase: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgement must be allowed to control." *Id.* at 388 (citation omitted).

13. Village of Belle Terre v. Boraas, 416 U.S. 1, 4 (1974) (construing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926)).

14. 416 U.S. 1 (1974).

15. *Id.* at 2-3.

16. *Id.* at 2 (quoting BELLE TERRE, N.Y. BUILDING ZONE ORDINANCE art. I, § D-1.359 (1970)) (emphasis added).

17. Village of Belle Terre v. Boraas, 416 U.S. 1, 3 (1974).

18. *See id.* at 4-5.

the caprice of the owners of adjacent land.[19] In his terse opinion, Justice Douglas dismissed appellees' allegations of infringement of their fundamental rights to privacy, association, and travel. The ordinance, Justice Douglas succinctly declared, "involves no 'fundamental' right guaranteed by the Constitution, such as voting, the right of association, the right of access to the courts, or any rights of privacy."[20]

The Court instead viewed the Belle Terre ordinance as "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a [permissible] state objective.' "[21] Applying this rational relationship test, Justice Douglas found the Belle Terre objectives of securing "family values, youth values, and the blessings of quiet seclusion and clean air"[22] sufficient to uphold the ordinance. Justice Marshall, the sole dissenter on the merits,[23] argued that the Belle Terre ordinance significantly burdened the fundamental rights of privacy and association guaranteed by the first and fourteenth amendments and that strict scrutiny analysis should therefore have been applied.[24] In upholding the students' right of domestic association, Justice Marshall stressed the close interplay between freedom of association and the right to privacy. In his view, the choice of household companions, "family, friends, professional associates, or others"[25] falls within the ambit of these constitutional protections.

The Court's tacit approval of zoning intrusion into "family" relationships is perplexing in light of *United States Department of Agriculture v. Moreno*,[26] decided during the term preceding *Belle Terre*. In *Moreno* the Court found the 1971 amendment of section 3(e) of the federal Food Stamp Act[27] unconstitutional in its denial

19. *Id.* at 6-7.

20. *Id.* at 7 (citations omitted).

21. *Id.* at 8 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), and Reed v. Reed, 404 U.S. 71, 76 (1971)).

22. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

23. Justice Brennan believed that no case or controversy existed for the Court to resolve. *See id.* at 10 (Brennan, J., dissenting).

24. *Id.* at 13 (Marshall, J., dissenting).

25. *Id.* at 16 (Marshall, J., dissenting).

26. 413 U.S. 528 (1973).

27. Act of Jan. 11, 1971, Pub. L. No. 91-671, § 2(a), 84 Stat. 2048 (amending 7 U.S.C. § 2012(e) (1964)). The 1971 amendment to § 3(e) of the Food Stamp Act of 1964 states:

> The term 'household' shall mean a group of related individuals (includ-

of food assistance to any household containing an individual unrelated to any other member of the household. In a decision by Justice Brennan, the Court declared legislative distinctions between related and unrelated households to be "wholly without any rational basis."[28] Government arguments based on abuse of federal food stamp assistance by college students and by other groups who had joined solely to obtain federal assistance[29] were deemed inadequate to support such a classification.[30] Yet, the following term in *Belle Terre* the goals of "quiet seclusion," "clean air," "family values," and "youth values" were deemed sufficient under the same rational relationship standard to support a legislative distinction between related and unrelated persons.[31] While *Belle Terre* and *Moreno* differ in the nature of the restrictions involved, the basic rights at issue are the same.

Justice Douglas, in analysis notably absent from *Belle Terre*, wrote a strong concurrence in the *Moreno* decision, citing *NAACP v. Alabama*[32] in support of "closest scrutiny" of the unrelated person provision:[33] In *Moreno* Justice Douglas stated: "The 'unrelated' person provision of the present Act has an impact on the rights of people to associate for lawful purposes with whom they choose. When state action 'may have the effect of curtailing the freedom to

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ing legally adopted children and legally assigned foster children) or nonrelated individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term 'household' shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption, or (2) an elderly person who meets the requirements of section 10(h) of this Act.

Id.

28. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973). *Moreno* found the 1971 amendment to the federal Food Stamp Act unconstitutional becuase it violated the equal protection clause of the fifth amendment. The fifth amendment, although not containing a specific equal protection clause, holds federal classifications to the same standard applied to state classifications under the equal protection clause of the fourteenth amendment. *See* Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954).

29. Brief for the Appellant at 14-17, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

30. Section 3(e) of the Food Stamp Act, 7 U.S.C. § 2012(e) (1970), bases eligibility for federal food stamp assistance on household rather than on individual income.

31. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

32. 357 U.S. 449 (1958).

33. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 541 (1973) (Douglas, J., concurring) (citing NAACP v. Alabama, 357 U.S. 449 (1958)).

associate' it 'is subject to the closest scrutiny.' "[34] However, citing the same case, *NAACP v. Alabama*,[35] in *Village of Belle Terre v. Boraas*,[36] Justice Douglas reached a contrary conclusion, stating summarily that ordinance restrictions on unrelated individuals involves "no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association."[37] Justice Douglas, who cited case after case in support of his determination of government infringement of the fundamental right to freedom of association in *Moreno*,[38] found the same related/unrelated classification valid in *Belle Terre*.[39] Even more perplexing is Douglas' clarification: "The [Belle Terre] ordinance places no ban on other forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it likes."[40] It is questionable whether restriction of one form of association may be rendered constitutionally permissible simply because another form of association is still permitted. If the constitutional right to freedom of association is of any cognizable dimension, its parameters must extend beyond the right to entertain whomever one pleases. The right of association should include the choice of one's daily companions.

In a single-sentence footnote to the *Belle Terre* decision, Justice Douglas dismissed any apparent contradiction between *Moreno* and *Belle Terre*. Justice Douglas declared *Moreno* "inapt,"[41] reasoning that the Belle Terre definition of "family" would allow the cohabitation of two unmarried people, whereas under *Moreno* the same two unmarried people could not get food stamps. It is difficult to reconcile the two Douglas positions. The Court in *Moreno* declared that legislative distinction between a household of two related members and a household of two unrelated members is unconstitutional and "wholly without any rational basis."[42] Legislative distinction between a household of three related members and a household of three unrelated members, however, is, under *Belle Terre's* rationale, "a permissible goal."[43] Regulation of the *number*

34. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 544-45 (1973) (Douglas, J., concurring) (quoting NAACP v. Alabama, 357 U.S. 449, 460-61 (1958)).
35. 357 U.S. 449 (1958).
36. 416 U.S. 1, 7 (1974) (citing NAACP v. Alabama, 357 U.S. 449 (1958)).
37. *Id.* at 7 (citations omitted).
38. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 542 (1973).
39. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974).
40. *Id.* at 9.
41. *Id.* at 8 n.6.
42. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973).
43. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

of persons in a household is not at issue; neither scheme directly limits the number of persons in a household. Rather, the focus of analysis must be the rationality of the related/unrelated distinction.

Equally difficult to reconcile, given the state interest in "peaceful bliss" proffered in *Belle Terre* compared with the state interest in elimination of fraudulent federal aid claims in *Moreno*, is the Court's declaration of a rational relationship to legitimate governmental interests in *Belle Terre*, and its opposite determination the previous term in *Moreno*. Quiet spaces constituted a legitimate governmental interest in *Belle Terre*, whereas the strong governmental interest in protection of limited aid funds carried little weight in *Moreno*.

Belle Terre added little to substantive constitutional argumentation; yet it seemed clear in its zoning implications. Following *Belle Terre*, the deference afforded zoning classifications as established in the earlier case of *Village of Euclid v. Ambler Realty Co.*[44] seemed all but absolute.[45] The *Belle Terre* opinion, without much precedent, had sustained a broad grant of power for local zoning authorities, a situation relatively undisturbed until 1976[46] when the Supreme Court noted probable jurisdiction to hear *Moore v. City of East Cleveland.*[47]

THE *Moore* CASE

In *Moore* the Supreme Court addressed for the second time the constitutional issue of zoning restriction of the "family." East Cleveland municipal zoning ordinances limited occupancy of dwelling units to members of a single family. "Family," as defined by the ordinance, included only a few categories of related individuals.[48] *Moore* involved a 63-year-old woman living with her son and two grandsons. Since Mrs. Moore's two grandsons were cousins rather than brothers, the living arrangement violated East Cleve-

44. 272 U.S. 365 (1926).

45. Justice Douglas, in the *Belle Terre* opinion, discussed only two instances in which zoning regulations violated the fourteenth amendment: zoning classifications based solely on race, and zoning restrictions requiring consent of two-thirds of neighboring homes for construction of an old age home or orphanage. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 6-7 (1974).

46. In his concurrence in *Moore*, Justice Stevens noted numerous state court decisions which, despite *Belle Terre*, upheld the right of unrelated persons to reside together. *See* Moore v. City of East Cleveland, 97 S. Ct. 1932, 1945 & nn.8-10, 1946 & nn.11-14 (1977) (Stevens, J., concurring).

47. 425 U.S. 949 (1976).

48. *See* note 2 *supra*.

land zoning ordinance restrictions. The Supreme Court, reversing both the trial court and the Court of Appeals of Ohio,[49] declared East Cleveland's ordinance in violation of the due process clause[50] of the fourteenth amendment.[51] The six disparate opinions written by the Court sparked further attention to the case. Justice Powell wrote the majority opinion in which Justices Brennan, Marshall, and Blackmun concurred. Justice Brennan, joined by Justice Marshall, wrote a separate concurrence emphasizing the disproportionate effect upon minority groups of zoning limitations on family patterns.[52] Justice Stevens, in yet another concurring opinion, stated that East Cleveland's ordinance constituted a taking of property without due process of law or just compensation.[53]

The dissenting justices in *Moore* were equally divided. Chief Justice Burger dissented on the grounds that since an administrative remedy, a local zoning variance, was available, the Supreme Court need not face the constitutional issue presented until the claimant had exhausted such remedy.[54]

Justice Stewart, joined by Justice Rehnquist, dissented largely on the basis that *Belle Terre* should be controlling and that East Cleveland's ordinance bore a rational relationship to the same legitimate governmental purposes identified in *Belle Terre*: quiet seclusion, clean air, family values, and youth values.[55]

In a separate dissent, Justice White stated that the doctrine of substantive due process, though not "illegitimate" nor "unacceptable,"[56] need be approached cautiously lest its use "lead to judges 'roaming at large in the constitutional field.' "[57] The extension of

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49. *See* Moore v. City of East Cleveland, 97 S. Ct. 1932, 1934-35 (1977). The Ohio Supreme Court denied review for lack of a substantial constitutional question.

50. U.S. CONST. amend. XIV, § 1.

51. *See* Moore v. City of East Cleveland, 97 S. Ct. 1932, 1939 (1977).

52. *See id.* at 1940-41 (Brennan, J., concurring).

53. *See id.* at 1947 (Stevens, J., concurring).

54. *See id.* (Burger, C.J., dissenting).

55. *See id.* at 1956 (Stewart, J., dissenting).

56. *Id.* at 1959 (White, J., dissenting).

57. *Id.* (White, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 502 (1965)). Justice White believed that the experiences of the *Lochner* era, during which judicial intervention increased substantially, had led to substantial reinterpretations of the Constitution. *See id.* at 1958 (White, J., dissenting). The *Lochner* era is a term generally used to describe the period beginning with the 1905 Supreme Court decision in Lochner v. New York, 198 U.S. 45 (1905), and extending into the mid-1930's. During that period, nearly 200 regulations were invalidated by the Court on substantive due process grounds. Widespread judicial intervention in economic regulation has become the characteristic most often associated with the *Lochner* era. Typically, the *Lochner* era decisions also contained strongly-worded dissents, often by

substantive due process to the facts in *Moore*, Justice White asserted, "suggests a far too expansive charter for this Court."[58] Justice White concluded that no due process rights were implicated by the facts in issue and that the East Cleveland ordinance should be sustained on the basis of the standard applied in *McGowan v. Maryland*:[59] " 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' "[60]

Justice Powell, writing for the Court in *Moore*, recognized a substantive due process "family" right. It began with a declaration that neither *Village of Belle Terre v. Boraas*[61] nor *Village of Euclid v. Ambler Realty Co.*[62] was controlling where "a city undertakes such intrusive regulation of the family."[63] Citing more than a dozen judicial decisions[64] in support of its conclusion, Justice Powell stated:

> 'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' A host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'[65]

After the Court reviewed its function under the due process clause,[66] it expanded the recognition of a substantive due process

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Justice Holmes. *See generally* G. GUNTHER, *The Discredited Period of Judicial Intervention: What Was Wrong with Lochner?*, in CASES AND MATERIALS ON CONSTITUTIONAL LAW 564 (9th ed. 1975). Justice White cites several *Lochner* era dissenting opinions in his criticism of the Court's use of substantive due process in the *Moore* decision. *See* Moore v. City of East Cleveland, 97 S. Ct. 1932, 1957-58 (1977) (White, J., dissenting).

58. *Id.* at 1961 (White, J., dissenting).

59. 366 U.S. 420 (1961).

60. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1962 (1977) (White, J., dissenting) (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)).

61. 416 U.S. 1 (1974).

62. 272 U.S. 365 (1926).

63. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1935 (1977).

64. *See id.* at 1935-36 (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Loving v. Virginia, 388 U.S. 1, 121 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); *id.* at 495-96 (Goldberg, J., concurring); *id.* at 502-03 (White, J., concurring); Poe v. Ullman, 367 U.S. 497, 542-44, 549-53 (1961) (Harlan, J., dissenting); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923)).

65. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1935-36 (1977) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)) (citations omitted).

66. '[T]he full scope of the liberty guaranteed by the Due Process Clause

right with regard to the "private realm of family life,"[67] stating that the protection of family rights cannot be cut off "at the first convenient, if arbitrary boundary—the boundary of the nuclear family."[68] Although *Moore* concluded by stating that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns,"[69] the Court explicitly discussed only the extended related family. The Court did not have to reach the difficult issue of protection for the extended family, that is, whether the related/unrelated distinction could also constitute a convenient, if arbitrary, boundary. Indeed, the Court began by distinguishing *Belle Terre* as involving unrelated persons, whereas *Moore* involved only related individuals.[70] The Court in *Moore*, like the many state courts which found reasons to distinguish *Belle Terre* from the decisions they rendered,[71] did not wish to be bound by *Belle Terre*'s rationale or to consider the more troublesome constitutional issue of the rights of unrelated individuals. The Court did, however, for the first time in its history, invalidate a zoning ordinance premised upon a substantive due process recognition of at least a limited "family" right. Interestingly, the cases cited by the Court in support

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cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . . [This liberty] is a rational continuum which, boradly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.'

Id. at 1937 (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).

67. *Id.* at 1936 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

68. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1937 (1977).

69. *Id.* at 1939.

70. *See id.* at 1935. If the substantive due process rights conferred on the family by *Moore* extend to "families" with unrelated members, it could be argued persuasively that the Belle Terre ordinance would be unconstitutional under *Moore*.

71. Justice Stevens cited several state court decisions which had avoided *Belle Terre* and permitted unrelated persons to occupy single-family residences. *See id.* at 1945 & nn.8-10, 1946 & nn.11-15 (Stevens, J., concurring). These decisions were: Women's Kansas City St. Andrew Soc'y v. Kansas City, 58 F.2d 593 (8th Cir. 1932); Village of Univ. Heights v. Cleveland Jewish Orphans' Home, 20 F.2d 743 (6th Cir. 1927); Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962); Carroll v. City of Miami Beach, 198 So. 2d 643 (Fla. App. 1967); City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. App. 1954); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); Missionaries of Our Lady of LaSalette v. Village of Whitefish Bay, 267 Wis. 609, 66 N.W.2d 627 (1954).

of this "family" right included not only cases supporting marriage or the rights of the traditional family,[72] but also cases involving the rights of the unwed, illegitimate, and otherwise nontraditional family.[73] Still, the Court did not stray very wide of its mark. It is notable that the Court excluded from its analysis *Eisenstadt v. Baird*[74] which had extended the marital right of privacy, recognized in *Griswold v. Connecticut*,[75] to the individual. The Court in *Eisenstadt* stated: "[I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[76] The *Eisenstadt* decision, emphasizing the rights of an individual, regardless of his status or relationship to another individual, was clearly beyond the Court's desired scope in *Moore*.

The Stevens concurrence dealt with the many questions left unanswered by the Court in *Moore*. Justice Stevens based his concurrence upon the determination that East Cleveland's ordinance "constitutes a taking of property without due process and without just compensation."[77] He noted that the facts in *Moore* represented an unprecedented restriction on an owner's use of his property. The concurring Justice asserted: "There appears to be no precedent for an ordinance which excludes any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis."[78] Justice Stevens then cited decisions by state courts which had invalidated ordinances restricting the right of unrelated individuals to reside together:[79] "[I]n well reasoned opinions, the courts of Illinois, New York, New Jersey, California, Connecticut, Wisconsin, and other jurisdictions, have permitted unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy."[80]

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72. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (upholding right of *married* persons to obtain contraceptive devices).

73. *See* Roe v. Wade, 410 U.S. 113 (1973) (right of unwed woman to obtain abortion); Stanley v. Illinois, 405 U.S. 645 (1972) (right of unwed father to custody of illegitimate child upon death of mother).

74. 405 U.S. 438 (1972).

75. 381 U.S. 479 (1965).

76. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

77. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1947 (1977) (Stevens, J., concurring).

78. *Id.* at 1946 (Stevens, J., concurring).

79. *See* note 71 *supra*.

80. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1945-46 (1977) (Stevens, J., concurring) (footnotes omitted).

Justice Stevens noted that zoning ordinances regulating the identity rather than the number of persons who may occupy a household have been upheld by state courts "only to the extent that the ordinances require such households to remain nontransient, single-housekeeping units."[81] In a footnote, Justice Stevens declared that *Village of Belle Terre v. Boraas*[82] was consistent with this line of state authority.[83] Justice Stevens agreed with a state court's[84] characterization of the Belle Terre ordinance as aimed primarily at the prevention of transiency. Justice Stevens declared that in Belle Terre, where college students shared in temporary living arrangements, "[t]here would be none of the permanency of community that characterizes a residential neighborhood of private homes."[85]

Whether the Stevens opinion indicates a changing attitude in the Court or merely is one more device to be used by state courts in eliding the *Belle Terre* decision, the split in the Court in *Moore* may signal an expansion of *Belle Terre*'s restricted view of "family" rights.

Belle Terre-Moore: THE FUTURE

Moore v. City of East Cleveland[86] established Supreme Court recognition of a substantive due process right for the "family." *Moore*, however, extended the parameters of the family no further than necessary for its holding. It prohibited, in particular, an ordinance which "makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here."[87] Nevertheless, *Moore* is not without import. Substantive due process, out of fashion for much of this century,[88] has reappeared and invaded

81. *Id.* at 1946 (footnote omitted). Single-housekeeping units are distinguished from boarding homes or fraternity houses in that the individuals therein live together as one economic unit, share common cooking facilities, and purchase food jointly. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 530 (1973).

82. 416 U.S. 1 (1974).

83. *See* Moore v. City of East Cleveland, 97 S. Ct. 1932, 1946 n.15 (1977) (Stevens, J., concurring).

84. City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S. 2d 449 (1974).

85. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1946 n.15 (quoting City of White Plains v. Ferraioli, 34 N.Y.2d 300, 304-05, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974)). It is interesting to note that Justice Douglas had rejected this interpretation in *Belle Terre*. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974).

86. 97 S. Ct. 1932 (1977).

87. *Id.* at 1935.

88. *See id.* at 1937 & n.9. *See also* note 37 *supra* and accompanying text. Justice White's dissent in *Moore* also recalled the so-called *Lochner* era which rendered due process rights suspect. *See id.* at 1957-58 (White, J., dissenting); note 57 *supra*.

the traditionally immune area of zoning regulations.[89] Although recognition of substantive due process rights in the "family" does not automatically imply freedom from all government regulation, any more than does freedom of speech imply license to yell "fire," the Court in *Moore* has moved perceptibly away from the earlier *Belle Terre* standard which had upheld such regulation.

The term "family" as defined in the Belle Terre ordinance raises an unusual paradox, particularly in light of the *Moore* decision. The ordinance defined "family" to include one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit.[90] Explicit in Belle Terre's definition is recognition that a family may consist totally of unrelated persons. *Moore* did not decide whether the family can consist of unrelated members when it extended substantive due process rights to the family. *Belle Terre* implicitly recognized that biological and marital ties cannot constitute the sole criteria for determining family status. To distinguish between families purely on the basis of blood relationships or contractual agreement within the group is irrational. To limit the unrelated family to two persons is also unnecessary. Local ordinances which are designed to limit noise, sanitary problems, or unsightly areas will effectively restrain the unrelated household, as well as the related household. Traffic congestion and overcrowding, legitimate zoning concerns, are better served by other ordinances and are only marginally served by Belle Terre's restriction. Traffic congestion can be reduced by prohibition of on-street parking. Overcrowding can best be avoided by limiting the number of occupants in a household directly, either in terms of absolute number or in relation to available floor space. Indeed, East Cleveland had such a density control ordinance in effect which "establishe[d] occupancy limits based upon logical criteria, namely the amount of living space in square foot terms available to each

89. *See generally* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

> The Supreme Court abandoned the supervision of zoning four decades ago. In *Village of Euclid v. Ambler Realty Co.* the Justices broadly sanctioned comprehensive zoning, declaring it immune to constitutional attack unless the conclusion could be reached that a given ordinance is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

Id. at 783 (footnotes omitted) (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

90. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 2 (1974).

inhabitant."[91] As Justice Stevens noted in his concurrence to the *Moore* decision, "[t]o attack these problems [of overcrowding and congestion] through use of a restrictive definition of family is, as one court noted, like 'burn[ing] the house to roast the pig.' "[92]

In view of Justice Brennan's emphasis in his concurrence in *Moore* on the disproportionate effect on blacks and the indigent of limiting household composition, and in view of our country's efforts to conserve resources, *Belle Terre* may be economically as well as socially unsound.

The *Belle Terre* evaluation of the parameters of the right to freedom of association is perplexing at best. It is difficult to conceive of a right to freedom of association limited to related persons alone; indeed, in its most traditional sense, this right has envisioned the joining of strangers or unrelated persons. Further, if first amendment association rights have traditionally recognized the right of groups to gather publicly in meetings,[93] the right to gather privately within one's home must also be protected. It is unlikely that the first amendment ever will be interpreted to permit the restriction of lawful assembly to two people.

The most crucial issue, however, lies in the constitutional implications of *Moore*. *Moore* recognizes a substantive due process right extending beyond the nuclear family, including, at least, the extended related family. But a constitutional right, if it is of any import, should not only protect the popular or traditional view. A constitutional right can hardly be deemed a constitutional right if it represents merely affirmation of, or worse, coercion into, fixed or uniform patterns.

Regulating family membership involves overseeing the most personal and intimate aspects of an individual's life. This area stands on the outer limits of a state's ability to regulate. The *Moore* decision, reflecting this type of concern, can and should mark the advance of the Supreme Court toward full recognition of a personal lifestyle right.

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91. Brief for the Appellant at 47, Moore v. City of East Cleveland, 97 S. Ct. 1932 (1977) (citing EAST CLEVELAND, OHIO MUNICIPAL ORDINANCES § 1351.03(e) (1967)).

92. Moore v. City of East Cleveland, 97 S. Ct. 1932, 1946 n.16 (Stevens, J., concurring) (quoting Larson v. Mayor of Spring Lake Heights, 99 N.J. Super. 365, 374, 240 A.2d 31, 36 (Law Div. 1968)).

93. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).