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The Power to Regulate People: Moore v. City of East Cleveland

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THE POWER TO REGULATE PEOPLE: *Moore v. City of East Cleveland*

INTRODUCTION

The Village of Euclid and the City of East Cleveland are adjacent suburban coumunities located northeast of Cleveland. Both Euclid and East Cleveland passed zoning ordinances which when challenged as constitutionally invalid became the subjects of review and decision by the United States Supreme Court.[1]

The two decisions, *Village of Euclid v. Ambler Realty Co.*[2] and *Moore v. City of East Cleveland,*[3] were handed down more than fifty years apart, and they represent two of the four times[4] the Supreme Court has spoken out on the power of municipalities to regulate land use through zoning.[5]

A subtle but significant change has taken place in the zoning powers of municipalities during the span of years between *Euclid* and *Moore:* What began in 1926 as the power to regulate the uses of land[6] has expanded in 1977 to include the power to regulate the people who use the land.[7]

The analysis of this evolution will be in three parts: First, a brief summary of the two cases which gave rise to the new power, *Village of Belle Terre v. Boraas*[8] and *Moore*; second, a discussion

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[1] Moore v City of East Cleveland, 431 U.S. 494 (1977); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[2] 272 U.S. 365 (1926).

[3] 431 U.S. 494 (1977).

[4] Moore v. City of East Cleveland, 431 U.S. 494 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[5] Three other Supreme Court cases in the 1970's interpret zoning ordinances, without tracing the origins of zoning power back to *Euclid.* Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).

[6] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Court in *Euclid* upheld a complex zoning scheme which divided the village into various classes of use districts, ranging from single family dwellings to heavy industrial uses. *Id.* at 389-91.

[7] Moore v. City of East Cleveland, 431 U.S. 494 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See* Frame & Scorza, Village of Belle Terre v. Boraas: *Property Rights, Personal Rights & the Liberal Regime,*2 HASTINGS CONST. L.Q. 935 (1975); Note, *An Extension of the State's Police Power: The Protection of Family Values Through Zoning Litigation,* 21 LOY. L. REV. 243 (1975).

[8] 416 U.S. 1 (1974).

of the confines of the so-called "two-tier" equal protection analysis which led to *Belle Terre;* and third, an analysis of *Moore* as a response to *Belle Terre.*

I. THE CASES

A. Belle Terre

The Village of Belle Terre passed an ordinance restricting land use to single-family dwellings, defining "family" to include one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons living as a single housekeeping unit.[9] The owners of a house in Belle Terre leased it to six unrelated students. When notified that they were in violation of the ordinance, the owners and three of the students sought to have the ordinance declared unconstitutional.[10] The district court sustained the ordinance,[11] but the court of appeals struck down the ordinance as violative of equal protection.[12]

The Supreme Court reversed, using an equal protection analysis: Since the ordinance did not infringe on any fundamental right it was to be given only a minimum level of scrutiny.[13] Justice Douglas,[14] writing for the majority, cursorily dismissed the contention that the ordinance encroached on any "fundamental right" guaranteed by the Constitution.[15] Rather, the opinion em-

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[9] *Id.* at 2.

[10] *Id.* at 2-3.

[11] 367 F. Supp. 136, 148-49 (E.D.N.Y. 1973).

[12] 476 F.2d 806, 818 (2d Cir. 1973). The court of appeals had departed from the traditional "two-tier" analysis. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972) [hereinafter Gunther], asking instead "whether the legislative classification is in fact substantially related to the object of the statute." Boraas v. Village of Belle Terre, 476 F.2d 806, 814 (2d Cir. 1973).

[13] The Court used the so-called "two-tier" approach. *See* notes 43-75 *infra.*

[14] Many people had expected Douglas to classify the choice of household living companions as a civil liberty not to be interfered with by the state, especially considering his concurring opinion one year earlier in Department of Agriculture v. Moreno, 413 U.S. 528, 543 (1973). Criticism of the apparent inconsistency between his views in *Moreno* and *Belle Terre* has been strong. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 17-18 (Marshall, J., dissenting); Margolis, *Exclusionary Zoning: For Whom Does Belle Terre Toll,* 11 CALIF. W.L. REV. 85 (1974); Note, *No Dogs, Cats or Voluntary Families Allowed,* 24 DEPAUL L. REV. 784 (1975).

[15] 416 U.S. at 7-8. The "fundamental rights" which have been held to trigger strict scrutiny are: The right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right of association, NAACP v. Alabama, 357 U.S. 449 (1958); the right of access to courts, NAACP v. Button,

phasized the wide latitude given to the state in its exercise of police power:[16] "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."[17]

Justice Marshall dissented,[18] stating that the classification distinguishing related and unrelated people "burden[ed] the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments."[19] The judicial deference generally given to legislative determinations did not require abdication of judicial responsibility to protect basic constitutional rights.[20] By attempting to regulate "the way people choose to associate with each other within the privacy of their own homes,"[21] Belle Terre had unconstitutionally interfered with fundamental rights.

B. Moore

Belle Terre appeared to be conclusive: Broad judicial deference must be given to local zoning officials in the exercise of their police power, and that power includes the power to regulate the internal composition of the household.

Three years later, however, the Court tempered its *Belle Terre* holding in *Moore v. City of East Cleveland.*[22] Petitioner Inez Moore lived with her son and two grandchildren. The grandchildren were first cousins rather than brothers, one being the child of her son and the other the child of her deceased daughter.[23] Because of the city's definition of "family" in its single-family zoning ordinance,[24] Mrs. Moore was notified that one of her grandchildren was an "illegal occupant." When she refused to

371 U.S. 415 (1963); the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); the right of privacy, Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965).

[16] *See* Berman v. Parker, 348 U.S. 26 (1954).

[17] 416 U.S. at 9.

[18] *Id.* at 12 (Marshall, J., dissenting).

[19] *Id.* at 13. The fundamental rights of association and privacy are included in note 15 *supra.*

[20] 416 U.S. at 13-14.

[21] *Id.* at 17.

[22] 431 U.S. 494 (1977).

[23] *Id.* at 496-97.

[24] The East Cleveland ordinance defined "family" members by their relation to the nominal head of the household. The complex provision is found at 431 U.S. 496 n.2.

remove the child, Mrs. Moore was convicted of violating the ordinance.[25] On appeal she challenged its constitutionality.

East Cleveland's ordinance, and Mrs. Moore's claim of invalidity, were substantially similar to the ordinance and claim the Court had reviewed three years earlier in *Belle Terre.* Both ordinances dealt with single-family zones, and attempted to define "family" in a restrictive fashion. Both purported to serve traditional zoning objectives: Preventing overcrowding, minimizing traffic and parking congestion, preserving a neighborhood free of disturbing noises.[26] Both ordinances recognized the importance of the "family."[27] Most importantly, both ordinances went beyond the traditional scope of zoning set forth in *Euclid,*[28] regulating the *use* of land, and sought to regulate *who* may use the land and in what manner.[29]

Despite some similarity, the Court chose to distinguish *Belle Terre* by creating a new fundamental right of "family" and by using substantive due process analysis instead of equal protection analysis.

The Court, Justice Powell writing for the majority, began by describing the effect of East Cleveland's ordinance. Unlike Belle Terre, East Cleveland had attempted to regulate its housing by slicing deeply into the family itself: "On its face, [the East Cleveland ordinance] selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson . . . ."[30] The opinion then discussed the constitutional issue of the case: whether the ordinance violated the due process clause of the fourteenth amendment.[31] The usual rule of judicial deference to legislative discretion was inappropriate here because the

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[25] *Id.* at 497.

[26] *Id.* at 499-500; Village of Belle Terre v. Boraas, 416 U.S. at 5, 9.

[27] Belle Terre sought to protect the "extended family," while East Cleveland provided protection to the "nuclear family." *See* Moore v. City of East Cleveland, 431 U.S. at 507-510 (Brennan, J., concurring).

[28] 272 U.S. 365, 387 (1926). *See* note 6 *supra.*

[29] Only Justice Stevens perceived the distinction. He saw the critical issue as the extent to which courts should allow interference with a property owner's right to determine the internal composition of his household. 431 U.S. 494, 518-19 (Stevens, J., concurring).

[30] *Id.* at 498-99.

[31] The Court found it unnecessary to reach Mrs. Moore's contention that the ordinance was violative of the equal protection clause. *Id.* at 496 n.3.

legislature had intruded on the freedom of choice in matters of marriage and family life.[32] Justice Powell noted that the Court had consistently recognized some private realm of family life which the state would not be allowed to penetrate.[33] Governmental intrusion into this realm was subject to strict judicial scrutiny.[34] The Court ruled that when such scrutiny was applied, the ordinance had to fall because the governmental interests advanced were not sufficient to justify the city's intrusion on a fundamental right.[35]

Justice Powell clearly recognized the need for "caution and restraint" whenever the Court proceeded to review legislation on substantive due process grounds. The pitfalls of the *Lochner*[36] years, when the Court took on powers of judicial intervention as a "super-legislature,"[37] served as a warning to courts that intervention must be exercised with great care.[38] But judicial interference was appropriate, even essential, when government impinged on "the sanctity of the family."[39]

Justices Brennan, Marshall, and Blackmun joined Justice Powell's majority opinion.[40] Justice Stevens gave the Court its bare majority in striking down the ordinance, but he concurred only in the judgment, not in the opinion of the majority.[41]

The four dissenting Justices filed three separate opinions

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[32] *Id.* at 499.

[33] *Id.* The Court listed numerous cases in support of the "private family realm," though none of the cases had specified any definitive boundaries of that realm. *Id.*

[34] *Id.*

[35] *Id.* at 499-500. East Cleveland had attempted to justify the ordinance as a measure designed to alleviate overcrowding and undue financial burdening of its school system. The Court ruled that the particular ordinance before the Court had but a tenuous relation to alleviation of those problems. *Id.*

[36] Lochner v. New York, 198 U.S. 45 (1904). *See* text accompanying notes 43-45 *infra*.

[37] The terminology is taken from Griswold v. Connecticut, 381 U.S. 479 (1964), wherein the Court refused to use *Lochner* as a guide. *Id.* at 482.

[38] "[T]here is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of the Court." Moore v. City of East Cleveland, 431 U.S. at 502.

[39] *Id.* at 503.

[40] *Id.* at 506 (Brennan, J., concurring).

[41] *Id.* at 513. (Stevens, J., concurring). Justice Stevens rested his opinion on procedural due process: "[T]here [does not] appear to be any justification for such a restriction on an owner's use of his property . . . . East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation." *Id.* at 520-21.

with varying reasons for their disagreement.[42]

II. THE CONFINES OF THE TWO-TIER ANALYSIS

A. *Development of and Difficulties with the Two-Tier Approach*

Around the turn of the century, a series of cases culminating in *Lochner v. New York*[43] had established a policy of judicial intervention on substantive due process grounds.[44] This policy, in reality a substitution of judicial notions of public policy for legislative choices, was gradually abandoned in the 1930's.[45] During the years of the Warren Court, however, intervention by the Court regained limited acceptance. This time, rather than relying on the due process clause, the Court began to use equal protection analysis in examining state legislation. Whenever a legislative classification impinged on a "fundamental right" or involved a "suspect classification," that legislation was subjected to strict scrutiny by the Court and was struck down unless the state could offer a compelling state interest to overcome its constitutional frailty. The list of fundamental rights and suspect classifications was finite,[46] but application of the high level of scrutiny was virtually always fatal.[47] Though never formally adopted by the Court,[48] the "two-tier" analysis, strict versus minimal scrutiny, became the standard of the Warren Court.[49]

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[42] Chief Justice Burger dissented on procedural grounds—Mrs. Moore's failure to exhaust her administrative remedies. *Id.* at 521. Justices Stewart and Rehnquist viewed *Belle Terre* as controlling on most issues, and they dissented primarily because of their belief that the Court possessed limited powers of intervention. *Id.* at 531-35. Justice White disagreed with the Court's use of substantive due process. *Id.* at 541.

[43] 198 U.S. 45 (1904).

[44] *See generally,* G. GUNTHER, CASES & MATERIALS ON CONSTITUTIONAL LAW 548-656 (1975).

[45] *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

[46] For a general list of fundamental rights, see note 15 *supra*. The most common suspect classifications triggering strict scrutiny are: Race, Loving v. Virginia, 388 U.S. 1 (1967); alienage, Graham v. Richardson, 403 U.S. 365 (1971), and Yick Wo v. Hopkins, 118 U.S. 356 (1886); and national origin, Oyama v. California, 332 U.S. 633 (1948).

[47] The one notable exception is Korematsu v. United States, 323 U.S. 214 (1944) (national security upheld as a compelling state interest for the confinement of Japanese during World War II).

[48] *See* Note, *Equal Protection: Modes of Analysis in the Burger Court,* 53 DEN. L.J. 687 n.1 (1976) [hereinafter cited as *Modes of Analysis in the Burger Court*].

[49] The approach of the Court in Shapiro v. Thompson, 394 U.S. 618 (1969), is illustrative of the two-tier analysis. In *Shapiro,* the Court invalidated three state laws which defined welfare benefits to persons not meeting the one-year residency requirement, stating:

Difficulties inherent in the two-tier system soon became apparent.[50] On the one hand, application of the two-tier approach seemed straightforward: Interference with a fundamental right or suspect class would not be tolerated, and the statute would be stricken; absent such interference, the statute would be upheld.[51] On the other hand, the enumerated fundamental rights were so imprecise that it was difficult to discern when legislation infringed on a fundamental right. Therefore, the Court was able to intervene freely and strike down statutes merely by spinning analogies to previously enumerated rights.[52] Dissatisfaction with the two-tier approach grew in the Supreme Court, expressed most vocally by Justice Marshall.[53]

The Burger Court seemed to move away from the rigidity of the two-tier system toward an intermediate standard of scrutiny. Some decisions of the early seventies marked an apparent change. In *Weber v. Aetna Casualty & Surety Co.*,[54] for example, the Court invalidated a Louisiana workman's compensation statute which denied recovery to an illegitimate child, stating: "[W]hen some statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . . The essential inquiry in all [these] cases is . . . : What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[55]

While a *Weber*-type approach was followed in a subsequent decision in the same year,[56] it was never accepted as a replace-

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> [W]e reject appellant's argument that a mere showing of a rational relationship between the waiting period and . . . permissible state objectives will suffice to justify the classification . . . [A]ppellees were exercising [their] constitutional right [to travel], and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

Id. at 634 (citations omitted).

[50] An exhaustive treatment of the "two-tier" approach and its vagaries is contained in Note, *Developments—Equal Protection*, 82 HARV. L. REV. 1065, 1123-24 (1969).

[51] *See* text accompanying notes 46-47 *supra*.

[52] *See* Gunther, *supra* note 12, at 10.

[53] *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 97-130 (1972) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520-21 (Marshall, J., dissenting).

[54] 406 U.S. 164 (1972).

[55] *Id.* at 172-73.

[56] Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

ment of the two-tier system. On the contrary, there were divergent views as to which standard the Court might apply in future cases. One commentator forecast the arrival of a "means-oriented" approach;[57] Justice Marshall advocated a "sliding-scale" approach.[58] But none of these was ever formally adopted by the Court.[59]

B. Belle Terre *and the Two-Tier Approach*

1. Background

In the absence of Supreme Court guidance in the zoning area,[60] courts addressing precisely the same issue—the extent to which a local zoning ordinance may interfere with the choice of household companions—handed down conflicting decisions using different constitutional rationales.[61]

A New Jersey court struck down a zoning ordinance with a restrictive definition of "family" on substantive due process grounds.[62] A federal court in Wisconsin struck down a similar statute using equal proteciion analysis and an intermediate standard of scrutiny.[63] An Illinois court ignored constitutional issues altogether, ruling that the legislature was not authorized to pass a zoning ordinance which regulated the internal composition of households.[64] And finally, a federal court in California upheld a restrictive definition of "family" after deciding that neither equal protection nor due process applied.[65]

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[57] Gunther, *supra* note 12, at 20-21.

[58] *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 98-99 (1972) (Marshall, J., dissenting).

[59] *See Modes of Analysis in the Burger Court*, *supra* note 48, at 716.

[60] *See* text accompanying notes 1-7 *supra*.

[61] *See, e.g.*, Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973). The dearth of Supreme Court zoning cases provided the judge with little guidance as to the Burger Court's approach to equal protection analysis. It was unclear whether minimum or strict scrutiny or some intermediate standard should be applied. *See* text accompanying notes 50-59 *supra*. His decision upholding the ordinance relied on similar state cases and his belief that the Burger Court had an intermediate standard of scrutiny—both were grounds for Supreme Court reversal. *See* text accompanying notes 9-21 *supra*.

[62] Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251-52, 281 A.2d 513, 518 (1971).

[63] Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974).

[64] City of Des Plaines v. Trottner, 34 Ill. 2d 432, 438, 216 N.E.2d 116, 120 (1966).

[65] Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

2. *Belle Terre*

The court of appeals opinion in *Belle Terre*[66] represented the Second Circuit's attempt to find the appropriate constitutional standard for examining restrictive definitions of family. The court's inquiry was limited to whether the zoning ordinance's unequal classification—allowing occupancy to more than two members of a traditional family while denying occupancy to a "voluntary" family—[67] violated the equal protection clause.

After deciding that the traditional "fundamental" rights were not affected and therefore strict scrutiny was inappropriate,[68] the court ruled that it was not limited by the rigidity of the two-tier formula: "[T]he Supreme Court appears to have moved from this rigid dichotomy . . . toward a more flexible and equitable approach . . . . Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute."[69] This ordinance had the purpose and effect of compelling Belle Terre residents to conform to the community's prevailing social preferences; as such, the ordinance had no relevance to the public health, safety, or welfare, and was thus invalid.[70]

The Supreme Court's reversal of the court of appeals had a two-fold effect. First, the Court did what the court of appeals said was not possible: It justified the restrictive ordinance under the traditional zoning objectives.[71] The Supreme Court expanded the concept of the general welfare to include the power to promote family values.[72]

Second, *Belle Terre* confirmed the application of the "two-tier" approach in zoning cases, and rejected the court of appeals'

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[66] Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973).

[67] *Id.* at 812.

[68] *Id.* at 813-14. The court acknowledged that the rights of privacy, association, and travel asserted by the plaintiffs were important, but that they did not "fit snugly" into any of the Supreme Court's previously recognized categories of fundamental rights. *Id.* at 814.

[69] *Id.* at 814 (footnotes omitted).

[70] *Id.* at 815.

[71] *See* Note, *The Entrenchment of the Traditional Family Structure*, 13 J. FAM. L. 901, 905 (1973-74).

[72] *Belle Terre*, 416 U.S. at 9. *See also* Note, Village of Belle Terre v. Boraas—*A Reaffirmation & Strengthening of the Police Power*, 4 CAP. U.L. REV. 157, 164 (1974) [hereinafter cited as *Strengthening of the Police Power*].

choice of an intermediate, flexible level of scrutiny.[73] Justice Douglas' review was brief and conclusive: No fundamental rights were involved, nor was the ordinance aimed at transients.[74] Such a restrictive definition of family was permissible within the exercise of the police power.[75] In short, strict scrutiny would be applied only to ordinances infringing on previously enumerated fundamental rights, and these rights would be strictly construed; minimal scrutiny would be the standard for all other ordinances.

III. *Moore:* RESPONDING TO *Belle Terre*

The inflexibility of the "two-tier" approach, specifically adopted in the zoning area by the Supreme Court, became apparent in *Moore.* The injustice of an ordinance which "makes a crime of a grandmother's choice to live with her grandson"[76] was clear enough, but the Court had confined itself to an either-or choice: Either find a fundamental right triggering strict scrutiny and force the government to show a compelling state interest justifying the ordinance, or allow the injustice to remain after a minimal amount of scrutiny.

Belle Terre had established a strong precedent, the application of minimum scrutiny of zoning cases. In *Moore,* the Supreme Court was forced to use two techniques to circumvent the constraints of its earlier decision. First, the Court avoided equal protection altogether, resting its decision within the contours of substantive due process.[77] The Court offered no explanation for its choice of due process instead of equal protection, but it seemed to take comfort in the imprecision of the due process clause itself. The Court quoted at length from Justice Harlan's dissent in *Poe v. Ullman,*[78] including:

> [T]he full scope of the liberty guaranteed by the Due Process Clause 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 recognizes what a reasonable and sensitive judgment must, that certain interests require

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[73] *See Strengthening of the Police Power, supra* note 72, at 164.

[74] 416 U.S. at 7-8.

[75] *See* text accompanying notes 16-17 *supra.*

[76] Moore v. City of East Cleveland, 431 U.S. at 499.

[77] *Id.* at 496 n.3.

[78] 367 U.S. 497 (1961) (Harlan, J., dissenting).

> particularly careful scrutiny of the state needs asserted to justify their abridgment.[79]

The Court recognized that its decision marked a reentry into the treacherous field of substantive due process,[80] but the Court's hesitance would not override its duty to strike down an arbitrary cutting off of protected family rights.[81]

A second and more significant way that the Court avoided its *Belle Terre* reasoning was by creating a new fundamental right, the right of family for related individuals.[82] Plaintiffs in *Belle Terre* had unsuccessfully claimed that the Village's ordinance infringed on their fundamental right of privacy, association, and travel.[83] For the Supreme Court in *Moore* to return to any of these rights as a means of invoking strict scrutiny would have been difficult without overruling, or at least emasculating *Belle Terre.*

Though it is too early to forecast the effect of the Court's resurrection of substantive due process, the Court's creation of a new fundamental right is likely to have several immediate and possibly profound consequences. Specifically, two issues have been raised by *Moore:* First, how can local zoning authorities reconcile the two Supreme Court holdings, *Moore* and *Belle Terre,* in drafting future single-family ordinances? And second, what are the perimeters of the newly established right of family?

A. *Reconciliation*

At first blush, reconciliation of the two decisions seems fairly straightforward. Justice Powell's majority opinion saw *Belle Terre* as distinguishable from *Moore.*[84] The *Belle Terre* ordinance made a clear cut and reasonable distinction between related and unrelated people, and it purported to promote "family needs" and "family values."[85] East Cleveland's ordinance on the other hand, made no such rational distinction; the city's scheme arbitrarily "selects certain categories of relatives who may live together and declares that others may not."[86]

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[79] *Id.* at 542-43, quoted in Moore v. City of East Cleveland, 431 U.S. at 499.
[80] *See* text accompanying notes 47-50 *supra.*
[81] 431 U.S. at 502.
[82] *See* text accompanying notes 36-38 *supra.*
[83] *See* text accompanying note 74 *supra.*
[84] 431 U.S. at 498.
[85] Village of Belle Terre v. Boraas, 416 U.S. at 9.
[86] Moore v. City of East Cleveland, 431 U.S. at 498-99.

The distinction between the two cases was clear especially in light of the different plaintiffs in each case: Six college students with no familial ties in *Belle Terre;*[87] a grandmother separated from her orphaned grandchild in *Moore.*[88] The clarity of the related-unrelated distinction begins to fade, however, when the contrast between potential plaintiffs is not so extreme. Justice Marshall summarized the possibly absurd results under a blood-relation requirement, questioning the validity of an ordinance which "permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household," but which limits "the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home."[89]

The majority opinion's failing in *Moore* is that it gives no guidance to the lower courts for future cases. If the related-unrelated test is carried to its extreme, a single-family ordinance might limit the number of unrelated individuals to one person.[90] At the other extreme, *Moore* might be interpreted to mean that municipalities may place no limits whatsoever on the number of related individuals, thus defeating the traditional purposes of zoning.[91]

Three other views offered by the Justices in *Moore* further confuse future applications of both *Moore* and *Belle Terre.*

Justice Brennan's concurring opinion perceived *Belle Terre* as supportive of the Court's holding rather than distinguishable from it.[92] The *Belle Terre* ordinance had extended protection to all related people; the Village knew it was powerless to interfere with families of related individuals. East Cleveland had extended protection only to nuclear families despite the existence of "extended" families, especially among blacks.[93] As such, the ordi-

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[87] Village of Belle Terre v. Boraas, 416 U.S. at 2.

[88] Moore v. City of East Cleveland, 431 U.S. at 496-97.

[89] Village of Belle Terre v. Boraas, 416 U.S. at 16 (Marshall, J., dissenting).

[90] *But see* Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[91] *See* note 35 *supra.* The obvious extension of the Court's holding is that no legislation may interfere with the family, no matter now large the family is, how many cars the family possesses, or how many children from the family enter the school system. *See, e.g.,* Riverside v. Reagan, 270 Ill. App. 355 (1933) (eighteen related individuals *held* to be a single family).

[92] 431 U.S. 494, 511 (Brennan, J., concurring).

[93] *Id.* at 508-510.

nance represented an "imposition by government upon the rest of us of white suburbia's preference in patterns of family living."[94]

Justice Brennan's view of *Belle Terre* suffers the same weakness that the majority view does: Under the *Moore-Belle Terre* combination, a city is powerless to regulate the number of people allowed in single-family dewellings if they are related, but the city may regulate the lifestyle choices of unrelated individuals, with no apparent limitations.

Justice Stevens, concurring only in the judgment, offered a third view of *Belle Terre.*[95] His actual interpretation of *Belle Terre* is contained only in a footnote,[96] and it is far from clear what significance he attached to *Belle Terre* as precedent. Justice Stevens stated that ordinances regulating the internal composition of households, like the Belle Terre ordinance, were permissible only if aimed at preventing transiency,[97] despite the fact that his predecessor Justice Douglas specifically ruled that the ordinance was *not* aimed at transients.[98] Justice Stevens' interpretation of *Belle Terre* can mean only that he would have decided *Belle Terre* differently if the city had been unable to prove the effectiveness of its ordinance in preventing transiency. Justice Stevens' basic premise was that a property owner, not the city, has a fundamental right to decide who may reside on the property.[99]

The fourth and final interpretation of *Belle Terre* is contained in Justice Stewart's dissent.[100] Justice Stewart described *Belle Terre* as controlling on Mrs. Moore's claimed rights of association and "privacy of the home."[101] While he recognized the distinction between related and unrelated persons, Justice Stewart stated that the mere existence of ties of kinship did not give related persons constitutional protection superior to that given to unrelated persons.[102] Like the other views of *Belle Terre,* Justice Stewart's opinion offers little guidance as to what extent future zoning ordinances may regulate the internal composition of households.

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[94] *Id.* at 508.
[95] *Id.* at 513 (Stevens, J., concurring).
[96] *Id.* at 519 n.15.
[97] *Id.* at 519.
[98] Village of Belle Terre v. Boraas, 416 U.S. at 7.
[99] Moore v. City of East Cleveland, 431 U.S. at 513-14.
[100] *Id.* at 531 (Stewart, J., dissenting).
[101] *Id.* at 535.
[102] *Id.*

Thus, *Moore* presented four disparate views of *Belle Terre*. Reconciliation of the two cases by local authorities and their subsequent application may prove difficult. Taken to extremes, *Belle Terre* would allow the exclusion of all unrelated individuals, while *Moore* would not allow any numerical limitation on related individuals. Should the Court now decide to step out of the zoning arena, as it did for fifty years after *Euclid*,[103] forcing the states to determine what *Belle Terre* and *Moore* really mean, confusion may be the end result.

B. *The Perimeters of the Family Right*

Zoning laws encompass a great variety of definitions of family.[104] The fact that zoning laws should be concerned with families at all is somewhat paradoxical, since zoning was originally upheld as a means of regulating uses of land[105] without regard to *who* uses the land or in what manner.[106]

Municipal definitions of "family" became inevitable when zoning ordinances began to set aside certain zones for single-family dewellings. Having upheld the power to zone, the Supreme Court initially declined to enter the definitional controversies that arose in lower courts.[107] The Supreme Court intervened only when local governments began to differ on the extent to which they could regulate who constituted a single "family" under their ordinances.

The decision in *Moore* represents the second step of the Supreme Court's review of permissible "families" which it began three years earlier in *Belle Terre*. Though the *Moore* majority attempted to distinguish the prior case, *Moore* is really a corollary to the *Belle Terre* holding: Zoning to *protect* the family and

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[103] 272 U.S. 365 (1926). *See* text accompanying notes 1-7 *supra*.

[104] *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) ("family" defined as two unrelated people or more than two people related by blood, marriage, or adoption); Neptune Park Ass'n v. Steinberg, 138 Conn. 357, 84 A.2d 687 (1951) ("family" defined as a single housekeeping unit); People v. Skidmore, 69 Misc. 2d 320, 329 N.Y.S.2d 881 (1971) ("family" defined as one or more persons occupying a unit as a non-profit housekeeping unit).

[105] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[106] *See* text accompanying notes 1-7 *supra*.

[107] After *Euclid* and *Nectow*, *see* text accompanying notes 1-7 *supra*, the Court specifically denied certiorari on several occasions. *See* Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *cert. denied*, 344 U.S. 919 (1953); Stover v. New York, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *cert. denied*, 375 U.S. 42 (1963).

"family values" is permissible,[108] but zoning which *interferes* with the family in any way must be striken.

1. Interpreting *Moore*'s "Family"

Taken at face value, the Supreme Court's holding in *Moore* is very simple. Courts will not tolerate any ordinance which limits the right of a family to reside in a single-family dwelling: "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[109] The Supreme Court never defined the scope of this family right, but it did rely on prior decisions in holding that the American tradition includes "uncles, aunts, cousins and especially grandparents sharing a household along with parents and children . . . ."[110]

Interpreting *Moore* in its broadest application, however, would cause several difficulties. First of all, interpreted literally, *Moore* took away the discretionary zoning power in defining the family the Court originally awarded in *Euclid.* Traditionally, the zoning power has been used to control population density and traffic and noise levels,[111] but that power was effectively curtailed by *Moore:* Families, those related by blood, marriage, or adoption, may live together no matter how many family members, how many automobiles are owned, and how much they disturb the neighborhood.[112] Related groups of eighteen or more are not inconceivable if the house can accommodate them.[113]

Second, using *Belle Terre* and *Moore,* local governments may define "family" in such a way as to legalize the social preferences of its residents. For example, a municipality may wish to develop a community without hippies, communes, or any unrelated people living together without benefit of marriage. Zoning ordinances

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[108] Village of Belle Terre v. Boraas, 416 U.S. at 9. The Belle Terre ordinance did allow two unrelated people to live together, however. Justice Douglas does not explain the correlation between "family values" and unmarried couples living together.

[109] 431 U.S. at 499.

[110] *Id.* at 504.

[111] *See generally* J. BEUSCHER, R. WRIGHT, & M. GITELMAN, CASES & MATERIALS ON LAND USE 500-29 (2d ed. 1976); Note, *The Entrenchment of the Traditional Family Structure,* 13 J. FAM. L. 901, 904 (1973-1974).

[112] Presumably, local health regulations and nuisance laws will still be available to control excesses, but the zoning tool is eliminated as to related groups.

[113] *See* note 91 *supra.*

defining "family" as only those related by blood, marriage, or adoption exclude these disfavored groups without regard to the traditional purposes of zoning, minimizing traffic and noise and protecting the environment for children.[114] In effect, zoning becomes an instrument for social control, even though it was never intended to be a means of excluding undesirables.[115]

Until the intended scope of *Moore* is clarified by the Supreme Court, local authorities will have to continue their attempts to regulate single-family districts by formulating various alternatives to the restrictive scheme struck down in *Moore*.

2. Supreme Court Oversight: The Power to Regulate People

Proper drafting of zoning ordinances requires the enacting muncipality to carefully formulate its objectives. If a city's sole object is preservation of the traditional family, those related by blood, marriage, or adoption, *Belle Terre* and *Moore* give planners the requisite judicial guidelines: A zoning ordinance may be drafted in furtherance of "family needs" and "family values,"[116] but "family" must include all blood relatives rather than the so-called nuclear family.[117]

If, however, municipalities wish to achieve other, more traditional zoning objectives, such as prevention of overcrowding and traffic congestion[118] or preservation of neighborhood character and property values,[119] restrictive definitions of "family" do little or nothing to further these aims.[120] On the contrary, such regula-

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[114] *Euclid*, 272 U.S. 365, 394 (1926).

[115] Note, *No Dogs, Cats or Voluntary Families Allowed*, 24 DEPAUL L. REV. 784, 795 (1975); Note, *An Extension of the State's Police Power: The Protection of Family Values Through Zoning Legislation*, 21 LOY. L. REV. 243, 247 (1975); Comment, 50 WASH. L. REV. 421, 435 (1975).

[116] Village of Belle Terre v. Boraas, 416 U.S. at 9.

[117] Moore v. City of East Cleveland, 431 U.S. at 504-06.

[118] *See* text accompanying note 35 *supra*.

[119] See Timberlake v. Kenkel, 369 F. Supp. 456, 458 (E.D. Wis. 1974).

[120] The Court in *Moore* recognized that the East Cleveland definition did little to further its supposed aims:

> For example, the ordinance permits any family consisting only of a husband, wife, and unmarried children to live together, even if the family contains a half-dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation.

431 U.S. at 500. Three years earlier, Justice Marshall made a similar point about the marginal utility of Belle Terre's ordinance. *See* text accompanying note 89 *supra*.

tions serve no purpose except to interfere with a property owner's "right to use her own property as she sees fit."[121]

The basic failing of both East Cleveland and Belle Terre is that in drafting their respective ordinances, they attempted to determine *who* might use their single-family dwellings. Rather, the two cities should have looked to see if restrictive definitions of "family" bore any relation to reduction of overcrowding or preservation of property values.[122] Quite simply, these ends cannot be achieved by prohibiting a grandmother from living with her grandchild[123] or prohibiting more than two unrelated people from living together.[124] By focusing on who might occupy a single residence, the two municipalities lost sight of zoning's proper function, regulating the use of land for residential dwellings. A brief overview of zoning development demonstrates how this failing came about.

Zoning began very simply. *Euclid*[125] held that a local government had the power to classify the use of land into three categories, residential, commercial, and industrial. Each of the three classifications was broken down further as zoning became more complex. Residential zones were subclassified into single-family and multi-family uses, but the city's power to regulate was still limited: It could regulate how a landowner used his property in relation to his neighbors, but it could not regulate the identity of those who used the property. When local governments began to define "family," however, the Euclidean emphasis on land *use* was subtly but definitely overthrown. *Belle Terre* represents more than Supreme Court ratification of the local power to set single-family zones; it represents judicial approval of the local power to regulate the identity of those who use the land.

Moore is the first and to date the only limitation on that power. But, far more significantly, *Moore* is a second lost opportunity to recognize and possibly reverse the changeover from land-use to "people-use." Until the Supreme Court recognizes the possible implications of the state's regulating the internal compo-

[121] Moore v. City of East Cleveland, 431 U.S. at 513 (Stevens, J., concurring).

[122] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), first enunciated a rational relationship test in zoning. *Id.* at 395.

[123] Moore v. City of East Cleveland, 431 U.S. at 499.

[124] Village of Belle Terre v. Boraas, 416 U.S. at 16 (Marshall, J., dissenting).

[125] 272 U.S. 365 (1926).

sition of households, local authorities can presumably exclude "undesirables"[126] from their neighborhoods and justify the exclusion under *Belle Terre* and *Moore*. As Justice Marshall concluded three years ago:

> Zoning officials properly concern themselves with uses of the land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.[127]

The *Euclid* power to govern land use was never intended to validate the regulation of individual lifestyle choices.[128] The courts and municipalities must recognize the growth of and the need for limits on the power to regulate people.

CONCLUSION

The development of zoning law from *Euclid* and *Nectow* to *Belle Terre* and *Moore* has brought with it a subtle but important new zoning power. Not only do localities have the power to regulate uses on the land; they have also acquired the power to regulate the people who use the land. Unfortunately, the Supreme Court has failed to address the evolution of this new power, attempting to evaluate the scope of that power with respect to traditional objectives the old power was supposed to achieve. The result of this failure is that the Court has upheld zoning ordinances which determine the internal composition of households without ever questioning the purpose of such regulation.

Recognition that there must be limitations on the power to govern the composition of households is the first step toward reversing the trend. Local governments must have the power to control use of the land, but that power should not be expansively construed to allow control of who uses the land or in what manner.

Belle Terre and *Moore* must be reanalyzed. The power to decide whether a piece of property may be used for residential,

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[126] *See* text accompanying note 115 *supra*.

[127] Village of Belle Terre v. Boraas, 416 U.S. at 14-15 (Marshall, J., dissenting).

[128] Note, *An Extension of the State's Police Power: The Protection of Family Values Through Zoning Legislation*, 21 LOY. L. REV. 243, 247 (1975).

commercial, or industrial purposes belongs to the state. The power to decide who resides on a piece of residential property properly belongs—and must be returned—to the property owner.

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