MOORE v. CITY OF EAST CLEVELAND: PRESERVING ENDANGERED FAMILIES

For more than half a century the Supreme Court has wrestled with the problem of appropriate guidelines for applying substantive due process. In recent years, the Court has increasingly relied on history and tradition for guidance, rather than explicit constitutional directives. *Moore v. City of East Cleveland*[1] is the Court's latest attempt to reach a solution to this problem. *Moore* involved a grandmother who was the head of a household that included her son and two grandsons, who were first cousins.[2] The city's housing ordinance[3] limited Moore's dwelling to single-family occupancy,[4] and defined "family" so as to exclude Moore's extended family.[5] The city in-

1. 431 U.S. 494 (1977).

2. *Id.* at 496-97, 497 n.4. Inez Moore lived with her son, Dale Moore, Sr., and her grandsons, Dale Moore, Jr. and John Moore, Jr. There is some dispute as to whether John, Jr.'s father was a member of the household. The Court felt that, had John Moore, Sr. been present, his presence would have constituted an additional violation. Since the violation listed only John, Jr., the Court commented on only that particular living arrangement.

3. While *Moore v. City of East Cleveland* involved a municipal housing ordinance, other attempts to define the family in relation to land management have involved zoning laws. For purposes relevant to the issues in *Moore*, this difference is unimportant. Three years prior to *Moore*, the Court faced similar problems in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), which involved a municipal zoning ordinance. Justice Powell, the author of the plurality opinion in *Moore*, placed both cases in a general "land-use" category and distinguished them on the grounds that the Belle Terre ordinance governed unrelated individuals, while the East Cleveland ordinance interfered with the traditional family.

4. EAST CLEVELAND, OHIO, HOUSING CODE § 1351.02 (1966).

5. The East Cleveland ordinance provides:

> "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:
>
> (a) Husband or wife of the nominal head of the household.
>
> (b) Unmarried children of the nominal head of the household or of 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.

formed Moore that one grandson was an illegal occupant and would have to be removed. Her failure to comply with these demands resulted in a criminal prosecution for violation of the ordinance.[6] Moore, appealing the conviction, claimed that the ordinance represented an unconstitutional violation of her freedom of association and right of privacy,[7] but the decision was upheld by both the Court of Appeals[8] and the Ohio Supreme Court.[9] The United States Supreme Court overturned the conviction on the grounds that prior decisions by the Court recognized that the family institution deserved strong constitutional protection.[10] Justice Powell, writing for a plurality of the Court,[11] concluded that when a law infringes on the family

(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 per cent 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, HOUSING CODE § 1341.08 (1966).

6. The ordinance provided for imprisonment of up to six months and a fine of up to $1,000 for violation of any provisions of the housing code. Each daily violation of the ordinance could be considered a separate offense. EAST CLEVELAND, OHIO, HOUSING CODE § 1345.99 (1966).

7. Brief for Appellant at 21, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

8. Ohio's Eighth Circuit Court of Appeals concluded that the East Cleveland ordinance was not in violation of the equal protection clause, ignoring Moore's substantive due process argument. The lone dissent from the three member panel found an equal protection violation, believing the ordinance to be arbitrary and unreasonable. Moore v. City of East Cleveland, No. 33888 (Ct. App. Ohio, July 18, 1975).

9. The Ohio Supreme Court affirmed the decision by the Court of Appeals on the grounds that no substantial constitutional question existed. The court did not elaborate on its holding. Brief for Appellant at Appendix A, p. la, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

10. Justice Powell cited past decisions that recognized the protection of rights surrounding childbearing, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); parental custody and companionship, Stanley v. Illinois, 405 U.S. 645 (1972); and child raising, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Justice Powell concluded that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the fourteenth amendment's due process clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." Moore v. City of East Cleveland, 431 U.S. 494, 500-01 (1977).

11. *Moore* evoked six different opinions from the nine voting Justices. Justice

decisionmaking process by regulating permissible living arrangements, the Court will no longer defer to legislative decisions.[12]

The Supreme Court views freedom of choice in the area of family interests as a liberty protected by the due process clause of the fourteenth amendment.[13] This principle originated in *Meyer v. Nebraska*,[14] where the Court acknowledged that liberty is more than just "freedom from bodily restraint,"[15] and includes many other aspects of life such as the right "to marry [and to] establish a home."[16] Since *Meyer*, the Court explicitly stated that there is a "private realm of family life which the state cannot enter"[17] and, through substantive due process, protected many rights surrounding the family relationship.[18] The Court's renewed use of substantive due process in

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Powell's plurality opinion was joined by Justices Brennan, Marshall and Blackmun. Concurring opinions were written by Justice Brennan and Justice Stevens. Justices Burger, Stewart, Rehnquist and White dissented in separate opinions. For the purposes of this Comment, only the opinions of Justices Powell, Stewart and White will be discussed in any detail.

Justice Brennan's opinion focused on socioeconomic factors surrounding the extended family. 431 U.S. at 506-13. Justice Stevens approached the issue from the basis of property rights, concluding that the right of an owner to determine who may reside on his property is a fundamental right of property ownership. *Id.* at 513-21. Chief Justice Burger refused to reach the constitutional issue, stating that Moore lacked standing since all administrative variance procedures had not been exhausted. *Id.* at 521-31.

12. *Id.* at 499.

13. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). *See* notes 17-18 *infra*.

14. 262 U.S. 390 (1923).

15. *Id.* at 399.

16. *Id.* In *Meyer*, a state law prohibited any teacher from teaching a modern language other than English. The Court held that the law invaded a liberty guaranteed under the fourteenth amendment. The Court conceded that the state has broad power to improve its citizens' lives, but ruled that the individual has certain inviolable fundamental rights. *Id.* at 401.

17. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Court in *Prince*, however, failed to explicitly delineate the "private realm of family life." *Prince* involved an extended family relationship between an aunt and her niece, a living arrangement that would have been allowed under the East Cleveland ordinance. *See* note 5 and accompanying text *supra*.

18. Roe v. Wade, 410 U.S. 113 (1973) (right of a woman to terminate her pregnancy); Stanley v. Illinois, 405 U.S. 645 (1972) (right of an unwed father to raise his illegitimate child); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right of procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to control their child's eduction).

this context, however, continued old debates[19] that many believed were resolved when the Court stated that it would not sit as a "super legislature to weigh the wisdom of legislation."[20]

Substantive due process blends several constitutional elements to produce a limitation on governmental authority.[21] The main thrust of the doctrine limits the power of state legislatures to curtail a person's liberty and property rights.[22] The Supreme Court, however, traditionally defers to those legislative actions that represent a valid application of the state's police power and do not invade any fundamental rights.[23]

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19. *See* notes 32-35 and accompanying text *infra*. One commentator states that "this untenable line of decisions came to a precipitant halt during the New Deal Years. In one field after another—labor law, price control, taxation—the law turned 180 degrees. Substantive due process, which had once threatened vast areas of social and economic legislation, became a 'last resort of constitutional arguments.'" Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867, 871 (1974) (citing Buck v. Bell, 274 U.S. 200, 208 (1927)).

20. Day-Brite Lighting Co. v. Missouri, 342 U.S. 421, 423 (1952). The Court reaffirmed this notion when it stated it would not return to a time when the due process clause was used "to strike down state laws, regulatory of business and industrial conditions, because . . . the challenged statute may be unwise, improvident, or out of harmony with a particular school of thought." Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963). *See* note 23 *infra*.

21. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411-12 (1974). Substantive due process may be viewed as a reflection of the philosophies of Locke, Blackstone, and Rousseau, involving "the original equality and independence of the individual, the sovereignty of the people . . ., limited government by consent of the governed for purposes determined by them, and rights retained under the government." *Id.* at 1412. *See generally* Dixon, *New Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BRIGHAM YOUNG U. L. REV. 43; Landynski, *Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire?"* 2 HOFSTRA L. REV. 1 (1974).

22. Henkin, *Privacy and Automony*, 74 COLUM. L. REV. 1410, 1412 (1974).

23. One of the first cases noting the existence of fundamental rights was Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), where the Court found a hierarchy among various rights. In dealing with the topic of privileges and immunities, Justice Washington in *Corfield* stated:

> We [the Court] feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states. . . . What these fundamental principles are, it would perhaps be more tedious than difficult to emumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may prescribe for the general good of the whole.

Id. at 551. *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of privacy); Sha-

Although the Court recognizes that fundamental rights deserve increased protection, it has never explicitly defined what constitutes a "fundamental right." Instead, it has simply described them as rights that are "implicit in the concept of ordered liberty,"[24] or as "principles of justice so deeply rooted in the traditions and conscience of our people"[25] that they deserve particular protection.

A fundamental right is not entirely immune from legislative infringement.[26] A statute that regulates in a "sensitive area of liberty"[27] is subject to strict judicial scrutiny. It will be upheld if it fulfills a compelling state interest.[28] In determining whether a state interest is "compelling" the Court demands a valid relationship between the statutory means and the legislative goal, and makes a subjective determination as to the appropriateness of the enactment.[29]

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piro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); NAACP v. Button, 371 U.S. 415 (1963) (right of access to the courts); NAACP v. Alabama, 357 U.S. 449 (1958) (right of association); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

24. Palko v. Connecticut, 302 U.S. 319 (1937). The Court stated:

> In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments [e.g., 1st, 6th] have been found to be implicit in the concept of ordered liberty, and thus, through the fourteenth amendment, became valid as against the States.

Id. at 324-25.

25. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The most vague, yet perhaps most accurate, description defines a fundamental right simply as an interest "explicitly or implicitly guaranteed by the Constitution. . . ." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See generally* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

26. Note, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 639-40 (1973). This concept is an accepted constitutional doctrine. Justice Goldberg noted that " '[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. Little Rock, 361 U.S. 516, 524 (1966). The law must be shown 'necessary and not merely rationally related to the accomplishment of a permissible state policy.' McLaughlin v. Florida, 379 U.S. 184, 196 (1964)." Griswold v. Connecticut, 381 U.S. 479, 497 (1975) (Goldberg, J., concurring). Justice Blackmun reiterated this concept in *Roe v. Wade* when he stated "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake." Roe v. Wade, 410 U.S. 113, 155 (1973).

27. Griswold v. Connecticut, 381 U.S. 479, 503-04 (1965) (White, J., concurring). *See* Note, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 639-40 (1973).

28. Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

29. Part of the subjective determination is an evaluation of the enactment in light

The Court's application of substantive due process is often a source of conflict,[30] generally because there are no specific guidelines for determining which rights are fundamental and which interests are compelling. At times the Court looks no further than specific provisions of the Bill of Rights to determine fundamental rights.[31] Various Justices of the Court, however, embrace the position that the fourteenth amendment liberty is "more than that which is enumerated in the Bill of Rights."[32] In recent years, the Court applied a more subjective test, looking to the nation's history and tradition for guidance.[33]

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of the court's notion of morality and decency. *See* Note, *Roe and Doe: Does Privacy Have a Principle?* 26 STAN. L. REV. 1161 (1974).

30. Judicial concern for the lack of proper guidance in the application of substantive due process has its source in the decisions following Lochner v. New York, 198 U.S. 45 (1905). This was a period in which the Court relied on American history and traditions to provide guidance for their decisions. Although the primary targets of the Court's substantive due process decisions were business, labor and price regulations, the application of the doctrine was not exclusively limited to those areas. Two of the most notable exceptions were Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

The decisions of Palko v. Connecticut, 302 U.S. 319 (1937) and Adamson v. California, 332 U.S. 46 (1947), triggered a renewal of the debate of what guidelines the Court should employ. *See generally* Landynski, *Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire?"* 2 HOFSTRA L. REV. 1 (1974); Note, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628 (1973).

31. Proponents of this method of decisionmaking have held that the Bill of Rights is applicable to the states through the fourteenth amendment, and that the Court is thereby limited to the first eight amendments for sources of fundamental rights. Historically, Justice Black is associated with this position, recognizing the existence of substantive due process in the fourteenth amendment but refusing to extend the doctrine beyond the specific provisions of the Bill of Rights. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 247 (1965). Justice Black's opposition to the use of "natural law" as the basis for decisionmaking reflected his fear that such a method would allow the Justices to "roam at will in the limitless area of their own beliefs as to reasonableness, and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 601 n.4 (1942) (Black, Douglas and Murphy, J.J., concurring). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Loving v. Virginia, 388 U.S. 1 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923).

32. Roe v. Wade, 410 U.S. 113, 172-73 (1973).

33. Justice Harlan is recognized as the major spokesman for this position on the modern Court. In Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Harlan stated that judicial restraint in the area of substantive due process was best "achieved . . . only by continual insistence upon respect for the teachings of history. . . ." *Id.* at 501. Opponents of this natural law concept of due process have feared that the approach would lead to "unprincipled" judicial decisionmaking. *See generally*

This subjective test allows the Court great discretion in classifying certain rights as fundamental.

The opinions in *Moore* illustrate both sides of this conflict. Justice Powell and a plurality of the Court applied a natural law concept to the facts, treating the family right as fundamental.[34] While the Constitution does not explicitly protect the familial relationship,[35] Justice Powell noted that decisions beginning with *Meyer*[36] continually extended judicial protection to the family.[37]

Justices White[38] and Stewart,[39] in dissent, advocated a traditional approach, seeking explicit constitutional directives for substantive due process cases.[40] While the two dissents agreed upon the methods that should be used in the decisionmaking process,[41] they differed in their resolution of whether Moore's specific interest warranted pro-

Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867 (1974); Landynski, *Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire?"* 2 HOFSTRA L. REV. (1974). *See also* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 601 n.4 (1942).

34. *See* note 10 *supra*.

35. *See* notes 32-33 *supra*.

36. 262 U.S. 390 (1923).

37. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). This interpretation is not a new judicial concept. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court recognized that parents were superior to all other groups in rearing their children. The Court based its decision on the "strong tradition" of these parental rights in the "history and culture of western civilization." *Id.* at 232. The result of this judicial recognition of the "family" as a protectible interest is increased judicial scrutiny of laws affecting the family. *See* Griswold v. Connecticut, 381 U.S. 479, 503-04 (1965) (White, J., dissenting). *See also* Note, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 639-40 (1973).

38. Moore v. City of East Cleveland, 431 U.S. 494, 541 (1977) (White, J., dissenting).

39. Moore v. City of East Cleveland, 431 U.S. 494, 531 (1977) (Stewart, J., with Rehnquist, J., dissenting).

40. *Id.* at 544. Justice White cited past statements of Justice Black regarding due process adjudication. Justice Black felt that all substantive due process decisions not based on explicit constitutional provisions were questionable. This includes many accepted decisions such as Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). Justice White felt that the Court should not overrule these past decisions, but did feel that substantive due process should not be used to invalidate *any* law the Court considered unreasonable. *Id.* at 543-44. *See* note 33 *supra*.

41. Both Justices recognized the existence of a hierarchy of protectible rights. *See* note 25 *supra*. This interest calls for greater protection of some interests over others.

tection under the due process clause. Stewart felt that only those rights "implicit in the concept of ordered liberty"[42] deserved protection.[43] In Justice Stewart's opinion, the right to share common living arrangements did not fall within the concept of a fundamental right[44] and could not be equated with the right to marry[45] or terminate pregnancy.[46] Justice White, while recognizing a valid liberty interest in Moore's situation, believed the issue turned on whether this liberty interest merited increased protection.[47] He concluded that Moore's liberty interest in residing with her extended family did not warrant strict judicial scrutiny;[48] due process is satisfied when a housing ordinance is both legitimately enacted and not arbitrary in purpose.[49]

42. *Id.* at 531, *citing* Palko v. Connecticut, 302 U.S. 319 (1937).

43. *Id.*

44. *Id.* Justice Stewart based his decision on Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). While Justice Stewart recognized that *Belle Terre* concerned unrelated individuals, he concluded that the case turned on a general right to privacy in the home rather on a specific living arrangement. *Id.* at 536. Although *Moore* involves the specific right of a grandmother to live with her grandchildren, *Belle Terre*'s holding that there is no explicit right to live with whomever one pleases is directly applicable to the facts in *Moore*. *Id.* at 535. Justice Stewart questioned why consanguinity should elevate one group above another.

45. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("marriage is one of the basic civil rights of man, fundamental to our very existence and survival," and is protected under the due process clause).

46. Moore v. City of East Cleveland, 431 U.S. 494, 536 n.54 & 55.

47. *Id.* at 546-47 (White, J., dissenting). Justice White cited Justice Douglas' remarks in Poe v. Ullman, 367 U.S. 497 (1961), where Justice Douglas stated that "the trouble with the holding of the old Court was not in its definition of liberty but in its definitions of the protection guaranteed to that liberty." *Id.* at 517. Justice White agreed with Justice Powell that Moore showed a liberty interest. Justice White, however, drew the issue more narrowly than did Justice Powell and was only willing to examine the liberty interest of a grandmother's right to live with two sets of grandchildren in her home. 431 U.S. 494, 546-47.

48. 431 U.S. at 549. After Justice White established that Moore showed a liberty interest, he considered the degree of protection required to protect that interest, concluding that the liberty interest deserved only the most basic due process protections. Thus, the Court should not apply the more stringent strict scrutiny examination of the challenged legislation. *Id.* at 549-50.

49. *Id.* at 550-51. Justice White concluded his remarks by examining the ordinance within a zoning framework. He noted that four generations could legally be represented in one household under the East Cleveland ordinance, and that if circumstances prevented a family from qualifying for residency under the statutory definition, the family was free to move to another suburb. If the city had the power and the desire to maintain a single-family lifestyle in a particular subdivision, Justice White felt it must be given sufficient authority to accomplish the goal. This would include the power to define the family. *Id.*

While the Supreme Court approached *Moore* from a substantive due process analysis, the lower courts[50] reached a contrary result by applying the equal protection clause as construed in *Village of Belle Terre v. Boraas*.[51] These lower court decisions are not surprising in light of prior Supreme Court rulings concerning zoning[52] and living arrangements[53] invoking the "lower tier" equal protection test.[54]

50. *See* note 8 *supra*.

51. 416 U.S. 1 (1974). The City of East Cleveland relied extensively on *Belle Terre* in preparing its brief. Brief for Appellee, Moore v. City of East Cleveland, 431 U.S. 494 (1977). *Belle Terre* involved both zoning and family definition disputes. The Belle Terre ordinance limited dwellings in certain areas to single-family occupancy, but defined family to include only related individuals and up to two unrelated individuals. The case involved six unrelated college students whose living arrangement violated the ordinance. In writing the *Belle Terre* opinion, Justice Douglas summarily dismissed claims that the ordinance violated fundamental rights guaranteed by the Constitution. The Court found no violation of the equal protection clause since the law was a reasonable means of achieving a legitimate goal. 416 U.S. 1, 8-9 (1974). East Cleveland noted the different factual situations in *Moore* and *Belle Terre*, but argued that the main issue was the authority of a municipality to define the term "family." East Cleveland maintained that since its ordinance was rational and not arbitrary, its law should be upheld under the lower tier of the equal protection test.

52. *Belle Terre* was the first Supreme Court zoning case since its decision in Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). Both *Belle Terre* and *Roberge* reaffirmed the Court's holding in City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), that a zoning ordinance is a valid exercise of the state's police power.

53. United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), is one of the most recent Supreme Court decisions in this area. *Moreno* was a class action suit brought by various individuals rendered ineligible to receive foodstamps by an amendment to the Food Stamp Act of 1964, 7 U.S.C. §§ 2011-2026 (1970). The amendment denied participation in the program to any household containing an individual unrelated to any other member of the household. The Court, speaking through Justice Brennan, concluded that the amendment was not rationally related to the Act's purpose of providing the poor with good nutrition. The Court held that the amendment constituted an irrational classification and violated the equal protection component of the fifth amendment. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973).

54. The Court utilizes a two-tiered test in applying the equal protection clause to determine the reasonableness of a statutory classification. The lower tier is the traditional rational basis equal protection test. This test determines whether the statutory classification is rational, promotes a valid governmental purpose, and treats all persons who fall within the classification equally. The statute is upheld by the rational basis test if there are any facts which may be construed to justify the classification. Lindsley v. Natural Carbonic, 220 U.S. 61 (1911). *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

The second tier of the equal protection test calls for strict scrutiny where the classification is "suspect" or infringes on some fundamental right. The strict scrutiny test requires the classification to meet the standards of the traditional equal protection

The Supreme Court distinguished *Moore* due process from *Belle Terre* equal protection by noting that the East Cleveland ordinance impinged directly on the blood, adoption, or marriage family while the Belle Terre ordinance was directed only at unrelated individuals.[55] While this distinction is valid,[56] both ordinances sought the same purpose, to eliminate traffic congestion and overcrowding.[57] The Court noted the legitimacy of the goals furthered by East Cleveland's ordinance, yet concluded that since the goals were only marginally served by the classification, the enactment could not survive the rational basis test.[58] The Belle Terre ordinance apparently fails the rational basis test for the same reasons.[59] Thus, a decision for

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test and, moreover, the statute must promote a compelling state interest and be so drawn to concern only the state interest involved. *See* Roe v. Wade, 410 U.S. 113 (1973).

55. Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977).

56. This distinction, while valid, should not enter into the judicial application of the lower tier of the equal protection test with regard to zoning litigation. The distinction deals only with the family definition issue. While the difference must be noted in determining the rationality of the ordinance, the Court must direct its examination to the statutory purpose and the means chosen to achieve it.

57. Both the East Cleveland and the Belle Terre ordinances were designed to prevent traffic congestion and overcrowded neighborhoods. The East Cleveland ordinance stated an additional purpose in preventing increased financial burdens on the local school system. This difference is not sufficient to distinguish the two ordinances, particularly since numerous living arrangements prohibited by the East Cleveland ordinance would have no impact on the city's educational system. Brief for Appellant at 49, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

58. Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977). Justice Powell referred to the inability of the means selected in the ordinance to accomplish the city's goals. Justice Powell noted, in a hypothetical, that the law would allow husband and wife to "live together with their unmarried children even if there were half a dozen licensed drivers in the family, each with his own car. At the same time, it forbids an adult brother and sister to share a household, even if both faithfully use public transportation." *Id.*

Commentators have noted the absence of trial evidence in *Belle Terre* showing that unrelated households create more noise and traffic than related households. *See* 50 WASH. L. REV. 421, 427 (1975). Despite this lack of evidence, the *Belle Terre* Court concluded that a law aimed at preventing overcrowding and traffic congestion by zoning against unrelated individuals is a valid means for achieving these goals. The *Moore* Court noted that East Cleveland's ordinance was much broader than the Belle Terre ordinance and affected a broader range of lifestyles. It is difficult to conceive how the narrowly-drawn Belle Terre ordinance was able to accomplish a statutory goal that the more inclusive East Cleveland ordinance failed to accomplish. Arguably, Justice Powell's hypothetical was intended to show that the city could employ alternative methods, such as limiting the number of licensed drivers per family. The same reasoning, however, could apply to the Belle Terre ordinance as well.

59. A step-by-step analysis of this conclusion clearly establishes that the East

Moore through the rational basis-equal protection test would be tantamount to overruling *Belle Terre*.

The Court could have distinguished *Moore* from *Belle Terre* on the basis of related versus unrelated individuals, and applied a higher level of equal protection scrutiny.[60] This, however, would compel a distinction based on mere accidents of birth, elevating the family relationship to a suspect classification.[61] While four of the Justices[62] distinguished the family from other groups, and appeared willing to

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Cleveland and Belle Terre ordinances are sufficiently similar to compel identical decisions. The first requirement of the lower tier equal protection test, which states that the law must have a proper governmental purpose, was established by *Belle Terre*. If a city's desire to prevent traffic congestion and overcrowding is a legitimate governmental purpose in Belle Terre, then the same statutory purpose must be upheld in East Cleveland.

The second requirement of the lower tier equal protection test, which states that the law must be rational and not arbitrary, is well established. *See* note 54 *supra*. The City of East Cleveland engaged in a line-drawing function by defining "family." The *Belle Terre* Court acknowledged this function as legitimate, noting that every legislative line leaves "some out who might well have been included." 416 U.S. at 8 (1974). Opponents of the East Cleveland ordinance claimed that the line of definition was arbitrarily drawn. The city argued, however, that a more rational line would have been the boundary of the traditional family, thus limiting the definition to the nuclear family rather than a more encompassing definition. Brief for Appellee at 5, Moore v. City of East Cleveland, 431 U.S. 494 (1977). In Louisville Gas Co. v. Coleman, 277 U.S. 32 (1928), Justice Holmes stated that "the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* at 41 (Holmes, J., dissenting). The East Cleveland ordinance can not be construed as being "wide of any reasonable mark," and as such the line drawn by the city should be considered rational.

60. This second tier of the equal protection test calls for strict scrutiny where the challenged classification infringes on some fundamental right or is based on a suspect classification. *See* note 54 *supra*. A suspect classification has never been officially defined by the Court. The term has traditionally been applied to classes defined by characteristics which are merely accidents of birth, or classes that have been historically subjected to discrimination. These classes usually lack sufficient power to defend themselves in the political arena. Johnson v. Robison, 415 U.S. 361 (1974). *See* Korematsu v. United States, 323 U.S. 214 (1944) (race as suspect classification); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (alienage as suspect classification). Despite numerous opportunities, the Court refused to recognize areas such as sex, illegitimacy, and poverty as suspect classifications. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (sex); Mathews v. Lucas, 427 U.S. 495 (1976) (illegitimacy); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (poverty).

61. *See* note 44 and accompanying text *supra*. Had the Court distinguished *Moore* from *Belle Terre* on the basis of blood relation, this would have been a finding for Moore on an equal protection rationale.

62. Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977) (Powell, J., Blackmun, J., Brennan, J., and Marshall, J.).

grant additional protection to the familial institution,[63] a majority declined to create such a category.[64]

Moore v. City of East Cleveland attempts to solve the vexing problem of family definition[65] in housing and zoning litigation.[66] The Court deviates from the customary equal protection approach to the problem[67] and instead utilizes a substantive due process analysis. This new approach not only recognizes the importance of the family in our society, but also acknowledges the extended family as an equal to the nuclear family unit.[68]

Moore fails, however, to explicitly state which extended family relationships deserve the protection that accompanies strict scrutiny. Justice Powell implies that the family is at the core of numerous decisions identifying a fundamental right, and on that basis extends the "rationale of those precedents to the family choice involved in [*Moore*]."[69] Yet must one conclude from *Moore* that whenever leg-

63. *See* note 54 *supra*.

64. 431 U.S. at 513-21 (Stevens, J., concurring).

65. Although the term "family" appears well defined, *see* Wentz v. Chicago B. & Q. R. Co., 259 Mo. 450, 168 S.W. 1166 (1914), it is actually an extremely flexible term, capable of numerous definitions. *See* Johnson v. State Farm Mut. Auto Ins. Co., 252 F.2d 158 (8th Cir. 1958), where the court defined family as "a flexible term which must necessarily vary with given facts and circumstances." *Id.* at 161. Laws affecting marriage, welfare, insurance, and zoning traditionally use different definitions of the term. For a general discussion of the term "family," see *The Legal Family: A Definitional Analysis*, 13 J. FAM. L. 781 (1975).

66. *Moore* impliedly affects municipal zoning laws. Since the decision in City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court has held that only those land use regulations "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare" violate the due process clause. The Court expanded this doctrine in Nectow v. City of Cambridge, 277 U.S. 183 (1928), holding that the government's power over the general welfare should not be narrowly defined. Courts usually defer to legislative actions where there is a rational relation between the means chosen by the statute and the desired governmental end. *Moore* weakens this position. The East Cleveland ordinance, under the *Euclid* standard, could be considered a legitimate governmental attempt to promote the general welfare of the community. Despite the applicability of zoning precedent to the facts in *Moore*, the Court approached the case on a substantive due process basis. Consequently, legislators can no longer base land use laws solely on the *Euclid* standards since a court might rule that the affected interest is so deeply rooted in our nation's history and traditions to preclude regulation. *Moore* has, in effect, weakened the state's police power over land use management.

67. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), and United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), are the two most recent attempts to utilize the equal protection clause.

68. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

69. *Id.* at 501.

islation infringes on any aspect of family life the challenged law is subject to strict scrutiny? Subsequent litigation should provide more precise boundaries for a family definition.

Moore's primary significance lies in the Court's renewed emphasis on the origins of substantive due process. The Court affirms the use of history and tradition as a basis for legal decisions. This doctrine re-emerged in *Griswold*,[70] and continues in modern due process decisions.[71] Consonant with this trend, the Court looks to social traditions for guidance rather than pursuing a solution based on pure legal doctrine. Whether the Court will abuse this approach through unprincipled *Lochner*-type decisionmaking[72] will be for history to decide.[73]

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70. 381 U.S. 479 (1965).

71. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

72. *See* Stone, *Introduction: Due Process of Due Process*, 25 HASTINGS L.J. 785, 797 (1974). *See generally* note 32 and accompanying text *supra*.

73. *See* note 33 *supra*. Justice Powell conceded that although history "counseled caution and restraint of this mode of decision-making it did not counsel 'abandonment.' " Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977). Justice Powell acknowledged the fears over this method of adjudication and called for caution in its application "lest the only limits to such judicial intervention become the predilections of those who happen at the time to be members of this Court." *Id.* at 502.