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Ralph J. Libsohn

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ZONING FOR THE ELDERLY AND FAMILY RIGHTS*

INTRODUCTION

The decay of the nation's housing,¹ coupled with the continuing increase in human longevity,² has engendered a shortage of housing suitable for occupancy by the elderly.³ As a result, while the earning power of the elderly has been diminished by retirement and inflation,⁴ substantial num-

* This article is a student work prepared by Ralph J. Libsohn, a member of the St. Thomas More Institute for Legal Research.

¹ See generally 6 R. POWELL, *THE LAW OF REAL PROPERTY* § 872.1[2] (rev. ed. 1977); DEPARTMENT OF COMMUNITY AFFAIRS, *CURRENT AND FUTURE HOUSING NEEDS OF ELDERLY PENNSYLVANIANS* 2 (1975) [hereinafter cited as *ELDERLY PENNSYLVANIANS*].

² See, e.g., *Taxpayers' Ass'n v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976), wherein the court observed that the number of persons over the age of 65 is increasing both numerically and "in relative proportion to the total population." *Id.* at 266, 364 A.2d at 1025, (citing U.S. BUREAU OF THE CENSUS, *1970 CENSUS OF THE POPULATION, CHARACTERISTICS OF THE POPULATION: UNITED STATES SUMMARY* 1-276 (1973)). The *Weymouth* court noted that nationally, the elderly have increased from 12.3 million persons (8.2% of total population) in 1950 to 20 million (9.9% of total population) in 1970. *Id.* In New York State, there were approximately 1.25 million persons aged 65 or over in 1950 (8.5% of total population). By 1970, the number of elderly individuals had increased to almost 2 million, comprising 10.8% of the state's population. 1 *NEW YORK STATE OFFICE FOR THE AGING, FACTS & IDEAS ABOUT OLDER PERSONS IN NEW YORK STATE* 9 (1974) [hereinafter cited as *FACTS & IDEAS*]. See also *ELDERLY PENNSYLVANIANS*, *supra* note 1, at 15.

³ In 1971, federal officials determined that there existed a need for 120,000 new units of housing for the elderly each year. See *Taxpayers' Ass'n v. Weymouth Township*, 71 N.J. 249, 272, 364 A.2d 1016, 1029 (1976) (citing 2 *WHITE HOUSE CONFERENCE ON AGING, TOWARD A NATIONAL POLICY ON AGING* 32 (1971)). A recent Pennsylvania study projected an annual need for nearly 16,000 new units of housing for elderly Pennsylvanians. See *ELDERLY PENNSYLVANIANS*, *supra* note 1, at 33. See also *DIVISION ON AGING, NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, PUBLIC HOUSING FOR THE ELDERLY—UNITS AND WAITING LIST* 3 (1971).

⁴ See *Taxpayers' Ass'n v. Weymouth Township*, 71 N.J. 249, 268, 364 A.2d 1016, 1026 (1976) (citing *NEW JERSEY OFFICE ON AGING, DETAILED HOUSING AND INCOME INFORMATION ON THE ELDERLY OF NEW JERSEY* 2 (1973)), where the court noted that in 1970, 82.3% of New Jersey households with elderly persons had yearly incomes less than \$10,000, and 62.1% had incomes less than \$5,000. In comparison, median yearly incomes for New Jersey households generally were almost \$11,500. *Id.*

One commentator has noted that as "galloping inflation and accelerated taxation" have forced the majority of citizens to live from presently earned income, the ability to save for old age has been greatly diminished. Alexander, *Symposium—Law & The Aged—Foreword: Life, Liberty, and Property Rights for the Elderly*, 17 *ARIZ. L. REV.* 267, 268 (1975). Thus, many senior citizens are being "catapulted into [a] world . . . of poverty, food stamps, . . . welfare payments, . . . obtrusive social workers, and often institutionalization." *Id.*

bers of these citizens have been compelled to reside in living quarters that are either substandard,⁵ unsuited to their needs⁶ or, at worst, pose potential hazards to their welfare.⁷ Increasingly, as part of their programs to provide adequate housing for the aged,⁸ municipalities have enacted senior citizen zoning ordinances which establish minimum age requirements for access to housing.⁹

Reflecting concern for the well-being of the elderly, these ordinances have been designed to encourage construction of residences attuned to the physical and psychological needs of these citizens.¹⁰ Thus, although the typical ordinance restricts occupancy of residential units to one individual aged 55 or over, zoning provisions often permit a spouse of any age and one adult offspring to live with the occupant.¹¹ Nevertheless, such ordinances have not been uniformly well received, and their legality has been challenged, unsuccessfully, under several theories.¹² On the basis of recently

⁵ See NEW JERSEY OFFICE ON AGING, DETAILED HOUSING AND INCOME INFORMATION ON THE ELDERLY OF NEW JERSEY 2 (1973). It has been noted that in New York "in 1960, 131,000 households with heads 65 years of age or older (13.4% of all such households) lived in dilapidated or deteriorated housing." DIVISION OF HOUSING AND COMMUNITY RENEWAL, NEW YORK STATE HOUSING PROGRAMS FOR THE AGING 1 (1970).

⁶ See, e.g., 2 FACTS AND IDEAS, *supra* note 2, at 11-13, where findings revealed that some elderly residents may be required to climb several flights of stairs to enter their living quarters; some live in "blighted" areas surrounded by factories and commercial facilities; some reside in crowded apartments or in inconveniently large units; others live in areas far away from essential medical facilities. *Id.*

⁷ See *id.*

⁸ See, e.g., N.Y. CONST. art. 18, § 1; N.Y. PRIV. HOUS. FIN. LAW § 11 (McKinney 1976). See generally OFFICE ON AGING, DIVISION OF HUMAN RESOURCES, NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, A COMMUNITY GUIDE: HOUSING NEW JERSEY'S ELDERLY 13; DIVISION OF HOUSING AND COMMUNITY RENEWAL, NEW YORK STATE HOUSING PROGRAMS FOR THE AGING (1970).

⁹ See notes 11 & 83 *infra*.

¹⁰ See *Campbell v. Barraud*, 58 App. Div. 2d 270, 272, 394 N.Y.S.2d 909, 912 (2d Dep't 1977).

¹¹ See, e.g., Manalapan, N.J., Amendment to Zoning Ordinance no. 1, art. V (August 1970), which provides:

One or more contiguous parcels of land having a total land area of 75 or more acres under common ownership or control which is planned for development with residential dwelling units and other structures and facilities designed to be occupied and used by and for single individuals 52 years of age or over; married couples at least one of whom is 52 years of age or over; two closely related persons, e.g., sisters, brothers, brother and sister, aunt and niece, parent and child, etc., when both persons are 52 years of age or older; or two unrelated persons of the same sex when both are 52 years of age or older; one person over 19 years of age may reside in a dwelling unit with an elderly person or persons, as permitted above, if the presence of such person is essential for the physical care or economic support of the elderly person or persons; children 19 years of age or older may reside with a parent or parents.

Cf. Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 234, 364 A.2d 1005, 1008 (1976) (citing the town's senior citizen zoning ordinance).

¹² See, e.g., *Taxpayers' Ass'n v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976) (ordinance challenged as violative of equal protection clause, ultra vires, and exclusionary); *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976) (ordinance challenged as violative of equal protection clause, ultra vires, and exclusionary); *Maldini v. Ambro*, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *cert. denied*, 423 U.S.

evolving principles of constitutional law, however, it is yet possible that some of these zoning schemes will eventually fail as unlawful intrusions upon the family rights of senior citizens residing within zoned subdivisions.

The questioned legal effect of zoning for the elderly can be illustrated by the following hypothetical: An elderly widow is an occupant of a housing complex situated on property zoned for senior citizen use. Upon the death of the resident's daughter-in-law, the occupant's son and grandson come to live with her in the zoned community. This arrangement enables the son to retain his job, while the occupant tends to her grandchild's needs. Moreover, the arrangement also serves the occupant, affording her the companionship of a family while she remains within a community designed to suit her physical needs. The arrangement, however, does not comport with the town zoning ordinance which permits only one adult offspring to reside with the elderly resident. Therefore, the occupant receives a notice of violation from the town, stating that her grandchild is an illegal occupant, and directing her to comply with the ordinance. Having failed to do so, the occupant is subject to criminal conviction, and a jail sentence or fine.

The following discussion will focus on two questions presented by the preceding hypothetical case: Does the ordinance touch upon an area of constitutionally protected family rights by circumscribing the right of the elderly to share a household with their progeny? If it does, may a state be precluded from enforcing such an ordinance?

Moore v. City of East Cleveland

Although the constitution does not contain specific provisions safeguarding familial relationships, the Supreme Court has recognized that some interests inherent in family life do warrant constitutional protection.¹³ In *Meyer v. Nebraska*,¹⁴ the Court declared that an individual's

993 (1975) (ordinance challenged as violative of equal protection clause, ultra vires, and exclusionary); *Bailey v. Board of Appeals*, 345 N.E.2d 367 (Mass. 1976) (claim that failure to hold public hearing and file environmental impact report invalidated ordinance).

Equal protection challenges to senior citizen zones have not been well received by the courts. Since age is not considered a suspect classification, *see, e.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (mandatory retirement age does not contravene equal protection clause); *Ramirez v. Weinberger*, 415 U.S. 970 (1974), *aff'g mem.* 363 F.Supp. 105 (N.D. Ill. 1973) (age limitation for receipt of welfare benefits permissible under fourteenth amendment); *Human Rights Party v. Secretary of State*, 414 U.S. 1058, *aff'g mem.* 370 F. Supp. 921 (E.D. Mich. 1973) (minimum age to hold public office permissible); *Gaunt v. Brown*, 409 U.S. 809, *aff'g mem.* 341 F. Supp. 1187 (S.D. Ohio 1972) (minimum voting age does not conflict with equal protection clause); *cf. Loving v. Virginia*, 388 U.S. 1 (1967) (race a suspect classification); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage a suspect classification); nor housing a fundamental right, *see, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); courts have employed a rational basis test in upholding the validity of senior citizen zoning ordinances. *See, e.g.*, *Campbell v. Barraud*, 58 App. Div. 2d 570, 394 N.Y.S.2d 909 (1977); *cf. Buchanan v. Warley*, 245 U.S. 60 (1917) (racially restrictive ordinance unconstitutional infringement of property owners' rights).

¹³ *See* note 15 *infra*.

¹⁴ 262 U.S. 390 (1923).

rights to "marry, establish a home and bring up children" are protected under the fourteenth amendment.¹⁵ Later, in *Poe v. Ullman*,¹⁶ Justice Harlan stated that "[t]he home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."¹⁷ More recently, in *Moore v. City of East Cleveland*,¹⁸ the Court, in a four-justice plurality opinion, expressed approbation of the thrust of *Meyer* and its progeny, apparently extending the "private realm of family life which the state cannot enter."¹⁹

Moore involved the criminal conviction of a property owner for violation of a local zoning ordinance. The ordinance, purportedly enacted to prevent overcrowding, traffic congestion, and overburdening of the local school system,²⁰ permitted only certain combinations of blood relatives to reside within a single-family dwelling unit.²¹ As a consequence, the ordi-

¹⁵ *Id.* at 399. Later Courts have recognized the right to marry, *see, e.g., Zablocki v. Redhail*, 98 S. Ct. 673, 681 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1976); *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the right to establish a home, *see, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974) (Marshall, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); *cf. Shapiro v. Thompson*, 384 U.S. 618, 629-31 (1969) (state cannot chill indigent's right to travel interstate and establish new residence); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (state anti-obscenity laws must respect privacy of one's home), and the right to bring up children, *see, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). The *Meyer* Court stated:

The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts.

262 U.S. at 399-400. *See also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 393 (1926).
¹⁶ 367 U.S. 497 (1961).

¹⁷ *Id.* at 551-52 (Harlan, J., dissenting).

¹⁸ 431 U.S. 494 (1977).

¹⁹ *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

²⁰ 431 U.S. at 499-500.

²¹ The East Cleveland ordinance provided that:

"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 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 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."

431 U.S. at 496 n.12 (quoting EAST CLEVELAND, OHIO CODIFIED ORDINANCES § 1341.08).

nance operated to preclude the appellant grandmother, Mrs. Moore, from residing with one of her parentless grandchildren.²² Forced by exigent circumstances to maintain this illegal living arrangement,²³ Mrs. Moore was convicted of violating the ordinance. She appealed from this conviction, challenging East Cleveland's ordinance as an impermissible infringement on her family rights.²⁴

The City of East Cleveland contended, however, that pursuant to the decision in *Village of Belle Terre v. Boraas*,²⁵ it was permissible for a municipality to promote effective land use regulation by delineating the class of individuals who could reside in single family dwellings. In *Belle Terre*, the challenged ordinance defined "family" to include persons related by blood, marriage, or adoption, and forbade occupancy of single family residences by any group comprised of three or more unrelated individuals.²⁶ Several college students living near their university in violation of the ordinance challenged the regulation.²⁷ Although the ordinance apparently regulated the lifestyles of residents directly,²⁸ and only indirectly regulated the land involved,²⁹ the Supreme Court applied the standard of review³⁰ traditionally employed in evaluating land use ordinances and sus-

²² 431 U.S. at 497. See note 23 *infra*.

²³ Mrs. Moore lived with her son and two grandchildren, who were first cousins. *Id.* at 496. One of the grandchildren, John Moore, Jr., moved in with Mrs. Moore upon the death of his mother. *Id.* at 497. Under the statutory section defining permissible family units, see note 21 *supra*, John was an "illegal occupant." 431 U.S. at 497. Thereafter, Mrs. Moore received a notice of violation from the city and, when she refused to comply with the ordinance or seek a variance, the city filed a criminal charge. *Id.* At trial, Mrs. Moore claimed the ordinance was unconstitutional on its face, a contention that was rejected by the trial court and the Ohio appellate courts. *Id.*

²⁴ *Id.* at 497-98.

²⁵ 416 U.S. 1 (1974).

²⁶ *Id.* at 2.

²⁷ The students contended that the ordinance interfered with one's rights to travel and relocate, privacy, and that the ordinance "reek[ed] with an animosity to unmarried couples who live together." *Id.* at 7-8.

²⁸ *Id.* at 16 (Marshall, J., dissenting).

²⁹ *Id.* at 17 (Marshall, J., dissenting).

³⁰ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is the leading case in the area of zoning review. *Euclid* involved a comprehensive zoning ordinance enacted by a suburban community. *Id.* at 379-80. The ordinance was challenged on the grounds that it deprived the plaintiff-landowner of his property without due process of law and denied him equal protection. *Id.* at 384. The landowner contended that his tract of land, rezoned for residential use, had been reduced greatly in market value, since industrial use of the undeveloped plot had been precluded by the ordinance. *Id.* Dismissing his complaint, the Court held that the exclusion of industrial buildings from residential areas bore a rational relation to the health and safety of the community, which was a legitimate concern of the local government. *Id.* at 391.

A different result was reached in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the next zoning case to be decided by the Court. In *Nectow*, the plaintiff's contentions were examined by a master, who found that the districting of the plaintiff's parcel of land did not "promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City . . ." *Id.* at 187. Agreeing that "a court should not set aside the

tained the regulation as bearing a substantial relation to permissible state objectives.³¹

In *Moore*, the City maintained that since a state may properly invoke its police powers in order to alleviate congestion and overcrowding, its ordinance should be sustained.³² The Court, in a plurality opinion authored by Justice Powell, reversed the conviction. Three dissenting justices, however, agreed with the City's contentions³³ while Justice Stevens, who concurred with the plurality in the judgment, did so on the ground that the ordinance failed the traditional substantial relation standard of review.³⁴

determination of public officers" in zoning matters, *id.*, the Court held it was bound by the master's report declaring that the ordinance bore no "substantial relation" to the public welfare. *Id.* at 188.

³¹ 416 U.S. at 9.

³² See 431 U.S. at 499-500.

³³ Justices Stewart, Rehnquist and White dissented. Analyzing the impact of *Belle Terre*, Justice Stewart stated:

The present case brings before us a similar ordinance of East Cleveland, Ohio, one that also limits the occupancy of any dwelling unit to a single family, but one that defines "family" to include only certain combinations of blood relatives. The question presented, as I view it, is whether the decision in *Belle Terre* is controlling, or whether the Constitution compels a different result because East Cleveland's definition of "family" is more restrictive than that before us in the *Belle Terre* case.

Id. at 532. Chief Justice Burger dissented on other grounds and did not reach the issue. *Id.* at 521.

It is interesting to note that ordinances like the one in *Belle Terre* had met with widespread condemnation in the past. See *id.* at 516 (Stevens, J., concurring); see, e.g., *Neptune Park Ass'n v. Steinberg*, 138 Conn. 357, 84 A.2d 687 (1951); *City of Des Plaines v. Trottnr*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Missionaries of Our Lady v. Whitefish Bay*, 267 Wisc. 609, 66 N.W.2d 627 (1954). In *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), the New York Court of Appeals attempted to harmonize *Belle Terre* with this authority by noting that the living arrangement prohibited in *Belle Terre* lacked the permanency that characterizes residential neighborhoods, and that an ordinance may properly emphasize and ensure the character of such neighborhoods "to promote the family environment." *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452. The *Ferraioli* court held that inasmuch as the defendant, a state sponsored group home for foster children, was "not a framework for transients or transient living," it did not conflict with the ordinance. *Id.* at 306, 313 N.E.2d at 758, 357 N.Y.S.2d at 453. In *Belle Terre*, however, was Justice Douglas careful to note that the ordinance did not affect transients, 416 U.S. at 7, for such an ordinance might be held invalid under *Shapiro v. Thompson*, 394 U.S. 618 (1969) (residency requirement for receipt of welfare held to unconstitutionally impinge on fundamental right to travel).

³⁴ In his pragmatic concurring opinion, see 431 U.S. at 513-21, Justice Stevens applied the rule of *Belle Terre* to the instant case. Turning to the statute's unique definitional section, see note 21 *supra*, Justice Stevens declared that the ordinance failed the substantial relation test and "constitute[d] a taking of property without due process." 431 U.S. at 521 (Stevens, J., concurring). Justice Stevens stated:

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. Nor does there appear to be any justification for such a restriction on an owner's use of his property. . . . Since this ordinance has not been shown to have any

Only the four justices joining in the plurality opinion, therefore, found family rights to be involved in *Moore*.³⁵ Those justices agreed that "[t]he tradition of . . . grandparents sharing a household along with parents and children has roots . . . deserving of constitutional recognition."³⁶

Justice Powell reasoned that *Moore* fell without the parameters of *Belle Terre*, as the challenged ordinance in the latter case affected only unrelated individuals.³⁷ Pointing out that the *Belle Terre* Court was "careful to note that [the ordinance] promoted 'family needs' and 'family values,'" Justice Powell stressed that East Cleveland's ordinance inhibited family life.³⁸ The *Moore* Court concluded therefore that "[w]hen a city undertakes such intrusive regulation of the family," the traditional deference accorded zoning regulations under the substantial relation test does not apply.³⁹ Instead, the Court subjected the ordinance to an intensified scrutiny, "examin[ing] carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."⁴⁰ Finding that the language of the ordinance did not effectively further the interests of the state, the plurality opinion thus held that the regulation constituted an unwarranted intrusion into a protected area of family rights.⁴¹

In his dissent, Justice Stewart declared that *Belle Terre* should govern,⁴² and that "[t]he interest that the appellant may have in [residing] with some of her relatives does not rise to [a constitutionally protected] level."⁴³ Disagreeing with the Court, which declined to cut off family rights

"substantial relation to the public health, safety, morals or general welfare" . . . and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property—it must fall

Id. at 520-21 (Stevens, J., concurring).

³⁵ *Id.* at 521. Justices Brennan, Marshall and Blackmun joined in Justice Powell's opinion.

³⁶ *Id.* at 504 (footnote omitted).

³⁷ *Id.* at 498.

³⁸ *Id.* In *Belle Terre*, Justice Douglas stated:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

416 U.S. at 9. The ordinance challenged in *Berman v. Parker*, 348 U.S. 26 (1954) provided for slum clearance in the District of Columbia. The Court held that the concept of public welfare that may be enhanced by zoning regulations is broad and inclusive, *id.* at 33, and that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.*

³⁹ 431 U.S. at 499.

⁴⁰ *Id.*

⁴¹ *Id.* at 506. It is important to note that the Court made no finding in fact that the ordinance failed to serve the public interest.

⁴² *Id.* at 534 (Stewart, J., dissenting).

⁴³ *Id.* at 537 (Stewart, J., dissenting).

at the "arbitrary boundary" of the nuclear family,⁴⁴ Justice Stewart stated that "[t]o equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition."⁴⁵ Disputing this point in a separate opinion, Justice Brennan, who also joined in the plurality opinion, conceded that the nuclear family arrangement is a commonly employed pattern of living.⁴⁶ Nonetheless, Justice Brennan concluded that the extended family, where several generations of family members reside in a single household, "remains a vital tenet of our society" also deserving constitutional protection.⁴⁷

In prior decisions where family privacy rights were at issue,⁴⁸ the Court "has not tolerated even a low degree of state meddling."⁴⁹ It is not surprising, therefore, that the intrusive ordinance challenged in *Moore*, which regulated the living choices of parents, would be struck down. While prior authority offered little indication whether the Court's vigilance would extend beyond protection of *parental* prerogatives,⁵⁰ the direction chosen by the plurality in its expansion of familial rights is seemingly supported by existing decisional law. In *Palo Alto Tenants' Union v. Morgan*,⁵¹ a case which antedated and correctly anticipated *Belle Terre*, a federal district court in California compared the rights of members of traditional families—individuals related by blood, marriage or adoption—with the rights of "voluntary" family members, such as the unrelated residents of a commune. Addressing plaintiff's claim that the Palo Alto ordinance excluding communal groups from an "R-1" zone was violative of the equal protection

⁴⁴ *Id.* at 494.

⁴⁵ *Id.* at 537 (Stewart, J., dissenting).

⁴⁶ *Id.* at 510 (Brennan, J., concurring).

⁴⁷ *Id.*

⁴⁸ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 623 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁴⁹ Comment, *Neither Seen nor Heard: Keeping Children Out of Arizona's Adult Communities Under Arizona Revised Statutes Section 33-1317(B)*, 1975 ARIZ. ST. L.J. 813, 823.

⁵⁰ *Prince v. Massachusetts*, 321 U.S. 158 (1944), cited by the *Moore* plurality to support its contention that family rights extend beyond the nuclear family, 431 U.S. at 505 n.15, dealt with the relationship between aunt and niece. 321 U.S. at 159. The aunt, a Jehovah's Witness, was convicted of violating the Massachusetts child labor law, by permitting her niece to sell religious magazines on the street. *Id.* at 159-60. In affirming the conviction, the Court recognized Mrs. Prince's "sacred" right to control the upbringing of the child, *id.* at 165, although the appellant was the custodian, rather than the parent, of the minor involved. *Id.* at 159. Not until *Moore* had the Court extended constitutional protection to those not parents or in loco parentis; on the contrary, protection had been extended expressly to such parties alone. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (liberty of parents and guardians to direct the upbringing of children).

⁵¹ 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd per curiam*, 487 F.2d 883 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

clause of the fourteenth amendment,⁵² the court stated that an ordinance purporting to exclude traditional families from residential zones would be greatly disfavored. The court went on to observe, however, that the long recognized value in the traditional family relationship is not inherent in the voluntary family.⁵³ The traditional family, it was found, is a union cemented by biological and legal ties. The family role in educating and nourishing the young has been a means, for innumerable generations, of satisfying the emotional and physical needs of human beings.⁵⁴ Thus, although "a zoning law which *divided* or totally excluded traditional families would . . . be suspect,"⁵⁵ the court concluded that communal groups share few of the characteristics militating against the disruption of traditional families.⁵⁶

Palo Alto and *Moore*, both of which express a distaste for the breaking up of blood related families, differ only in regard to the intensity with which such ordinances will be scrutinized. The *Palo Alto* court would require a municipality to demonstrate a compelling interest to justify its intrusion into the forbidden area;⁵⁷ in contrast, *Moore*, if read literally, demands only that a municipality establish the potential effectiveness of its ordinance in attaining a permissible purpose.⁵⁸ *Moore* does, however, subject intrusive ordinances to a far more stringent standard of review than that established by *Belle Terre*. It is therefore significant that the *Moore* plurality, while agreeing with Justice Stevens' contention that East Cleveland's ordinance failed to survive even a minimum level of constitutional scrutiny,⁵⁹ felt compelled to go beyond this rationale in order to afford greater protection to the family.

THE IMPACT OF *Moore* ON ZONING FOR THE ELDERLY

By examining the potential effectiveness of the challenged ordinance, the *Moore* Court appears to have entered into an area normally reserved for legislative judgment.⁶⁰ The *Moore* standard, therefore, seems inconsis-

⁵² 321 F. Supp. at 911.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.*

⁵⁷ See also *Zablocki v. Redhail*, 98 S. Ct. 673, 679 (1978); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17, 28, 32-33 (1973).

⁵⁸ See text accompanying notes 39-41 *supra*. In actuality, the Court appeared to use an equal protection analysis in this substantive due process case. The Court found the ordinance both underinclusive and overinclusive, and struck it down on that basis. See note 59 *infra*.

⁵⁹ The Court found that the definitional section of the ordinance, see note 21 *supra*, bore "but a tenuous relation" to the alleviation of overcrowding, traffic and parking congestion and school overcrowding. 431 U.S. at 500. Noting several anomalies in the East Cleveland ordinance, the Court stated that any family fitting the city's definition could reside within a housekeeping unit, even if the family contained many licensed drivers. *Id.* Furthermore, the ordinance would permit a grandmother to live with one dependent son and his children, even if the children numbered a dozen. *Id.*

⁶⁰ See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974); *Berman v. Parker*, 348 U.S. 26,

ent with prior decisions concerning the reviewability of typical zoning laws. In *Construction Industry Association v. City of Petaluma*,⁶¹ for instance, the Ninth Circuit applied the traditional standard of review in upholding a zoning ordinance in the face of the plaintiff's substantive due process challenge,⁶² emphasizing that "[t]he reasonableness, not the wisdom, of the [ordinance] is at issue in this suit."⁶³ In contrast, when a statute impinges on a "fundamental right," the scope of legislative discretion is restricted somewhat by the judiciary. In such a situation, the statute will be upheld only if the state can demonstrate that the enactment is necessary to promote a "compelling interest" which cannot be served by less intrusive means.⁶⁴

The "less intrusive means" test comprises an efficacy test of sorts, but is only invoked when fundamental rights are imperiled.⁶⁵ The *Moore* Court, while treating Mrs. Moore's right as fundamental in nature, did not clearly denominate them as such. Nevertheless, Chief Justice Burger has described *Moore* as a case involving a "fundamental liberty"⁶⁶ and reiterated that statutes impinging on such liberties are "subject to the most searching kind of scrutiny, thus harmonizing"⁶⁹ properly *Moore* with the *Meyer* line. It appears, therefore, that grandparents have a fundamental right to live with their linear descendants.

32 (1954); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975).

⁶¹ 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

⁶² *Id.* at 909. The zoning plan challenged in *Petaluma* fixed the city's rate of growth and created a "greenbelt" around the city. New housing starts were allocated to builders and dispersed throughout sections of the city according to a complicated system. *Id.* at 901. The purpose of the scheme, the city contended, was to insure the orderly development of the city, *id.*, and to protect its small town character, *id.* at 902. The Construction Industry Association of Sonoma County challenged the plan as being arbitrary and unreasonable, and therefore violative of due process. *Id.* at 905. The association contended that the ordinance was an exclusionary device designed to insulate the city from an expected influx of new residents. *Id.* at 905. The ordinance was nevertheless sustained as bearing a rational relationship to a permissible objective. *Id.* at 906-07 (footnote omitted).

⁶³ *Id.* at 906. The court noted that, in examining the reasonableness of a zoning ordinance, the fact that the ordinance has an exclusionary effect is not determinative; rather, the question is whether the exclusion is reasonably related to a proper purpose. If no such relation exists, the ordinance cannot stand. The court held, however, that if the ordinance is related to a proper purpose, then the court "must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation." *Id.* See also *Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7, 359 N.E.2d 337, 390 N.Y.S.2d 827 (1976).

⁶⁴ *Cf. Zablocki v. Redhail*, 98 S. Ct. 673, 682 (1978) (restrictive marriage statute subjected to rigorous scrutiny); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29-38 (1973) (school district financing subject to strict scrutiny).

⁶⁵ See *Zablocki v. Redhail*, 98 S. Ct. 673, 681 (1978).

⁶⁶ 433 U.S. 425, 527 (1977).

⁶⁹ *Id.* at 526. In *Zablocki v. Redhail*, 98 S. Ct. 673 (1978), a Wisconsin statute was held to impermissibly interfere with plaintiff's right to marry. *Id.* at 681. Justice Marshall, writing

Considered in the light of Justice Burger's pronouncement, *Moore*, while not entirely dispositive of the questions posed in the introduction, strongly suggests that both questions be answered in the affirmative. Fundamental to the *Moore* decision is the notion that a municipality must justify an intrusion into the protected area of family rights.⁷⁰ Assuming that senior citizen zoning ordinances will be subject to the same intensified probing exhibited in *Moore*, a showing by a municipality that an ordinance can effectively serve an important state objective will be sufficient to enable the statute in the hypothetical situation to withstand a substantive due process attack.⁷¹ Clearly, the state and its political subdivisions have a legitimate interest in providing the elderly with access to suitable housing,⁷² and no court has ever ruled otherwise.⁷³ The potential effectiveness of senior citizen ordinances, however, is a more difficult issue to resolve.

In *Taxpayers' Association v. Weymouth Township*,⁷⁴ the Supreme Court of New Jersey considered the potential efficacy of a local ordinance permitting the creation of planned mobile home parks for the elderly in an area where mobile home parks were generally excluded.⁷⁵ The Court found that such parks provided inexpensive, convenient and safe shelter for the elderly and concluded that the challenged ordinance clearly promoted the general welfare.⁷⁶ The *Weymouth* case, however, involved an

for the Court, stated, "we do not mean to suggest that every state regulation which relates in any way to the incidents of marriage will be subjected to rigorous scrutiny." *Id.* The challenged regulation was found to "directly and substantially" interfere with such rights, however, and the more stringent standard was applied. *Id.* at 682. The Court also noted that marriage rights "have been placed on the same level of importance as decisions relating to . . . family relationships." *Id.* at 681.

⁷⁰ See 431 U.S. at 499-500.

⁷¹ See *id.* at 499.

⁷² See, e.g., *Taxpayers' Ass'n v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976); *Maldini v. Ambro*, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1975), *cert. denied*, 423 U.S. 993 (1976). *But cf.* the dissent in *Maldini*, where it was argued that age was an irrelevant consideration insofar as zoning is concerned, and that such a classification "clearly favors a class without any apparent justification in violation of the equal protection clause of the Fourteenth Amendment." 36 N.Y.2d at 490, 330 N.E.2d at 409, 369 N.Y.S.2d at 393 (Jasen, J., dissenting). See *In re Central Management Co. v. Town Bd. of Oyster Bay*, 47 Misc. 2d 385, 387, 262 N.Y.S.2d 728, 731 (Sup. Ct. Nassau County), *aff'd*, 24 App. Div. 2d 881, 204 N.Y.S.2d 1011 (2d Dep't 1965).

⁷³ *But cf.* *Hinman v. Planning & Zoning Comm.*, 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965) wherein the court suggested that there was no evidence that the citizens of the rural town of Southbury required such an ordinance, and concluded that "[t]he welfare of aged people undoubtedly is a matter of concern to the state and federal government, but it is not ordinarily a matter of local government concern and, certainly not in towns the size of Southbury." *Id.* at 129, 214 A.2d at 134 (dictum).

⁷⁴ 71 N.J. 249, 364 A.2d 1016 (1976).

⁷⁵ *Id.* at 259, 364 A.2d at 1021.

⁷⁶ *Id.* at 274, 364 A.2d at 1030.

inclusionary ordinance, rather than an exclusionary one,⁷⁷ and therefore does not support the proposition that the exclusion of an elderly occupant's younger relatives from a zoned subdivision effectively promotes important state interests.⁷⁸

Recently, in *Campbell v. Barraud*,⁷⁹ New York's Appellate Division, Second Department, held that such an exclusion served a legitimate interest of the state by ensuring that senior citizen housing will be available to those for whom it has been constructed.⁸⁰ The *Campbell* court stated that "[i]t is illogical to encourage the construction of housing geared to the specialized needs of the elderly and then prohibit its exclusive use by such group."⁸¹ The court concluded that "it is essential to the achievement of the purpose of the planned retirement community ordinance . . . that the population group intended to be served be specifically defined and granted exclusive user status."⁸² An examination of senior citizen zoning schemes, however, suggests that the assessment of the *Campbell* court is questionable. Many such ordinances expressly permit limited occupancy of dwelling units by individuals younger than the prescribed age, apparently without fear that the legislative purpose will be thwarted. Many ordinances, for example, provide that one adult child may reside with a senior citizen;⁸³ in addition, the spouse of the senior citizen is not usually subject to the age restriction.⁸⁴ Indeed, a municipality enacting a typical ordinance might

⁷⁷ *Id.* at 294, 364 A.2d at 1040.

⁷⁸ The *Weymouth* court noted that "zoning may not be used to regulate family life," *id.* at 276, 364 A.2d at 1031 (citing *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971)), "or to prevent whole classes of people from residing within a community," 71 N.J. at 276-77, 364 A.2d at 1031 (citing *Molino v. Mayor & Council*, 116 N.J. Super. 195, 281 A.2d 401 (Super. Ct. Law Div. 1971) (limitation on apartment sizes in order to exclude families with children)).

⁷⁹ 58 App. Div. 2d 570, 394 N.Y.S.2d 909 (2d Dep't 1977).

⁸⁰ *Id.* at 572, 394 N.Y.S.2d at 912.

⁸¹ *Id.*

⁸² *Id.* The court also noted that the ordinance was not violative of New York's Human Rights Law. *Id.*, 394 N.Y.S.2d at 913. Although N.Y. EXEC. LAW § 291(2) (McKinney Supp. 1977) provides that "[t]he opportunity to obtain . . . the ownership, use and occupancy of housing accommodations . . . without discrimination because of age . . . is hereby recognized as and declared to be a civil right," the legislative intent behind this section was to specifically exempt publicly assisted housing for the elderly. See OP. ATT'Y GEN. (Nov. 6, 1975). Age discrimination in such housing is therefore a proper exercise of power. See *id.* The *Campbell* court extended this rationale to public and private housing for the elderly. See 58 App. Div. 2d at 590, 394 N.Y.S.2d at 913.

⁸³ See, e.g., Point Pleasant, N.J., Code, ch. 109-54, § 20 (1969), which provides:

The occupancy for a Senior Citizen Project shall be limited to persons who are fifty-five (55) years of age or over, with the following exceptions:

- (a) A husband or wife under the age of fifty-five (55) years who is residing with his or her spouse, who is of the age of fifty-five (55) years of age or over.
- (b) Children residing with their parent or parents when one (1) of said parents with whom the child or children are residing is fifty-five (55) years of age or over. . . .

⁸⁴ See, e.g., notes 11 & 83 *supra*.

reasonably expect that two members of a three-member household will be considerably younger than the minimum age prescribed by the ordinance. Thus, a locality defending such an ordinance may not properly contend that the essential flavor and legislative purpose underlying such an enactment will be undermined if certain youthful relatives of the senior citizen are permitted to reside in the zoned area. It is therefore likely that senior citizen zoning laws cannot withstand the most searching kind of judicial scrutiny often exacted in cases involving fundamental family rights.

Furthermore, even if the states have a compelling interest in the creation of areas zoned exclusively for the use of senior citizens, less intrusive means are available to ensure that senior citizen housing benefits the elderly. In order to promote the use of zoned units by the elderly a municipality may provide that the age of the nominal owner or tenant must exceed the minimum requirement for admission to the development. Additionally, the ordinance should require that the senior citizen actually reside within the dwelling or housekeeping unit, to ensure that the elderly are not used as "fronts" to obtain select housing for ineligible citizens. The tenant or owner, however, should be free to reside with a *reasonable number* of relatives of any age.⁸⁵ In the event of the death of a tenant, any relatives residing in the dwelling unit should be provided a reasonable time to vacate the premises. The estate of a deceased owner in fee should be allowed to pass to any heirs in the normal fashion, but it is important to note that if an eligible senior citizen does not thereafter reside on the premises, the use thereof will not conform to the requirements of the statute. In that case, the municipality may seek any remedy available to it under its own code.

⁸⁵ Under New York's enabling act, town boards are permitted to regulate and restrict the density of population. N.Y. TOWN LAW § 261 (McKinney 1965). See also *Maldini v. Ambro*, 36 N.Y.2d 481, 485 n.1, 330 N.E.2d 403, 406 n.1, 369 N.Y.S.2d 385, 389 n.1 (1975), cert. denied, 423 U.S. 993 (1975) (importance of population composition in town planning). Typically, senior citizen ordinances limit the maximum number of persons who may occupy a residential unit. The ordinance challenged in *Shepard v. Woodland Township Comm. & Planning Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976), which is typical of senior citizen ordinances, provided:

The permanent residents of a Senior Citizen Community shall be confined to persons who are 52 years of age or over except that one child who is 19 years of age or over may be permitted to reside in any senior citizen dwelling unit occupied by his or her parent(s) or guardian(s). Full time occupancy of any residential unit shall be limited to 3 individuals.

Id. at 234, 364 A.2d at 1008. It would pose no difficulty in draftsmanship for an ordinance to provide that any relatives of any age may be permitted to reside in a dwelling unit, with a maximum number determined in relationship to objective criteria, e.g., the floor area of the dwelling unit. See also *Molino v. City of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (Super. Ct. Law Div. 1971) (town may not limit apartment sizes to exclude families with children). It is possible also to limit the number of bedrooms per apartment in order to check overcrowding. See *Bailey v. Board of Appeals*, 345 N.E.2d 367 (Mass 1976).

As demonstrated by the foregoing suggestions, alternatives to the practice of relegating senior citizens to narrowly defined housing patterns do exist.⁸⁶ Courts and municipal planners will therefore be forced to resolve the conflict between the special physical requirements of the elderly, the interest of the states in providing suitable housing for senior citizens, and the need of the elderly to maintain family relationships.⁸⁷

CONCLUSION

Under the standard of review promulgated in *Moore*, it is unclear whether the state need demonstrate the existence of a compelling interest to justify the interference in family life occasioned by senior citizen zoning. As a result, the typical senior citizen zoning ordinance may withstand challenge on substantive due process grounds. Should courts apply a more stringent standard of review in evaluating a substantive due process challenge, however, senior citizen zoning ordinances may fall. The Supreme Court has ruled that states are empowered to promulgate laws and rules strengthening family life,⁸⁸ and that this power extends to zoning.⁸⁹ The

⁸⁶ Cf. *Moore v. City of East Cleveland*, 431 U.S. 506 (1977) (city may not standardize its families by forcing them to live in narrowly defined patterns); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (state may not standardize its children by forcing them to accept instruction exclusively from public school teachers).

⁸⁷ In a study of the elderly's dissatisfaction with their housing, it was noted that about 60% of elderly citizens preferred younger neighbors, while only about 25% preferred retired neighbors. See I. ROSOW, *SOCIAL INTEGRATION OF THE AGED* 337 (1967) [hereinafter cited as *SOCIAL INTEGRATION*]. Less than half of the sampled group found retirement neighborhoods acceptable, and about 25% "dissociate[d] themselves most vehemently from the idea of living in a retirement neighborhood . . ." *Id.* Nevertheless, the most important finding of the study was that "[h]ousing dissatisfaction is primarily a manifestation of an income problem." *Id.* at 334 (emphasis in original).

Residents of retirement communities do, however, "show a high degree of satisfaction with the retirement community concept and their own life-style in these communities . . ." D. RICHARDSON, *THE IMPACT OF RETIREMENT COMMUNITIES—SUMMARY REPORT* 39 (1974) [hereinafter cited as *SUMMARY REPORT*]. Negative factors mentioned by residents, while not common, did include lonesomeness, lack of youthful neighbors, and regimentation. *Id.* at 42 (12-29% of the sample group expressing dissatisfaction). It is interesting to note that the Rosow study found that while only 8% of the sample group expressed *housing* complaints, 19-37% complained about health, money, loneliness or feeling bored and useless. *SOCIAL INTEGRATION*, *supra*, at 334. A comparison of these figures appear to reinforce the conclusion that "[g]erontologists, housers and practitioners may generally overemphasize the importance of housing problems for older people." *Id.* at 333.

It is indisputable, however, that retirement communities have a strong impact on the larger community of which it is a part. See *SUMMARY REPORT*, *supra*, at 6. A great strain is placed on existing health and medical facilities, police, *id.* at 25, and educational systems, *id.* at 31. "School officials at the local and county level have publicly cited retirees as the cause for school budget defeats and analysis of voting returns demonstrate a strong negative vote is cast by retirees in general." *Id.* The author concludes that "[w]ith a larger influx of age-segregated residents, attitudes, belief and behavior in small, established communities will be affected." *Id.* at 38.

⁸⁸ See *Labine v. Vincent*, 401 U.S. 532, 538 (1971) (Louisiana intestacy law precluding inheritance by illegitimate children in certain instances held valid).

Court has yet to hold, however, that zoning laws directly impinging on family rights may be upheld absent a showing of a compelling governmental interest. Indeed, the trend of recent decisions indicates that family rights may not be vitiated by legislative action.⁹⁰

The *Weymouth* court, in expressing its approval of a senior citizen ordinance, stated: "the fact that children may have moved away sometimes causes elderly persons to seek an age-homogeneous environment to replace broken family ties."⁹¹ It is therefore ironic that localities, in order to benefit the elderly, have chosen a method which may contribute to the disintegration of family life.

⁹⁰ See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

⁹⁰ See notes 48-49 and accompanying text *supra*.

⁹¹ 71 N.J. at 270, 354 A.2d at 1027.