The Collision of Zoning Ordinances and the Constitutional Rights of Privacy and Association: Critique and Prognosis

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THE COLLISION OF ZONING ORDINANCES AND THE CONSTITUTIONAL RIGHTS OF PRIVACY AND ASSOCIATION: CRITIQUE AND PROGNOSIS

Two recent Supreme Court cases, Moore v. City of East Cleveland and Village of Belle Terre v. Boraas, have impacted—ostensibly within the framework of zoning law—upon first amendment rights of privacy and association. This Note examines the failure of those cases to fashion an appropriate standard to relate zoning restrictions to the right to choose one’s living companions. The author suggests that, by recognizing a right of family choice, the Court has implicitly sanctioned a municipality’s invocation of “family values” in order to exclude unrelated groups of individuals who, for whatever reason, have chosen to share kitchens.

INTRODUCTION

Population pressures and shifts in socioeconomic patterns have stimulated changes in traditional living arrangements, making inevitable the collision of traditional municipal zoning prerogatives and assertions of fundamental rights of privacy and association. Two recent Supreme Court cases, Moore v. City of East Cleveland and Village of Belle Terre v. Boraas, suggest that the conflict which has arisen will not easily be resolved. This Note accordingly examines the Court’s failure to fashion a constitutional standard for gauging the impact of zoning restrictions upon the right to choose one’s living companions.

Belle Terre and Moore, while ostensibly zoning cases, raise even broader issues. The challenged ordinances were alleged to infringe upon fundamental constitutional rights of the parties involved, in particular, their rights of privacy and association.

In Belle Terre, a homeowner and three unrelated student tenants brought suit under Section 1983 of the Civil Rights Act, seeking an injunction and a judgment declaring unconstitutional a

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3. Although Justice Douglas’ majority opinion in Belle Terre was joined by six other Justices, Justices Brennan and Marshall dissented on separate grounds. In Moore, the plurality opinion of Justice Powell was joined by Justices Brennan, Blackmun and Marshall. A concurring opinion was filed by Justices Brennan and Marshall, elaborating on the plurality view. Justice Stevens concurred in the judgment on quite different grounds. Chief Justice Burger, Justice Stewart joined by Justice Rehnquist, and Justice White all filed dissents on varying grounds. See note 11 infra.
zoning ordinance which restricted land use to single-family dwellings and which defined "family" to exclude more than two unrelated persons living together as a single housekeeping unit. The plaintiffs' claim of violation of their rights of equal protection, privacy, association, and travel—approved by the court of appeals—was rejected by the Supreme Court. The Court held that the ordinance in question was valid because it bore a rational relationship to a permissible state objective and thus was not arbitrary.

In Moore, a grandmother living with her two grandsons was convicted for violating a city zoning ordinance which effectively restricted permissible living patterns to the nuclear family. Since Mrs. Moore's two grandsons were cousins and not brothers, they were deemed to fall outside the ordinance's definition of "family." The Supreme Court reversed, holding that the ordinance violated the due process clause of the fourteenth amendment. In so doing, the Court extended the existing right of privacy to embrace the right of a nuclear or extended family to choose to share one household. Although Mrs. Moore's family could not technically meet the narrow definition in the ordinance, the Moores nevertheless fit into previously accepted judicial notions of protec-

5. For an interesting comparison of the court of appeals' approach with that of the Supreme Court, see Note, No Dogs, Cats, or Voluntary Families Allowed—Village of Belle Terre v. Boraas, 24 DePaul L. Rev. 784 (1975). The author critiques the Supreme Court's rejection of the new "intermediate" level of scrutiny applied by the lower court.

6. 416 U.S. at 8. This standard was first articulated in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Ordinarily a case that appears to involve constitutional rights, such as privacy and association, would not be treated merely as "economic and social legislation." Rather, the lesser standard of mere reasonableness or rationality would apply only where fundamental rights were not at stake. Since the Court refused to find the students' fundamental rights of privacy, association, and travel implicated, it was an easy step for the Court to treat the case as one of mere economic and social legislation, meritng only a standard of reasonableness instead of a strict scrutiny standard.

7. 431 U.S. at 494. Section 1341.08 of the ordinance stated:

Family means . . . individuals related to the nominal head of the household . . . living as a single housekeeping unit . . . but limited to the following: (a) Husband or wife of the nominal head . . . (b) Unmarried children of the nominal head . . . provided, however, that such unmarried children . . . have no children residing with them . . . (d) notwithstanding . . . (b) . . . a family may include not more than one dependent married or unmarried child of the nominal head . . . and the spouse and dependent children of such dependent child.

Id. at 495.

8. Throughout this Note, the term "family" will be used as the Moore Court used it, to connote persons related by blood, marriage, or adoption, except in factual situations where groups of people desire to call themselves "families" for specific purposes (for example, in order to receive food stamps or similar welfare benefits).

9. 431 U.S. at 500.
tion of family sanctity.10

Moore stands for the general proposition that the time-honored deference to municipal zoning authority must give way if an ordinance deprives a "family," either nuclear or extended, of the fundamental right to choose to live together.11 The Belle Terre court, however, declared that a local zoning authority may, in the name of "family values," prescribe household composition to exclude certain persons or prevent certain living arrangements in a community.12 Moore thus created a new right of family choice under the general rubrics of privacy and associational rights, while Belle Terre invented a new rationale for the exercise of state police power to circumscribe those same rights.

10. Justice Powell reasoned that the extended family and its protected status have been recognized in the "teachings of history" and in the "basic values that underlie our society." Id. at 503. Thus, it appears that constitutional protections of privacy also extend to families such as the Moores. It is ironic, however, that the range of family choice was extended under the privacy umbrella, seemingly creating a new right of privacy, while at the same time, the Moore Court's privacy discussion has actually narrowed the law of privacy by ignoring other types of privacy. See text accompanying notes 108-61 infra.

11. In Moore, the plurality focused on carving out a right of family choice. Justices Brennan and Marshall elaborated on the plurality opinion, decrying the "cultural myopia" of zoning ordinances which treat only nuclear families as families per se, 431 U.S. at 507-10 (Brennan & Marshall, JJ., concurring), and reaffirming earlier decisions upholding the sanctity of the family against state intrusion. Id. at 510-11.

Justice Stevens preferred the principle applied in Nectow v. City of Cambridge, 277 U.S. 183 (1928), that, if an ordinance is clearly arbitrary, with no substantial relation to health, welfare, safety, or morals, the local government is constitutionally prohibited from interfering with individual property rights. He further preferred to look to the myriad state decisions which have upheld the right of persons to form a "single housekeeping unit," whether such persons are related or not. 431 U.S. at 514-20 (Stevens, J., concurring).

Chief Justice Burger's dissent noted that Mrs. Moore had failed to exhaust administrative remedies in not seeking a variance and thus had burdened the Court's docket. Id. at 521-31 (Burger, C.J., dissenting). Justices Stewart and Rehnquist found Belle Terre to be dispositive and insisted that the "biological fact of common ancestry" should not create a special constitutional right of association. Id. at 534-35 (Stewart & Rehnquist, JJ., dissenting). Justice White challenged the plurality's substantive due process approach, preferring not to breathe any further life into that mode of due process analysis. 431 U.S. at 544 (White, J., dissenting).

12. 416 U.S. at 9. In Belle Terre, the majority focused on land use legislation, the deference to be accorded state and local discretion in the area of zoning, and judicial respect for legislative line-drawing for the good of the community. The Court relied heavily on the leading cases of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) and Berman v. Parker, 348 U.S. 26 (1954), although it did so at some cost to logic, and with a strained application of the facts of those cases to the facts of Belle Terre. 416 U.S. at 3-6. See text accompanying notes 67-69 infra.

Justice Brennan insisted there was no case or controversy since the student claimants whose rights were at issue had moved out. Id. at 10-12 (Brennan, J., dissenting). Justice Marshall agreed on the broad discretion to be accorded zoning authorities, but he saw the issue as one of fundamental constitutional rights superseding legislative discretion, thus requiring strict scrutiny. Id. at 12-20 (Marshall, J., dissenting).
In order to examine the inconsistencies raised by the Moore and Belle Terre opinions, this Note adopts a threefold approach. First, it sketches the history of adjudication in the area of zoning law, noting that judicial development has been left largely to the state courts. Moore and Belle Terre are contrasted with key state decisions on the power of zoning authorities to prescribe household composition.

Second, the Note discusses the apparent narrowing of the developing right of privacy. This right has emerged from shadowy areas of the Constitution over the last thirty years, provoking the Court's strict scrutiny and invalidation of intrusive legislative and executive acts in a broad variety of contexts. This examination leads to the suggestion that the Court was unnecessarily constrained in its treatment of the privacy assertions in both Moore and Belle Terre.

Third, the Note explores the nascent right of association in its socioeconomic dimension, as developed in United States Department of Agriculture v. Moreno. In Moreno, the right of persons to invite others—whether related or not—to live with them was classed as fundamental by Justice Douglas, and not to be interfered with by the government. Yet the same right, and Moreno, were dismissed by him as "inapt" in Belle Terre, one year later.

14. See text accompanying notes 59–95 infra.  
15. See text accompanying notes 96–124 infra.  
16. See Griswold v. Connecticut, 381 U.S. 479 (1965). In this leading case, the Court invalidated a state ban on contraceptive use as an infringement on the constitutional right of privacy. Justice Douglas based his opinion on the theory that although the right of privacy is not explicitly found in the language of the Constitution, specific guarantees in the Bill of Rights are surrounded by penumbral zones of privacy, without which the literal language of the amendments would leave only a few rights truly protected. Id. at 481–86.  
17. If the Court perceives a fundamental interest at stake, strict scrutiny of the state or federal law is the appropriate analytical standard. Privacy is, at least since Griswold, such a fundamental interest. See note 16 supra. See generally G. Gunther, Cases on Constitutional Law 616–56, 788–838 (9th ed. 1975). The broad concept of "privacy" has been held to embrace such matters as not having one's stomach pumped by police in search of criminal evidence, Rochin v. California, 342 U.S. 165 (1952); procreative freedom, Roe v. Wade, 410 U.S. 113 (1973); the purchase of contraceptives, Griswold v. Connecticut, 301 U.S. 479 (1965); not being sterilized against one's will, Skinner v. Oklahoma, 316 U.S. 535 (1942); freedom from police seizure of obscene literature from one's home, Stanley v. Georgia, 394 U.S. 557 (1969); and receiving political literature without special Post Office intervention, Lamont v. Postmaster Gen., 381 U.S. 301 (1965).  
20. 413 U.S. at 543.  
21. 416 U.S. at 8 n.6.
The plurality in Moore, however, appears to cite Moreno with approval. The Note traces the implications of these judicial inconsistencies within the framework of the right of association.

The Note concludes by proposing that in analyzing Belle Terre and Moore, the Court should have adopted the approach developed by state courts in fifty years of adjudication. Within this model, the Court would have applied a combination of strict scrutiny and rational relation standards to each zoning provision to determine whether it was reasonable or arbitrary. Thus, an arbitrary provision would be one that distinguished between related and unrelated classes of people. As Justice Powell said in Moore:

[The Court has a] continuing obligation to test the justifications offered by the state for state-imposed constraints which significantly hamper those modes of individual fulfillment which are at the heart of a free society. . . . [T]he Constitution prevents [the municipality] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

The Court in both Belle Terre and Moore appears to have forgotten this obligation. By being preoccupied with "family" values and rights, the two decisions unnecessarily complicated zoning law by inventing a new police power for zoning authorities to exercise in Belle Terre, and by inventing, in Moore, a new right which only traditional families may exercise in the face of restrictive zoning provisions. Neither invention was necessary. Given the confusion engendered by superimposing privacy jurisprudence over zoning law, neither decision was particularly wise.

I. Why Do Six Priests Constitute a Valid, Constitutionally Protected "Family Unit," While Six Students Do Not?

A. Background and State Cases

Zoning ordinances originally developed as a means of controlling land use in urban areas. The early twentieth century population exodus from the countryside to cities and increasing industrialization spawned the creation of planning boards in an effort to order the chaos. The power of the planning boards to
design the urban environment was attacked by developers as an unconstitutional taking of property without due process or compensation.\textsuperscript{25}

The Supreme Court's principal foray into this area was in deciding a land use question in \textit{Village of Euclid v. Ambler Realty Co.},\textsuperscript{26} in 1926. In \textit{Euclid}, the village attempted to preserve its rural character from industrial encroachment by the adjacent city of Cleveland. The developer wanted to expand its commercial property into Euclid, claiming that to deny it this right would greatly diminish the value of the property and constitute a taking without due process.\textsuperscript{27} The Supreme Court held Euclid's ordinance to be a valid exercise of the village's authority, establishing the constitutional standard of validity for zoning ordinances, and granting broad latitude and extreme deference to local zoning authorities.\textsuperscript{28} During the subsequent half century, the Supreme Court deftly avoided rendering any further opinions\textsuperscript{29} in this delicate area of local autonomy, except where racially restrictive covenants raised constitutional questions under the fourteenth amendment.\textsuperscript{30} Thus development of zoning case law remained primarily, until \textit{Belle Terre} and \textit{Moore}, at the state judicial level.

Consistent with the historic origins of zoning power, litigation in state courts has primarily involved land use controversies.\textsuperscript{31}
Property owners or real estate developers oriented to investment potential and a maximum rate of return generally square off against municipalities intent on optimal housing density, provision of open space, reasonable distribution of water, sewer, and utility services, and minimization of traffic congestion.\textsuperscript{32} Code provisions manifesting these traditional zoning objectives—minimum lot size, building height limits, floor space required per occupant, number of buildings per acre and numerous other physical specifications\textsuperscript{33}—have seldom suffered invalidation. Local laws enacted to achieve these goals have continued to be measured by the \textit{Euclid} standard: as long as the ordinance is neither unreasonable nor clearly arbitrary, it will be sustained.\textsuperscript{34}

If a zoning authority prefers a purely residential pattern with no commercial or mixed uses, ordinances typically limit single dwellings to a "single housekeeping unit"\textsuperscript{35} or "single economic unit" with shared sleeping, eating, and cooking facilities. As Justice Stevens pointed out in his concurring opinion in \textit{Moore}, the legitimacy of these restrictions is well-settled.\textsuperscript{36}

A more difficult issue, however, is the right of zoning authorities to reach inside residential dwellings and specify the preferred composition of a household. In the past fifteen years this issue has arisen with increasing frequency in the state courts.\textsuperscript{37} Although the factual settings vary widely in these cases, it is generally held sufficient that the parties who have ostensibly violated a household composition provision have "economic or other personal reasons for living together as a bona fide single housekeeping unit."\textsuperscript{38} Thus nearly all state court decisions in which household composition is at issue indicate that any attempt by local government to define who may occupy a dwelling must fail.\textsuperscript{39}

Zoning ordinances containing references to or explicit definitions of "family" have been invalidated in various ways in state
courts. The court may rule that the group before it—whether it is a group of six priests,\textsuperscript{40} ten foster children,\textsuperscript{41} or four unrelated young men\textsuperscript{42}—is a "family" for purposes of the ordinance,\textsuperscript{43} or it may reject the "family" provision outright as unconstitutional.\textsuperscript{44} The former, less drastic, as-applied approach to statutory construction is by far preferable to wholesale invalidation. Zoning is still, under the \textit{Euclid} standard, an area of presumed legislative sensitivity and competence. Nonetheless, it is evident from the nearly universal condemnation of narrowly defined "family" requirements that they are not regarded as legitimate zoning objectives or as rational means to achieve traditional land use controls.\textsuperscript{45}

Closer examination of three representative state cases reveals similar reasons for the states' aversion to narrow household composition requirements. The highest courts in New York,\textsuperscript{46} New Jersey,\textsuperscript{47} and Illinois,\textsuperscript{48} for example, have proceeded from the

\begin{itemize}
  \item \textsuperscript{40} \textit{E.g.}, Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 267 Wis. 609, 66 N.W.2d 627 (1954) (holding that a group of priests and lay brothers living together in a single housekeeping unit constituted a family within the zoning ordinance and did not constitute a prohibited convent); Boston-Edison Protective Ass'n v. Paulist Fathers, Inc., 306 Mich. 253, 10 N.W.2d 847 (1943) (holding that five priests and two servants constituted a "family" and that their use of a single-family dwelling for residential purposes did not violate a "family" ordinance).
  \item \textsuperscript{41} \textit{E.g.}, City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (holding that a couple living with their two natural children and ten foster children qualified as a single "family" unit).
  \item \textsuperscript{42} \textit{E.g.}, City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966) (holding that four tenants who were unrelated young men were not restricted by a "family" ordinance).
  \item \textsuperscript{43} \textit{E.g.}, City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). \textit{See} note 41 \textit{supra}.
  \item \textsuperscript{44} \textit{E.g.}, Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251–52, 281 A.2d 513, 518 (1971).
  \item \textsuperscript{45} \textit{Id.} at 248–52, 281 A.2d at 517–19. The Court in \textit{Kirsch} said: "The practical difficulty of applying land use regulation to prevent the evil [unruly and immoral conduct by young summer renters] is found in the seeming inability to define the offending groups precisely enough so as not to include innocuous groups within the prohibition." \textit{Id.} at 253, 281 A.2d at 519.
  \item \textsuperscript{46} The court in City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966), noted only one case which sustained a conviction for violation of a "family" ordinance. That was City of Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (1961). Both \textit{Kirsch}, 59 N.J. at 250, 281 A.2d at 518, and \textit{Trottner}, 34 Ill. 2d at 437, 216 N.E.2d at 119, disavowed the reasoning in \textit{Johnson}. The \textit{Johnson} court had regarded the restrictive zoning ordinance as an anti-overcrowding regulation, which legitimately outlawed too many foster children in one home. Since \textit{Belle Terre} and \textit{Moore}, however, the \textit{Johnson} result may not be quite so aberrant. \textit{See} notes 59–95 \textit{infra} and accompanying text.
  \item \textsuperscript{47} City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).
  \item \textsuperscript{48} Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971).
\end{itemize}
premise that zoning power may not extend beyond land use controls. As the Court of Appeals of New York stated in *City of White Plains v. Ferraioli*, 49 "zoning is intended to control types of housing and living conditions and not the genetic or intimate family relations of human beings." 50 Defendants in this case were a homeowner, a tenant couple, their two biological children, and ten foster children, seven of whom were related to each other. The court decided that insofar as the licensed group home was structured as a "single housekeeping unit" and bore the "generic character of a family unit," the group qualified as a "family" under the ordinance. 51

In *Kirsch Holding Co. v. Borough of Manasquan*, 52 the New Jersey Supreme Court went further. In this case, zoning authorities sought to exclude rowdy groups from summer resort communities by allowing only conventional "families" to rent summer homes. The court held that the municipality's efforts to ban certain "obnoxious" groups from summer resort areas by defining permissible "family" renters as those related by blood or marriage, and by requiring collective groups to be "of a permanent and distinct domestic character" and married to each other, swept too broadly. It affected "innocuous" groups as well, and violated the due process rights of prospective tenants. 53 "Family" prescriptions had no real and substantial relation to the express objective of preventing drunken and immoral behavior of summer renters: 54

[A] general municipal restriction of occupancy of dwelling units to groups of persons all of whom are related to each other by blood, marriage or adoption is unreasonably restrictive of the ordinary and natural utility of such property as dwellings for people, and of the right of unrelated people in reasonable number to have recourse to common housekeeping facilities in circumstances free of detriment to the general health, safety and welfare. . . . 55

Thus, the ordinance as a whole fell as an unconstitutional in-

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50. Id. at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.
51. Id. at 304–06, 313 N.E.2d at 758–59, 357 N.Y.S.2d at 452–53.
53. Id. at 248–52, 281 A.2d at 516–18.
54. Id. at 251, 281 A.2d at 518. "It is elementary that substantive due process demands that zoning regulations . . . be reasonably exercised . . . [and] the means selected must have a real and substantial relation to the object sought. . . ." Id.
55. Id. at 252, 281 A.2d at 519 (emphasis added) (quoting Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (1970)).
fringement on any person's rights to choose to live in one household.

Without deciding the constitutional due process and equal protection questions raised by the defendants in City of Des Plaines v. Trottner and without quite deciding that four unrelated male defendants were a "family," the Supreme Court of Illinois found a "family" requirement to be an invalid classification. The court observed that other decisions emphasized the "single housekeeping unit" aspect of the definition of family, disapproving intrusive legislative inquiries concerning consanguinity or affinity. The court further observed that blood or marital ties are neither guarantees of stability, morality, and discipline, nor sure prevention of transiency, noise, traffic congestion, and other urban evils.

A biological family with eight children, a history of unemployment, and an impending divorce may stimulate any of the evils which such "family" zoning limits are designed to avoid. Thus, these state cases stand for the proposition that relatedness or lack of it do not answer a community's need for peace, quiet, and rational development.

B. Belle Terre and Moore

In light of the Supreme Court's half-century of virtual abdication of authority in the area of zoning law, it is startling to find only one Justice citing these state decisions as a guide in either of the two principal cases.

Euclid, relied on extensively in Belle Terre, is, of course, an unassailable starting point in any zoning controversy. The Belle Terre court, however, noted rather cryptically that the instant case

56. 34 Ill. 2d 432, 216 N.E.2d 116 (1966).
57. Id. at 436–38, 216 N.E.2d at 119–20.
58. Id. at 436–38, 216 N.E.2d at 119.
59. See Moore v. City of E. Cleveland, 431 U.S. at 516–17 (Stevens, J., concurring). If the Court deliberately left development of zoning law to state courts, and those courts had ample opportunity to confront the very issue of interference with individual choice of household companions by zoning boards, it seems odd for the Supreme Court to ignore the states' collective wisdom on the subject entirely.
60. Euclid is so firmly established that the term "Euclidean zoning" has been coined to represent division of an area into various land uses. See I. R. Anderson, supra note 24, § 3.01. Both Belle Terre and Moore acknowledged Euclid as a starting point for analysis. 431 U.S. at 498; 416 U.S. at 3. That each state court began with Euclid's guidance is no excuse to forget that Euclid's general land use context—and its validation of zoning authority—is superseded when zoning boards go beyond land use controls.
was a “different phase” from Euclid. 61 Euclid in particular and zoning power in general were several times characterized as involving land use control—the “usual” phase—and urban planning controversies. 62 Therefore, it must be assumed that the Court did not regard the challenged village ordinance as being the common land use variety validated in Euclid.

Wherever state courts have confronted zoning ordinances which attempt to limit internal household composition, they have recognized that such regulation does not satisfy land use goals and exceeds legitimate zoning. 63 These courts’ mode of analysis shifted from near-total deference to legislative prerogatives to a more critical stance. Remaining within the Euclid guidelines, state courts tested the rationality of the means for achieving specified zoning objectives. When the latter were the usual ones of noise and traffic reduction, or optimum housing density, the courts found the means used—requirements that permissible occupants be related by blood, marriage, or adoption—not to be rationally related to the locality’s objectives. 64 This suggests that the Belle Terre Court need not have strayed from Euclid. The Court could have remained deferential, using minimal or perhaps intermediate scrutiny, and found the “family” requirement clearly arbitrary, as urged by the court of appeals. 65

Although the Court in Belle Terre ignored Euclid’s admonition that zoning laws not be arbitrary, it did, somewhat paradoxically, adopt the fear of industrial conversion and urban blight first articulated in Euclid 66 and reaffirmed in Berman v. Parker. 67

61. 416 U.S. at 3.
62. Id. at 3, 5, 9. Justice Marshall saw a constitutional infirmity in Belle Terre’s ordinance reaching “beyond control of the use of the land.” Id. at 17 (Marshall, J., dissenting).
63. See text accompanying notes 24–58 supra.
64. See text accompanying notes 46–58 supra.
66. 416 U.S. at 3–5.
That is, the *Belle Terre* Court brought the following considerations to bear upon the constitutionality of the ordinance in question: danger of fire or collapse of buildings, offensive industries, the ugly sores and misery of blighted urban housing, and suffocation of the human spirit. It strains the imagination to utilize the stark language of *Euclid* and *Berman* to support the efforts of a remote, bucolic village of 700 people on the north shore of Long Island to exclude six students from their community. The Court, however, did exactly that, declaring that in order for a zoning board to justify the exercise of its powers, "even those historic police power problems need not loom large or actually be existent in a given case."

More significantly, the Court invented new zoning objectives—wide yards, "youth and family values," clean air—and linked them explicitly to "family needs." The phrase "family needs" marks a bold departure from the firmly held view of state courts that zoning authorities may not dictate the character of a residential community by deciding who may live with whom. Zoning authorities could traditionally specify density limits; *Belle Terre* indicates that they may now also look inside homes to see if the "correct" people are living there.

*Belle Terre* further implies, without elaboration by the Court, that "family" necessarily connotes the white-picket-fence, suburban, nuclear variety, with no more than two unrelated persons per household. Giving zoning boards the authority to set such limits on household composition is a far cry from *Euclid*’s exercise of public welfare is not to be construed only in the narrowest sense of health and cleanliness. He had found in *Berman* that the legislature was entitled to make Washington "beautiful" as well. 348 U.S. at 33. Extending that idea to embrace "wide yards and open spaces" in *Belle Terre* is not an untoward judicial prerogative. It is difficult to compare, however, the effect of six student renters on a small community, and the cancerous blight of a Washington, D.C., ghetto. With no evidence on the record to suggest the students were a nuisance, see 416 U.S. at 20, it seems that the Court merely derived presumptions from factually inapposite urban renewal cases.

67. 348 U.S. 26 (1954). *Berman* represents a rare example of a Supreme Court zoning decision. As earlier noted, the Court preferred to leave zoning law development to state courts from *Euclid* until *Belle Terre*, a span of nearly 50 years. See notes 29-30 supra and accompanying text. Since *Berman*, however, involved the District of Columbia and a federal law, there was no state court in which to litigate.

Justice Douglas cited his *Berman* opinion in *Belle Terre* to demonstrate that public welfare is not to be construed only in the narrowest sense of health and cleanliness. He had found in *Berman* that the legislature was entitled to make Washington "beautiful" as well. 348 U.S. at 33. Extending that idea to embrace "wide yards and open spaces" in *Belle Terre* is not an untoward judicial prerogative. It is difficult to compare, however, the effect of six student renters on a small community, and the cancerous blight of a Washington, D.C., ghetto. With no evidence on the record to suggest the students were a nuisance, see 416 U.S. at 20, it seems that the Court merely derived presumptions from factually inapposite urban renewal cases.

68. 416 U.S. at 3-5.
69. Id. at 4.
70. Id. at 9.
71. See text accompanying notes 35-59 supra.
72. 416 U.S. at 9.
police power. Given *Belle Terre*’s preoccupation with “wide yards,” “few people,” and the “blessings of quiet seclusion,”73 a zoning board could decide that foster homes, group homes for the mentally handicapped, or other similar voluntary associations with a legitimate need to form a single household were inconsistent with “family and youth values” and therefore excludable. It appears that zoning boards will no longer have to try to justify regulation of household composition on the tenuous grounds of health, safety, welfare, or morals—justifications which consistently failed before state courts.74 With “family needs” as a new and convenient hook upon which zoning boards may now hang their decisionmaking, potential plaintiffs will find it difficult to demonstrate the irrationality of restrictive provisions such as those in *Belle Terre*. Zoning boards may now indulge in social control as well as land use planning. Boards will not have to explain why unrelated homeowners or tenants might adversely affect a residential community if the status of being unrelated is ipso facto enough to justify exclusion.

Needless to say, such a weapon in the arsenal of already powerful zoning boards is a great boon to exclusionary zoning.75 Zoning laws are ostensibly subject to constitutional restraint through the equal protection and due process clauses of the fourteenth amendment.76 Nonetheless, *Belle Terre*’s express judicial sanction of zoning authorities’ use of a classification to exclude persons from a community would seem to deprive any fourteenth amendment challenge of much of its force, absent a religious, political, or

73. *Id.*

74. See text accompanying notes 37–59 *supra*.

75. “Exclusionary” zoning is not to be confused with the more general term “restrictive zoning ordinance”. This latter term as used herein simply recognizes that there are limitations of all varieties in an ordinance. “Exclusionary” has been defined as “zoning that raises the price of residential access to a particular area, and thereby denies that access to members of low-income groups.” Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STANFORD L. REV. 767 (1969). Requirements for substantial minimum floor space, or several-acre lot sizes have been the usual barriers to those persons with lesser financial resources. Nonetheless, until *Belle Terre*, poorer persons could band together to pool resources. Now municipalities may constitutionally demand that those who pool their resources be related by blood, marriage, or adoption as well. *Belle Terre* in this sense is of a piece with Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) and City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) where the Court upheld exclusionary zoning ordinances.

76. The Court in *Belle Terre* noted specifically that if Belle Terre’s ordinance had set aside an area for only one race, it would have violated the fourteenth amendment. 416 U.S. at 6. It rejected as inapposite, however, arguments based on procedural disparities or deprivation of fundamental constitutional rights. *Id.* at 7. Had the facts been such that the plaintiffs could have made such an argument, the ordinance might have fallen.
free speech dimension.\textsuperscript{77}

The effect of \textit{Belle Terre} on state courts is not yet clear. It is interesting that the New York court in \textit{Ferraioli} reached the same result as had other state courts in spite of the fact that it followed \textit{Belle Terre} by several months. \textit{Ferraioli} does, however, appear to be phrased in more cautious language than the pre-\textit{Belle Terre} state cases. As noted earlier, \textit{Ferraioli} described the group home as having the "generic character of a family unit,"\textsuperscript{78} phraseology meant to distinguish \textit{Belle Terre} as a case expressly concerning "transiency."\textsuperscript{79} The court appeared constrained by \textit{Belle Terre} to import an element of relative permanency into the context of a foster home as opposed to the presumably peripatetic existence of the college students who wanted to live in Belle Terre. Justice Douglas, however, had expressly \textit{denied} that Belle Terre's ordinance was aimed at transients,\textsuperscript{80} implying that had it been so aimed, a fundamental rights issue may have been successfully raised by the students. The only problem with the students was that they did not share the biological or marital ties consistently found to be unnecessary in state decisions. "Family values" may thus apparently defeat the "right of unrelated persons to . . . have recourse to common housekeeping facilities,"\textsuperscript{81} no matter what their reasons for choosing to share kitchens.

It is not at all surprising to find the Court in \textit{Moore} characterizing \textit{Belle Terre} as supporting its decision to invalidate East Cleveland's ordinance.\textsuperscript{82} Promotion of "family needs" and "family values" having become a new \textit{sine qua non} for the constitution-

\textsuperscript{77} Since these rights are explicitly protected by the first amendment, it would presumably be more difficult for zoning power to interfere with their exercise. 416 U.S. at 14 (Marshall, J., dissenting).
\textsuperscript{78} 34 N.Y.2d at 306, 313 N.E.2d at 758, 357 N.Y.S.2d at 453. \textit{See} notes 50–51 \textit{supra} and accompanying text.
\textsuperscript{79} 34 N.Y.2d at 306, 313 N.E.2d at 758, 357 N.Y.S.2d at 453.
\textsuperscript{80} 416 U.S. at 7. The Court said "[The zoning ordinance] is not aimed at transients." If it had been so aimed, \textit{Belle Terre} would have been decided on the strict equal protection grounds of \textit{Shapiro} v. Thompson, 394 U.S. 618 (1969). \textit{Id.} at 7. That leading case declared unconstitutional certain welfare laws which contained minimum residency requirements of a year. The decision established a constitutional right to travel and settle in a community without losing the right to welfare aid. Justice Marshall in his dissent urged \textit{Shapiro} as one of a number of suitable precedents for the instant case. \textit{Id.} at 18.

In spite of \textit{Belle Terre}’s denial of the transiency issue, Justice Stevens, in \textit{Moore}, quoted \textit{Ferraioli}’s view of \textit{Belle Terre} on transiency with approval. 431 U.S. at 416 n.9.
\textsuperscript{82} 431 U.S. at 511.
ality of zoning ordinances, the Moore Court could not tolerate East Cleveland's "slicing deeply into the family itself."83

To invalidate East Cleveland's zoning ordinance, the Court had to depart from the minimal scrutiny applied in Belle Terre and Euclid. Thus, after passing reference to zoning matters, the Court turned to considerations of substantive due process and privacy jurisprudence, thus triggering a strict scrutiny analysis and its almost inevitable concomitant, invalidation.84 The Court extracted a substantive "right of family choice" from prior privacy cases85—effectively forbidding zoning boards from regulating nuclear or extended families.

It is a discretionary custom of the Supreme Court to avoid deciding broad constitutional issues wherever narrower, alternative grounds will suffice. The Euclid Court itself admonished:

In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred . . . a gradual approach . . . by a systematically guarded application and extension of constitutional principles to particular cases as they arise. . . . This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police. . . .86

This warning was given within the context of Ambler Realty's challenge to the very existence of an anti-industrial zoning law.87 In the absence of a challenge to a specific provision of that law, the Court sustained it in toto. The Court indicated, however, that if a specific provision of that law were ever challenged, it could be found arbitrary and struck down as unconstitutional.88

Just such a challenge was raised two years later in Nectow v. City of Cambridge.89 In that case, a zoning ordinance not unlike

83. Id. at 498.
84. See generally G. GUNThER, supra note 17, at 616–56.
85. For an analysis of the Moore Court's use of precedent in privacy and substantive due process areas, see Note, Constitutionally Protected Notions of Family: Moore v. City of East Cleveland, 19 B. C. L. Rev. 959 (1978). The Note suggests that Justice Powell's plurality opinion ignored the presence in prior cases of additional facts, such as the existence of a contractual right, which allowed those decisions to affirm a right of privacy. The Note concludes that a "right of family choice" should not have been drawn out of these cases.
86. Id. at 501.
88. Id. at 370.
89. Id. at 395.
89. 277 U.S. 183 (1928).
that in *Euclid* was challenged on grounds that a specific provision, as applied to Mr. Nectow's property, resulted in an unconstitutional taking of that property. The ordinance as a whole was sustained under *Euclid*’s guidance, but the specific zoning restriction placed on Nectow's property was held to be arbitrary. It bore no substantial relation to the public health, safety, morals, or general welfare and was, therefore, unconstitutional.90

Likewise, in *Moore*, the issue was focused not on an entire ordinance, but on a peculiarly narrow version of the common internal composition regulations dealt with by state courts.91 It seems that under *Euclid* and *Nectow*, as well as the state decisions noted earlier, the *Moore* Court could simply have found the specific “family” restriction to be arbitrary. The Court need not have resorted to the extreme measure of extracting a new right from the area of privacy and substantive due process in order to protect “family values.” A serviceable “as-applied” approach could have been used to invalidate the challenged provision, thus eliminating the need to create a new constitutional right. As the plurality in *Moore* itself acknowledged, fashioning a new substantive due process right is a risky business.92 Justice Powell referred to substantive due process jurisprudence as occasionally “treacherous . . . for this Court. . . . [T]he history of the *Lochner* era . . . counsels caution and restraint.”93 Indeed, caution may well help to explain why Justice Powell could only garner three other votes for his opinion.94

90. *Id.* at 188–89.
91. 431 U.S. at 496.
92. *Id.* at 502–03.
93. *Id.* at 502.
94. Such meager support does not create the kind of precedential value on which future litigants may wish to rely in asserting the “right to family choice” of living companions. It is not difficult to imagine future courts reasoning that *Moore* should be restricted to its uniquely poignant facts: a grandmother can not be torn from her motherless grandsons by a capriciously narrow zoning provision.

American society is in the throes of change. Conventional notions of family no longer adequately describe social and cultural reality. All manner of groups without blood or kinship ties claim “family” status: lesbians with children, two or more couples and children sharing one home for economic or other reasons, widows and widowers setting up housekeeping together without matrimonial ties to avoid loss of the woman's Social Security benefits. Only the latter “family” would find constitutional support for the arrangement, since *Moore* cum *Belle Terre* permit a maximum of two unrelated individuals to comprise a family for purposes of a restrictive zoning ordinance.

By limiting the invocation of this new right of family choice to traditional family groupings, *Moore* further narrowed the utility of its decision. Arguably, the Court was moved by the pathos of Mrs. Moore being branded a criminal for wanting her extended family to live with her. Pathos, however, is not restricted to situations involving blood relations. It is not
Arguably *Belle Terre*'s strengthening of traditional zoning power stands as a symbol of local autonomy in an era of broad invasions of local prerogative by the federal government. Such a bias toward local autonomy and community self-definition merges with *Moore*'s warning against local legislative tampering with diverse family groupings. But this otherwise commendable blend of local power with cultural tradition produces a curious result. On one hand, the biological family may have to struggle to assert its sanctity before zoning boards, given the split in the *Moore* Court. On the other hand, after *Belle Terre*, zoning boards will have virtually a carte blanche to exclude from a given neighborhood anyone whom they define as nonfamily. Resolution of this tension will determine the extent to which "residential" zoning becomes "biological family" zoning.

II. THE CONSTITUTIONAL RIGHT OF PRIVACY AFTER *BELLE TERRE* AND *MOORE*

The ramifications of *Belle Terre* and *Moore* for the constitutional rights of privacy and association are unclear. It may well be that these two cases are part of the general tendency of the Court to resist further expansion of these rights.

*Moore* created a supposedly new right of family choice. The decision has thus been criticized as an unwarranted extension of the privacy rights already existing in the areas of child rearing, procreation, and marital relations. It is well-settled, however, that the right of privacy extends beyond the literal confines of these three contexts. Rather, the liberty of choosing to live with one's kin, affirmed in *Moore*, may be regarded as fitting comfortably into a broader context in which privacy protection extends to such rights as distributing contraceptives, receiving political mail without government interference, and not having one's stomach at all difficult to conjure up stories of retired school teachers, welfare mothers, young, poorly paid workers, and others unrelated by blood, marriage, or adoption, sharing a common household purely out of need. The *Moore* decision's preoccupation with nuclear and extended families suggests that these less conventional, unconsanguinous groups, ever more common in American society, will not be able to claim a constitutional right to live together if confronted with a "family" limitation in a residential zoning ordinance.

95. See note 11 supra.
96. See Note, supra note 84.
98. Lamont v. United States Postmaster Gen., 381 U.S. 301 (1965) (finding that a federal law allowing the Post Office to destroy "communist propaganda" violated the first amendment).
forcibly pumped by police. In fact, given the variety of freedoms which have come under the protective umbrella of the constitutional right to privacy, it is surprising that Moore was a mere plurality and that Belle Terre so resoundingly defeated the privacy claim at issue in that case.

A. The Constitutional Right of Privacy

In Griswold v. Connecticut, Justice Douglas stated that the right of privacy emanated from penumbral zones which surround several constitutional amendments. In Griswold, a state ban on the use of contraceptives was challenged as an invalid intrusion into the privacy of married couples. The Court found that enforcement of the ban could encourage police prying to find the "telltales signs" of contraceptives. This prying into the innermost sanctum of the home was held to be an unconstitutional invasion of privacy. That was in 1965. Quite recently, Justice Rehnquist conceded the existence of such a constitutional right, but only in the context of the fourth amendment's direct proscription against illegal searches and seizures. Supreme Court opinions vary widely when addressing the true source of a constitutional privacy guarantee; likewise, the form of the right ranges from freedom to receive political propaganda through the mail without having to register with the Post Office, to freedom to use or distribute contraceptives. Privacy law has been called an "unrelated bag of goodies" and a "haystack in a hurricane." It has stimulated broad and heated commentary and has been divided into so many generic categories that a recent article on economic dimensions

100. 381 U.S. 479 (1965).
101. Id. at 485.
102. Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting). In Paul v. Davis, 424 U.S. 693 (1976), Justice Rehnquist reiterated this narrow view. A man's name and photograph were circulated to shopkeepers on an "active shoplifters' bulletin. Although distribution occurred after the charges had been dropped, the Court found no unconstitutional invasion of his privacy. Id. at 713.
103. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965), in which Justice Douglas, writing for the majority, found a "zone of privacy created by several fundamental constitutional guarantees." Id. at 485. He included the first, third, fourth, fifth, and fourteenth amendments as sources of this right to privacy. Justice Goldberg singled out the ninth amendment as well. Id. at 487 (Goldberg, J., concurring).
106. E.g., Gerety, Redefining Privacy, 12 HARV. CIV. RIGHTS CIV. LIB. L. REV. 233
of the right of privacy refused to "spill any more ink" on that intellectual conundrum.107

But to chart the fate of the right of privacy after Belle Terre and Moore, it is necessary to spill a little ink to delineate the spectrum of privacy law into which the two cases fit. The right of privacy was first conceptualized in the legendary 1890 article by Samuel Warren and Louis Brandeis.108 They proposed that every person had a "right to be let alone" or a right to keep one's identity intact, analogous to private property rights and the law of defamation.109 After a New York court rejected the idea in 1902 as a judicial interference in legislative business,110 public outrage provoked the state legislature to promulgate the first state privacy law, which forbade the unauthorized use of a person's name or image for commercial purposes.111 What followed was the sporadic acceptance of such a right by state courts and state legislatures over the next half century.112

(1977). In this article the terms “autonomy,” “identity,” and “intimacy” are used to capsulize privacy law. See also Reiman, Privacy, Intimacy and Personhood, 6 PHILOSOPHY & PUB. AFF. 26 (1976); Comment, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision, 64 CAL. L. REV. 1447 (1976).

107. Posner, The Right of Privacy, 12 GA. L. REV. 393 (1978). In his introduction, Professor Posner states: "The concept of 'privacy' is elusive and ill-defined. Much ink has been spilled in trying to clarify its meaning. I will avoid the definitional problem by simply noting that one aspect of privacy . . . is the withholding or concealment of information." Id. at 393.


109. Id. at 193.

110. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). Mrs. Roberson's picture had been used to advertise flour without her consent. She sued for invasion of her privacy. The court of appeals denied her relief, saying that "the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence and . . . the doctrine cannot now be incorporated without doing violence to settled principles of law . . . ." Id. at 536, 64 N.E. at 447.


112. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904) is the seminal state privacy decision. In Pavesich, the Supreme Court of Georgia expressly rejected New York's view. The plaintiff's name and picture in this case had been used to advertise insurance. Like Warren and Brandeis, the court implicitly recognized a right of privacy in the law of nuisance. In dicta, the court suggested a right of privacy is the underlying premise of the fourth amendment.

In Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956), Iowa allowed a cause of action for invasion of privacy for the first time. The plaintiffs had sued the local newspaper for publishing an allegedly obscene photograph of their deceased child. The court noted that as of 1956, 20 states had recognized a right of privacy, while 4 had rejected it. See also Vogel v. W.T. Grant Co., 458 Pa. 124, 327 A.2d 133 (1974).

Dean Prosser eventually systematized the right of privacy into 4 separate torts: (1) putting another in a false light, (2) appropriating another's name or reputation, (3) intruding
In an early Supreme Court case, *Jacobson v. Massachusetts*, the Court held that no right of privacy had been violated by a state program of mandatory smallpox vaccination. By 1942, however, in *Skinner v. Oklahoma*, the Court found that a state law mandating sterilization for thrice-convicted felons was an unconstitutional infringement on a prisoner's privacy. Ten years later, in *Rochin v. California*, the Court held that police efforts to obtain evidence from a suspect by forcibly pumping his stomach was an egregious assault on his constitutional right of privacy. State intrusion on one's bodily integrity "shocked the conscience," said Justice Frankfurter, and offended notions of civilized conduct.

Once the right of a married couple to use contraceptives found its place under the privacy umbrella in *Griswold*, the extension of that right to all individuals, married or not, was a short step. In *Eisenstadt v. Baird*, William Baird had exhibited contraceptive devices during the course of a lecture and distributed them to the audience at the close of his presentation. Writing for the Supreme Court, Justice Brennan indicated that *Griswold* did more than recognize a mere right of marital privacy; *Griswold* encompassed the right of an individual to decide whether or not to beget children.

The Court's holdings in *Griswold* and *Eisenstadt* actually had two precursors dating back to the earlier part of this century and the Supreme Court's venture into substantive due process. In

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113. 197 U.S. 11 (1905).
114. 316 U.S. 535 (1942) (recognizing that the right of procreation is a basic civil right of which a person cannot be deprived by the state).
115. 342 U.S. 165 (1952) (stating that the state may not justify brutal bodily intrusion even if it is the only way to obtain evidence for trial).
116. *Id.* at 172-73. This approach—affirming a constitutional right by relying on the perceptions or predilections of the Justices, rather than on clear constitutional language—appalled Justice Black, and would continue to do so as later cases established broader applications of the right of privacy. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 665 (1961) (Black, J., concurring) (praising the Court's rejection of what he perceived to be the "shock-the-conscience" standard of *Rochin* in the context of procedural due process).
117. *See* text accompanying notes 100-101 *supra*.
118. 405 U.S. 438 (1972). Justice Brennan's opinion for the majority stated:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person . . . as the decision whether to bear or beget a child.

*Id.* at 453 (emphasis added).
119. *Id.*
Pierce v. Society of Sisters, the Court recognized a parental right to send children to religious schools. Meyer v. Nebraska marked the Court's acknowledgment that parents—and not the state—have the right to decide whether children can learn a foreign language. Both Pierce and Meyer are cited in Moore as collective support for the proposition that the state has no right to standardize its children—and, by extension, its adults. Indeed, a common thread throughout the privacy fabric woven by the Supreme Court is the recognition of private human processes—both mental and physical—with which the government may not interfere without demonstrating a compelling reason to do so. Constitutional protection, therefore, is accorded to conduct, behavior, and life choices which are intimate and personal. Baird's right to distribute contraceptives to willing individuals and Skinner's right not to be sterilized against his will relate to a "family" interest in only its broadest and most generic sense. To regard such cases as representing "family privacy" in the same sense as blood relatives exercising a private choice is overly narrow and inaccurate. Yet, that is precisely what Moore appears to have done.

B. The Right to Privacy After Belle Terre and Moore

Moore may be read as joining this line of bodily integrity and intimate choice cases by explicitly linking the privacy right to the status of the Moores' relationship. The fact of blood ties may have been incidental. It is possible, however, that blood relation was a necessary prerequisite to the existence of the right of privacy in the eyes of the Moore Court. Justice Powell's plurality opinion speaks of "this degree of kinship" (grandmother to grandsons) meriting a finding of a right to private choice in selecting living companions. It is not clear whether distant cousins have this right. Justice Powell expressly distinguished Belle Terre as not involving a family. Thus it may be argued that Moore does not affirm individual rights in the area of intimate decisionmaking.

120. 268 U.S. 510 (1925).
121. 262 U.S. 390 (1923).
122. 431 U.S. at 505.
125. 431 U.S. at 505-06.
126. Id. at 498.
Rather, it appears to confine the application of privacy to the literal meaning and context of the symbolic construct, the "family."

The effect of narrowing privacy rights to their most basic symbolic context—the home or family—is heightened by the decision in Belle Terre. To the consternation of commentators who have followed Justice Douglas' long identification with individual rights, the Justice flatly denied that the students' right of privacy was violated by Belle Terre's zoning ordinance. The Court found the "family" provision, which allowed one person or two unrelated persons, as well as conventional blood- or marriage-related persons, to live in Belle Terre, constitutionally sound. In Belle Terre, the sanctity of the "home" failed to extend to three or more unrelated persons who live together in a residence. If home equals family—and if one is to be consistent with Moore—then privacy in the home is limited to family privacy.

The spectrum of core privacy rights to which the Moore and Belle Terre decisions belong includes a number of other home-as-sanctuary decisions, which demonstrate that home is not necessarily to be defined in the context of blood ties. Stanley v. Georgia, for example, involved a drug raid on a home which resulted in the confiscation of obscene materials. The Court held a conviction for possession of those materials to be invalid on the grounds that privacy rights had been violated. Similarly, in Rowan v. United States Post Office Dep't, a person's mailbox

127. E.g., Note, Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas, 87 YALE L.J. 1579 (1978). The author found Justice Douglas' extreme deference to the village "surprising." Id. at 1598. The Note traces the development of Justice Douglas' commitment to protection of individualism, concluding that Belle Terre is out of step with four other opinions on related subjects written by Justice Douglas. Id. at 1598 n.108. One of those contradictory opinions is United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973) (Douglas, J., concurring). See notes 167-80 infra and accompanying text. 128. 416 U.S. at 7-8. 129. Id. at 8. The Court added at this point that "The ordinance places no ban on other forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it likes." Id. at 9. It is this rather cavalier dismissal of the students' associative and privacy claims which Justice Marshall found disturbing. Id. at 17 (Marshall, J., dissenting). 130. See, e.g., Lamont v. Postmaster Gen., 381 U.S. 301 (1965), which involved a Post Office requirement that Mr. Lamont make a positive request for certain political mail to be delivered to him. The Court found such a requirement to be an invasion of his right to receive mail like any other person in the privacy and anonymity of his home. 131. 394 U.S. 557 (1969). 132. 397 U.S. 728 (1970). In this case, the Court balanced first amendment free speech against the right to be let alone. Chief Justice Burger found:
was found to be an extension of the private realm of one's home.

These decisions indicate that the core right of privacy may be conveniently labelled as "home"-related. They also indicate that exercise of the right is not contingent on genetic heritage, unless the Court purports in *Belle Terre* and *Moore* substantially to constrict the parameters of privacy law. Decisions from *Griswold* to *Rowan* interpret the right of privacy as a protection of personal conduct in order that one not have the government peering over one's shoulder to read one's mail or check whether one is viewing pornography or using contraceptives in the bedroom. Whether that conduct is or is not carried out with one's kin is irrelevant.

Choosing one's living companions would appear to be an act which the government may not monitor. On most scales of human values, it would seem to rank at least as high as one's right to receive mail. Justice Marshall, in his dissent in *Belle Terre*, insisted that a choice of home is a fundamental constitutional value:

The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.133

Justice Marshall then cited as support the same line of cases which Justice Powell cited in his plurality opinion in *Moore*.134 The latter textual citation, however, was preceded by a far narrower interpretation of that line of cases: "'This Court has long recognized that freedom of personal choice in matters of marriage or family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'"135 Ironically, three years after his broad affirmation in *Belle Terre* of anyone's right to choose living companions, Justice Marshall joined Justice Brennan's concurring opinion in *Moore* in stating with apparent approval, that *Belle Terre* actually supports the plurality opinion in

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[T]he right of every person "to be let alone" must be placed in the scales with the right of others to communicate . . . [A] sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail . . . . [A] mailer's right to communicate must stop at the mailbox of an unreceptive addressee.

*Id.* at 736-37.

133. 416 U.S. at 16.

134. 431 U.S. at 499.

135. *Id.* (emphasis added).
Moore. Justice Marshall’s views appear to have come full circle as he joined the Moore plurality in distinguishing Bell Terre’s ordinance from East Cleveland’s. The Belle Terre ordinance “affected only unrelated individuals. It expressly allowed all who were related by ‘blood, adoption, or marriage’ to live together, and in sustaining the ordinance we were careful to note that it promoted ‘family needs and family values.’”

C. The Creation and Development of Informational Privacy

The shrinkage of the core from “home” in a broad generic sense to “family” in its most literal sense may be part of a general Supreme Court retrenchment in the area of privacy law. This consolidation is especially apparent in an area of privacy jurisprudence which may be termed “informational privacy.”

Informational privacy involves an assertion by an individual that intimate decisions, made in private, not be the subject of state recordkeeping or governmental publicity. In this area, the Court has been much more inclined to tip the balance toward state exercise of traditional police powers—health, safety, welfare, and morals.

For example, in California Bankers Ass’n v. Schultz, the plaintiff complained that the recordkeeping and reporting requirements of the 1970 Bank Secrecy Act, whereby customer identities and copies of all checks must be available to the government for scrutiny, infringed upon the privacy of bank customers. The majority held that the government’s interest in pursuit of potential criminal evidence outweighed the constitutional privacy interests of customers. Justices Powell and Blackmun added a caveat, however, in a brief concurrence. They indicated that if the Act had applied to all customers with deposits, and not just those with deposits over $10,000, they would have found a constitutional privacy violation. Their concurrence, and Justice Douglas’ dissent, pointed out that one’s cancelled checks reflect one’s beliefs, activities, and associations. “At some point, governmental intrusion upon these areas would implicate legitimate expecta-

136. Id. at 511 (Brennan, Marshall, JJ., concurring).
137. Id. at 498.
140. 416 U.S. at 69.
141. Id. at 78–79 (Powell, Blackmun, JJ., concurring).
142. Id. at 79 (Douglas, J., dissenting).
tions of privacy. Justice Douglas also admonished that "a person is defined by the checks he writes" and "[w]here fundamental personal rights are involved—. . . when as here the Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns, and the like—the Act should be 'narrowly drawn' . . . to meet the precise evil."

It is ironic that California Bankers was announced on the same day as Belle Terre. It is tempting to suggest that one is as "defined" by the company one keeps as by the checks one writes. It appears perplexing that Justice Douglas should write two opinions back to back, recognizing a fundamental privacy interest in one's financial transactions in California Bankers and denying such an interest in one's choice of living companions in Belle Terre. The majority opinions in California Bankers and Belle Terre are only consistent to the extent that they find governmental interests in criminal investigation or zoning stronger than any invasion of individual privacy.

Another case which arose out of a similar law enforcement concern is Whalen v. Roe. In Whalen, doctors and patients challenged the New York State Controlled Substances Act of 1972. The Act required that the names, addresses, and ages of all persons who had received doctors' prescriptions for drugs such as amphetamines, cocaine, or methadone be recorded in a state data bank. Such drugs are legitimate treatment for migraine headaches, hyperkinesia, and epilepsy, but are subject to patient abuse. Plaintiffs claimed infringement of their right to privacy given the potential for leakage of such delicate personal information and obvious attendant harm to reputations. They also argued that fear of disclosure had a chilling effect on behavior. The Court observed that privacy law covers at least two general areas: the freedom to make decisions in private and the freedom to control government access to information about oneself. The Court found neither version implicated in Whalen, since the Act

143. Id. at 78–79. None of the three Justices made clear when this point would be reached. Presumably they would agree that a dragnet law with no clear criminal investigation purpose would fall on grounds of overbreadth.
144. Id. at 85–86.
147. 429 U.S. at 591–92, 593 n.8.
148. Id. at 600.
149. Id. at 599–600.
provided for adequate safeguards and penalties for disclosure.\textsuperscript{150} The decision was unanimous.

Controlling public information about oneself may also be expressed as an interest in one's reputation. In \textit{Paul v. Davis},\textsuperscript{151} a news photographer was arrested on suspicion of shoplifting. The charges were dropped, but a flyer on "active shoplifters" with his name and photograph on it had already been distributed by police to shopowners. Like the students in \textit{Belle Terre}, Paul brought a section 1983 action,\textsuperscript{152} claiming invasion of his privacy. The plaintiff asserted that injury to his reputation and future employment prospects intruded on both his privacy and property liberty interests. Justice Rehnquist, writing for a five-member majority, declined to extend the \textit{Roe v. Wade} line of privacy cases to embrace such an interest in reputation. The Court held that the claimants' "freedom of action" was not at stake, nor had there been an actual loss of employment.\textsuperscript{153} The decision in \textit{Paul} thus swings back full circle to Warren and Brandeis' conception of the right to privacy as the right to preserve one's "inviolate personality" as a form of property right in one's self-image\textsuperscript{154}—and rejects it.

Justices Brennan, Marshall, and White objected strenuously to the majority's crabbed construction of personal liberty.\textsuperscript{155} They maintained that privacy law since \textit{Meyer} and \textit{Pierce} had included protection of a broad variety of interests and that one's public reputation should not be more vulnerable to arbitrary or injurious

\textsuperscript{150} \textit{Id.} at 605. Justice Brennan, in a concurring opinion, suggested that some reporting was to be expected in the medical field. He cautioned, however, that without the safeguards written into the law, or in the event of abuse of the information held by the state, the statute would clearly violate constitutionally protected privacy rights. \textit{Id.} at 608 (Brennan, J., concurring).

\textsuperscript{151} 424 U.S. 693 (1976).

\textsuperscript{152} The Civil Rights Act, 42 U.S.C. § 1983 (1976), provides that an individual may seek a civil remedy for the violation of his or her federal rights by any agency of a state operating under color of state law. Although such an inquiry is beyond the scope of this Note, it is curious that § 1983 actions never seem to fare well in the context of "penumbral" rights such as privacy and association. \textit{See}, e.g., Monroe \textit{v. Pape}, 365 U.S. 167 (1961); \textit{Brown v. Caliente}, 392 F.2d 546 (9th Cir. 1968); \textit{Sheridan v. Williams}, 333 F.2d 581 (9th Cir. 1964).

\textsuperscript{153} 424 U.S. at 713.

\textsuperscript{154} \textit{See} notes 108–109 supra and accompanying text.

\textsuperscript{155} 424 U.S. 693 (Brennan, Marshall, White, JJ., dissenting). The three dissenters insisted that the majority's reading of precedent was "unduly restrictive in its construction of our precious Bill of Rights" and that prior liberty interest cases had not been rationally distinguished by the Court. They branded the decision as "a short-lived aberration." \textit{Id.} at 735.
state action than one's choice of schools or languages for one's children.\textsuperscript{156}

These recent decisions suggest several conclusions about the way in which \textit{Moore} and \textit{Belle Terre} fit into the continuum of privacy interests. Attempts to expand the developing right of privacy into areas beyond the core of intimate decisionmaking have apparently failed. It is not unlikely that even existing privacy law might be viewed by the Court with a less favorable eye.\textsuperscript{157} The lack of unanimity or even a strong consensus of opinion in core privacy cases suggests that privacy law is on shaky ground, and that any further narrowing of the dimensions of "privacy" could threaten the vitality of venerable privacy decisions such as \textit{Griswold}, \textit{Roe}, \textit{Eisenstadt}, \textit{Rochin}, and \textit{Skinner}.

In this light, the \textit{Belle Terre} decision does not appear to be such an aberration after all. It is simply one more instance of the Court's reluctance to allow any further elaboration of privacy freedoms.\textsuperscript{158} This is not to suggest that the choice of living companions is identical to the interest in not being publicly labelled a drug addict or criminal. The general division of privacy into the intimate decisionmaking of \textit{Belle Terre} and \textit{Moore} and "informational" privacy in \textit{California Bankers}, \textit{Whalen} and \textit{Paul}, is still apt, or at least convenient.\textsuperscript{159} Nonetheless, the line between the two categories is blurred.

\textit{Belle Terre}'s refusal to examine the fundamental interest of unrelated persons in choosing housemates blurs the line further. State police power interests in controlling petty crime and drug abuse are now ranked with zoning prerogatives. All are superior to privacy assertions. The Moores, but for the compassionate intervention of four Justices, would have had to split up their extended family. The pathos of a grandmother being branded a criminal for wanting to raise her motherless ten year old grandsons may not be present in the next case. The \textit{Moore} decision, upholding rights of privacy and association for related persons against zoning power may itself be short-lived with such slim support.

\textsuperscript{156} Id.
\textsuperscript{157} Thus, dissenting in \textit{Moore}, Justice White said that \textit{Griswold}, \textit{Roe}, \textit{Eisenstadt}, and others of that genre should not be overruled. 431 U.S. 494 (White, J., dissenting). Yet, there is an implicit "but" following his assertion. One senses that he wishes such decisions had never been made—he dissented in many of them.
\textsuperscript{158} See text accompanying notes 138–53 \textit{supra}.
\textsuperscript{159} See \textit{Whalen v. Roe}, 429 U.S. at 598–600.
A similar fate may befall the constitutional right of association. Justices Stewart and Rehnquist, dissenting in *Moore*, posed the question: what difference should blood-relatedness make to the existence or nonexistence of a constitutional right?

To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect. Freedom of association [or privacy] has been constitutionally recognized because it is often indispensable to effectuation of explicit First Amendment guarantees.160

The two Justices had a simple answer to their query. Neither related nor unrelated persons should have a right of association if the only justifications they assert are "gratification, convenience, and economy of sharing the same residence."161 The answer could just as easily be the opposite: if there is a constitutional right of association in choosing one's living companions, both related and unrelated persons should be able to assert it.

III. THE CONSTITUTIONAL RIGHT OF ASSOCIATION

Freedom of association, like the right of privacy, has been found in the shadowed zones of constitutional guarantees of speech, assembly, press, and religion.162 The Court has firmly supported the first amendment right to exercise one's political beliefs in association with others. Twenty years ago, in *NAACP v. Alabama*,163 the Court invalidated an Alabama law which required that the NAACP file its membership lists with the state. The Court held that members of the NAACP were entitled to the right of association without threat of state scrutiny and the concomitant chilling effect upon the pursuit of political objectives.164

Two other NAACP decisions, *Bates v. City of Little Rock*165 and *Shelton v. Tucker*,166 utilized the same analysis. The Court found, respectively, that state justifications for needing members' names in order to collect a license tax on trades, and wanting "relevant" information on outside activities of school teachers, were

160. 431 U.S. at 535.
161. Id. at 536.
162. See, e.g., United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 541 (1973) (Douglas, J., concurring).
164. Id. at 466.
166. 364 U.S. 479 (1960).
inadequate to support state scrutiny of NAACP membership lists.\textsuperscript{167}

Until \textit{United States Department of Agriculture v. Moreno},\textsuperscript{168} the right of association had been generally confined to a political, racial, or religious context. \textit{Moreno} appears to have given the right of association a socioeconomic gloss. In a factual context reminiscent of the \textit{Belle Terre} and \textit{Moore} zoning ordinances, \textit{Moreno} involved the restriction of food stamp eligibility to households of \textit{related} persons. Section 3(e) of the Food Stamp Act of 1964\textsuperscript{169} excluded from the subsidy program any household containing one individual unrelated to any other member of the household. The original version of section 3(e) used the broader classification of an "economic unit sharing common cooking facilities." A 1971 congressional amendment, however, evidently aimed at preventing "hippies and communes" from taking advantage of the program, specified that a household could only mean related persons or nonrelated persons over age sixty.\textsuperscript{170}

The plaintiffs were several groups of unrelated indigent persons caught in this congressional web of exclusion. The Court found that the objectives of the Act—raising levels of nutrition among the nation's poor and strengthening the agricultural economy—were ill-served by the classification of households into "related" and "unrelated."\textsuperscript{171} The Court concluded that the 1971 amendment violated the plaintiffs' equal protection rights by excluding not those likely to abuse the food stamp program but "only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."\textsuperscript{172}

Justice Douglas cast an equally penetrating light on the controversy. "This case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance."\textsuperscript{173} Justice Douglas declared that the banding together of people to fight the age-old enemies of hunger and poverty was a protected freedom of association "deep in our traditions."\textsuperscript{174} Further, "[t]aking a person into one's home be-
cause he is poor or needs help or brings happiness to the household is of the same dignity" as the right of parents to have their children study German or the right of adults to use contraceptives.\textsuperscript{175}

From \textit{Moreno}, it may fairly be inferred that the right of association has taken on broader implications. The majority's decision indicated that relatedness—or lack of it—cannot rationally serve the usual purposes of economic and social legislation designed to cure pervasive societal ills. If this is so, a classification of household "economic units sharing a kitchen" on the basis of blood-relatedness seems as irrational in a zoning context as in \textit{Moreno}'s context of food stamp distribution. Yet, in a peculiarly terse and puzzling footnote, the \textit{Belle Terre} majority rejected \textit{Moreno} as "inapt."\textsuperscript{176} Justice Marshall, dissenting in \textit{Belle Terre}, wondered how Justice Douglas could so blithely lay aside his \textit{Moreno} opinion.\textsuperscript{177} Justice Marshall himself read \textit{Moreno} as standing for the proposition that the right to invite strangers into one's home extended not only to entertainment but also to the choice of living companions.

A closer reading of Justice Douglas' concurrence in \textit{Moreno} reveals the seeds of his seemingly inconsistent opinion in \textit{Belle Terre}. In clarifying his views with respect to taking needy persons into one's home, he remarked that the "unrelated person" provision was not aimed at the maintenance of normal family ties.\textsuperscript{178} Had it been so aimed, the law would have been sustained. This idea is repeated later:

Since the "unrelated" person provision is not directed to the maintenance of the family as a unit but treats impoverished households composed of relatives more favorably than impoverished households having a single unrelated person, it draws a line that can be sustained only on a showing of a "compelling" governmental interest.\textsuperscript{179}

Extending the import of this dictum to the \textit{Belle Terre} context, it is apparent that the Court, speaking through Justice Douglas, regarded the village's zoning provision as one "directed at the maintenance of the family unit." The \textit{Belle Terre} decision explicitly identifies one legitimate zoning goal (albeit one newly in-

\textsuperscript{175} Id. at 542.
\textsuperscript{176} The footnote declared that \textit{Moreno} was "inapt as there a household containing anyone unrelated to the rest was denied foodstamps." 416 U.S. at 8 n.6.
\textsuperscript{177} Id. at 17–18 (Marshall, J., dissenting).
\textsuperscript{178} 413 U.S. at 542.
\textsuperscript{179} Id. at 544 (emphasis added).
vented for the occasion) as the creation of a "land use project addressed to family needs."^180

There is indeed a surface contradiction between *Moreno* and *Belle Terre* regarding the rationality of classifying people by blood ties. It would seem that this distinction permits the denial of rights to a group unfortunate enough not to have kin, but grants those rights to a group *with* kin. The "family maintenance" gloss in *Moreno*, however, presaged the fuller development of that idea in *Belle Terre* and renders the two decisions more consistent than they otherwise appear. It is then echoed in *Moore*, once the state is found to be interfering with maintenance of the family.

If a socioeconomic right of association remains after *Belle Terre*’s efforts to distinguish *Moreno*, it does so only when the most dire of circumstances exist: abject poverty, malnutrition, or threats to the efforts of the powerless to retain their dignity. It may well be that the relative freedom of the Belle Terre students to move elsewhere without hardship encouraged the Court to pass so quickly over their "fundamental rights" claims in the presence of such a powerful countervailing interest as local zoning prerogatives.^181

IV. Conclusion

Viewed narrowly, *Moore* and *Belle Terre* are superficially consistent decisions. They both affirm the enduring American heritage of strong family orientation,^182 albeit in the narrow, traditional sense of "nuclear" and "extended" family. Both decisions reaffirm that zoning is a critical historic local function with which the Supreme Court will not lightly tamper.^183 However, this surface consistency produces an anomalous result. Read together, *Moore* and *Belle Terre* stand for the ironic proposition that it is the village or municipality that may invoke "family values" as

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^180. 416 U.S. at 9.

^181. See L. Tribe, *American Constitutional Law* 975–80 (1978). Professor Tribe suggests that one explanation of *Belle Terre* may be that the Court saw a stronger associational right among the *villagers* themselves. Justice Douglas did refer to the village as a "sanctuary for people." 416 U.S. at 9. Professor Tribe proceeds, however, to question this view. In particular, he notes that a village, as a state subdivision, should not be allowed to create invidious classifications in the name of its own penumbral rights. Further, even if the village was supposed to be acting as a whole for self-protection, its alleged consensus became a sham once the homeowner decided to rent to the students.

^182. 431 U.S. at 503–06; 416 U.S. at 9–10.

a constitutional bar to outsiders, whereas, given the meager support for Justice Powell's plurality opinion in *Moore*, family groups will have a difficult time in the future asserting the "right to family choice" in forming a household. This will be especially true for foster homes, halfway houses, small groups of retired persons, and other less conventional, self-defined "families." Such a result marks a fundamental shift away from the firmly held view of state courts that formation of a household may legitimately be based on economics, convenience, or other intangible human considerations, with the state deciding solely questions of general land usage.

Although their intention was to deny the right to choose one's living companions, Justices Stewart and Rehnquist made a valuable observation when they pointed out in their dissent in *Moore* that it should not make any constitutional difference whether a person associates with a cousin or a colleague—the measure of protection (high or low) should be the same. State court decisions appear to agree with the two Justices' view, albeit with the opposite intention of affirming the right to choose one's living companions. It remains for future decisions to pinpoint the proper balance between zoning goals and individual rights under the Constitution. In the interim, state court interpretations of a "family" as a single housekeeping unit—developed over half a century in the absence of a Supreme Court pronouncement—have been jeopardized.

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