The Burger Court Opinion Writing Database

Moore v. East Cleveland

431 U.S. 494 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Folder

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 22, 1976

Re: 65-6289 Moore v. City of East Cleveland

MEMORANDUM TO THE CONFERENCE:

You will recall that conference consideration of this case resulted in a close vote with some positions tentative. Following the conference, I pursued some of the ideas the discussion had exposed and concluded that I would assign the case to myself. My vote was, at least at that time, a dispositive vote.

My further exploration has brought me to the point which my old colleague Henry Edgerton often described, when he changed his mind, as doing so "because it won't wash."

I, therefore, expose my present analysis of the case in this memorandum with a view to determining whether its general thrust will gain the support of four or more votes. If it does not, I will ask the senior Justice of five to take the case for assignment. I will then develop my ideas as a dissent. If four or more join, I will prepare an opinion.

This appeal requires that we decide whether a suburban community may constitutionally zone itself for single-family residential dwelling units under a definition of "family," which excludes some persons related by blood to members of the household--here any but the children of one son of the owner.

The City of East Cleveland, Ohio, is one of a number of residential suburbs, or so-called "dormitory"suburbs, located in the metropolital area of Cleveland, Ohio. The community's zoning ordinances limit residential occupany in a number of ways. One such limitation, not directly relevant here, establishes a minimum floor area for each occupant of a dwelling unit.[1/] Another limitation, which

1/ East Cleveland Ordinance § 1351.03

gives rise to the present litigation, restricts occupancy of dwelling units to single families.[2]

The term "family" is defined:

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

East Cleveland Ordinance § 1341.08.

The municipality permits a Board of Building Code Appeals to grant variances from this single family standard where necessary to alleviate "practical difficulties and unnecessary hardships" and "to secure the general welfare and [do] substantial justice . . . . "[3] Recourse to the Board of Appeals is by appeal within 10 days of notice of any adverse decision made in the enforcement of the zoning ordinance.[4]

2/ East Cleveland Ordinance § 1351.02

3/ East Cleveland Ordinance # 1311.02

4/ East Cleveland Ordinance § 1311.03

Appellant Inez Moore is a homeowner residing in East Cleveland. Living with her in her home are her adult sons, John Moore, Sr., and Dale Moore, and their respective children, John Moore, Jr., and Dale Moore, Jr. Neither son has a wife.

On January 16, 1973, appellant, as the homeowner, was cited for violation of the single family housing violation. Appellant was advised that she, her two sons and two grandchildren constituted two families under the ordinance. The notice of violation directed appellant to comply with the ordinance within a stated time. Occupancy by the grandmother, one son and his children would not violate the ordinance.

After receipt of the notice of violation, appellant made no effort to obtain a variance which would have exempted her from the literal language of the ordinance, though her situation appears to present precisely the kind of "practical difficulties and unnecessary hardships" the variance was intended to accommodate. Appellant does not contend that she was unaware of her right to seek a variance, or that she at any time attempted to obtain a variance but was prevented from doing so for some reason.

Negotiations failed to resolve the matter and a complaint was filed; appellant's counsel stipulated all facts necessary to constitute a violation of the ordinance. The defense was an attack on the unconstitutionality of the ordinance. It is inferable that appellant's counsel made an intentional, tactical decision not to pursue the expeditious administrative remedy provided by the variance. Counsel apparently made no attempt, either at trial or before, to show any extenuating circumstances or hardship mitigating the violation or punishment. It appears counsel were more interested in"making law" than in resolving their client's problem. For me this adds up to a "deliberate bypass."

The municipal court found appellant guilty and fined her $25 and sentenced her to five days in jail; the court agreed to suspend both the fine and jail term if appellant complied with the ordinance within 45 days but also stayed execution of the penalty during any appeal.

Tentatively, I would analyze the case on three levels:

1. Freedom of association is constitutionally recognized because it is often indispensable to effectuation of one of the explicit First Amendment guarantees. See NAACP v. Alabama, 357 U.S. 449, 460-61. But the scope of the associational right is limited by the need which creates it; obviously not every "association" is for First

Amendment purposes or serves to promote values the First Amendment was designed to protect. The stringent protections of the amendment should attach only to associations which may fairly be said to have as a purpose the promotion of any activity independently protected by the amendment.

Under that standard, I question whether appellant has a First Amendment associational right to reside with her grandchild. The "association" in this case is not for any purpose relating to the promotion of speech, assembly, the press, or religion, but simply to live in the same household as a matter of convenience, albeit an eminently sensible kind of arrangement. Without a substantive First Amendment value at stake, however, I would not extend freedom of association to protect a purely private relationship such as this one.

2. Our decisions suggest certain privacy rights inherent in the family relationship towhich the Constitution gives protection, as in Griswold v. Connecticut, for example. But we have also held, in Bill Douglas' opinion, that there is no such right guaranteeing the right of cohabitation when claimed by unrelated persons. Village of Belle Terre v. Boraas, 416 U.S. 1, 7. I take it as agreed that there is no constitutional privacy right to cohabit with every person related by blood, marriage or adoption;at some point the families relationship becomes so attenuated that constitutional privacy rights no longer attach.

Though a grandmother (or grandchild) is "family" in a colloquial meaning of the term, constitutional privacy has thus far been limited to the most intimate familial relationships. The "family" the Constitution gives special protection to is the family unit which forms the basic unit of society--parents and their offspring. This is not a denial of the special relationship which many feel for other relatives, particularly grandparents or grandchildren. Many family homes, my own included, often had a grandparent living in the household.

But lines must be drawn, and I think single family or "nuclear" family, as some call it (but I will not), is the basic building block of our society and is a rational place to draw a line. Once we acknowledge, as we must, the power to draw a line, then the test for me is whether the line has a rational basis. Every line,as Bill Douglas noted in Belle Terre,includes some categories that could be left out and excludes some that could appropriately be in.

If we go beyond, to include those familial relationships--grandmother, grandchildren--to which, as in this case, circumstances have attached a special significance, it will be impossible to draw supportable lines. For that reason I do not think that appellant should be treated, for constitutional purposes, as the de facto or surrogate mother of her grandchildren--though I note parenthetically that this is precisely the kind of argument to which zoning authorities ordinarily may be expected to respond on a request for a variance.

I conclude that appellant can claim no constitutional right of privacy as a bar to enforcement of this ordinance.

3. Without first amendment or privacy infringements, and with no "suspect class" involved, I am satisfied that the proper equal protection standard is that applied in Euclid v. Ambler Realty 272 U.S. 365, and McGowan v. Maryland, 361 U.S. 420. Under that test, it seems clear that the purpose of this ordinance is the same which underlay the ordinance before us in Village of Belle Terre; it is constitutional for the same reasons.

An ordinance of this kind serves the legitimate purpose of preserving the character of the community as a single family residential area; it operates to restrict population density which, though perhaps not inimical to public safety or health,[1] would make East Cleveland a noisier, more congested, less tranquil place to live.[2] There are other subsidiary purposes outlined in the briefs. If a municipality may constitutionally zone for single-family occupancy, then in the absence of other constitutional violations it does not violate equal protection to define a single family as East Cleveland had done.

Legislative line-drawing is inevitable and often produces "odd" results; while such lines must not be capricious, it is obvious that because the reach of legislation is prospective and "wholesale," any line may later prove to have unintended results or to exclude some who might better

---

1/ Appellant makes much of Ordinance § 1351.03, the municipality's density ordinance, and argues that because the municipality has chosen to establish a specific density control the single-family ordinance can have no role to play in the control of population density. But it is obvious that § 1351.03 is directed not at preserving the character of a residential area but at establishing minimum health and safety standards for fire and disease control.

2/ Or at least a legislative body could rationally so conclude.

be left in. A person probably gains no special wisdom on the day of his 18th birthday which qualified him to vote; an income tax return filed one day late may cause no disruption to the government, and may not even be opened for weeks or months. Bill Douglas in Belle Terre quotes Holmes' salient observation that:

> "When a legal distinction is determined . . . . between day and night, childhood and maturity or any other extremes, a point has to be fixed or a line drawn . . . . to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary."

Belle Terre, 416 U.S., at 8.

In considering the rationality of the line drawn here, it is significant that the ordinance left open an avenue of relief for "hardship" cases--those falling close to but on the proscribed side of the legislative line.

1311.02 Variances; Rules and Regulations

> "The Board of Building Code Appeals shall determine all matters properly presented to it and where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance for which it is designated as the Board of Appeals, such Board shall have the power to grant variances in harmony with the general intent of such ordinance and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City."

The variance in this instance is an important recognition by the municipaltiy of the impossibility of legislating infallibly. Strict ordinances accompanied by the "safety valve" of variances are traditional in American zoning laws.They are a rational, common-sense means of accommodating "hardship" cases and doing "substantial justice" with common sense.

I have little doubt that on this record a variance would have been granted if sought. That appellant chose not to take that route can hardly reflect on the irrationality of the ordinance.

In short, I have concluded that the challenged zoning ordinance survives the constitutional challenges mounted by appellant. Accordingly, I now vote to affirm.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1976

Re: 75-6289 - Moore v. City of East Cleveland

MEMORANDUM TO THE CONFERENCE:

My view, expressed in the November 22 memorandum, has not attracted significant support for what is the key, for me, to the case. The variance provisions and petitioner's failure to exhaust them is, for me, the critical factor, and I have therefore concluded I am not in a position to write for the Court.

In assigning cases between now and Monday, I will reassign the case to someone else. I will likely express my basis for affirmance separately.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

1st DRAFT

Circulated: MAR 1 1 1977

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant, v. City of East Cleveland, Ohio. | On Appeal from the Supreme Court of Ohio.

[March —, 1977]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment, but it is unnecessary for me to reach the difficult constitutional issue this case presents. For me, the deliberate refusal to make use of a plainly adequate administrative remedy should foreclose appellant from pressing any constitutional objections to the city's zoning ordinance in this Court. Considerations of federalism and comity, as well as practical aspects of the limits of the capacity of the federal courts, dictate this result. In courts, as in hospitals for example, two bodies cannot occupy the same space at the same time; when any case which could have been disposed of long ago at the local level comes here, it fills space some other case might well have been given.

(1)

The single-family zoning ordinances of the city of East Cleveland define the term "family" to include only the head of the household and his or her most intimate relatives, principally the spouse and unmarried and dependent children. Excluded from the definition of "family," and hence from cohabitation, are various persons related by blood or adoption to the head of the household. The obvious purpose of the City is the traditional one of preserving certain areas as family residential communities.

The city has established a Board of Building Code Appeals to consider variances from this facially stringent single-family limit when necessary to alleviate "practical difficulties and un-

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. [illegible]
Mr. [illegible]

From: The Chief [illegible]

Circulated: MAY 16 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[March —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

It is unnecessary for me to reach the difficult constitutional issue this case presents. Appellant's deliberate refusal to use a plainly adequate administrative remedy provided by the City should foreclose her from pressing in this Court any constitutional objections to the City's zoning ordinance. Considerations of federalism and comity, as well as the finite capacity of federal courts, support this position. In courts, as in hospitals, two bodies cannot occupy the same space at the same time; when any case comes here which could have been disposed of long ago at the local level, it takes the place some other case, having no alternative remedy, might well have been given.

(1)

The single-family zoning ordinances of the City of East Cleveland define the term "family" to include only the head of the household and his or her most intimate relatives, principally the spouse and unmarried and dependent children. Excluded from the definition of "family," and hence from cohabitation, are various persons related by blood or adoption to the head of the household. The obvious purpose of the City is the traditional one of preserving certain areas as family residential communities.

The City has established a Board of Building Code Appeals to consider variances from this facially stringent single-family limit when necessary to alleviate "practical difficulties and un-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM J. BRENNAN, JR.

November 23, 1976

RE: No. 75-6289 Moore v. City of East Cleveland, Ohio

Dear Chief:

I cannot possibly agree with the analysis in your memorandum of November 22 which brings you out to affirm this case. I can agree neither with your First Amendment associational nor your privacy analysis. Worse still, the "nuclear family" concept seems to me completely out of touch with the reality of a vast number of relationships in our society, including my own as a youngster growing up. Only a minority of American families still can afford to warehouse old people in retirement communities. In urban areas a grouping such as the Moores remains an economic necessity. East Cleveland is definitely not Fairfax County. In short, I cannot believe that the Constitution embraces purely and simply an affluent suburban concept of what is a family.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 11, 1977

RE: No. 75-6289 Moore v. City of East Cleveland, Ohio

Dear Lewis:

Please join me, and I'll also be shortly filing a separate dissent.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[February —, 1977]

MR. JUSTICE BRENNAN, dissenting.

Reaction to this decision must be one of shocked disbelief. The Court holds that the Constitution is powerless to prevent East Cleveland from prosecuting as a criminal and jailing a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with and been brought up by her since his mother's death when he was less than one year old.[1] The grandmother is black, and was widowed in 1958 with seven children to care for. Illness forced her to quit work and she now lives on Social Security.[2] Her two sons, Dale and John, and her two grandsons, Dale, Jr., age 6 and John, Jr., age 10, have been living with her in her modest house.[3]

[1] Curiously, the Court nowhere mentions that this is a criminal prosecution which resulted in the grandmother's conviction and sentence to prison and a fine. Section 1345.99 permits imprisonment of up to six months, and a fine of up to $1000, for violation of any provision of the Housing Code. Each day such violation continues may, by the terms of this section, constitute a separate offense.

[2] See The Plain Dealer (Cleveland), Nov. 5, 1976, at A-1, col. 1.

[3] The Court mistakenly asserts, p. 6 n. 7, that there is "nothing in the record to indicate that the appellant has any hand in the upbringing of her grandchildren, and it is thus unnecessary to speculate about the extent to which cases such as *Pierce* v. *Society of Sisters* . . . and *Meyer* v. *Nebraska* . . . might in that event be relevant." The opening paragraph of appellant's brief states that she has "raised her grandson in her own home since the death of the child's mother in 1967, when [he] was

pp 3 and 7.
Minor stylistic changes throughout.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:
Recirculated: 2/17/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[February —, 1977]

MR. JUSTICE BRENNAN, dissenting.

Reaction to this decision must be one of shocked disbelief. The Court holds that the Constitution is powerless to prevent East Cleveland from prosecuting as a criminal and jailing a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with and been brought up by her since his mother's death when he was less than one year old.[1] The grandmother is black, and was widowed in 1958 with seven children to care for. Illness forced her to quit work and she now lives on Social Security.[2] Her two sons, Dale and John, and her two grandsons, Dale, Jr., age 6 and John, Jr., age 10, have been living with her in her modest house.[3]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 12, 1977

RE: No. 75-6289 Moore v. City of East Cleveland

Dear Chief:

If as Potter suggests the above should be reassigned, and it falls to me to do it, I assign it to Lewis.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 3, 1977

RE: No. 75-6289 Moore v. City of East Cleveland, Ohio

Dear Potter:

I've sent the enclosed draft back to the printer for the changes indicated and will not make a general circulation of this draft. I am sending the enclosed to you, however, with the thought it will give you the substance of my concurrence.

Sincerely,

Bill

Mr. Justice Stewart

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/4/77

Recirculated:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[May —, 1977]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing [1] a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old.[2] I do not question that a municipality may constitutionally zone to alleviate noise and traffic congestion and to prevent overcrowded and unsafe living conditions, in short to enact reasonable land-use restrictions in furtherance of the legitimate objectives East Cleveland claims for its ordinance. But the

[1] This is a criminal prosecution which resulted in the grandmother's conviction and sentence to prison and a fine. Section 1345.99 permits imprisonment of up to six months, and a fine of up to $1000, for violation of any provision of the Housing Code. Each day such violation continues may, by the terms of this section, constitute a separate offense.

[2] Brief for Appellant, at 4. In addition, we were informed by appellant's counsel at oral argument that,

"application of this ordinance here would not only sever and disrupt the relationship between Mrs. Moore and her own son, but it would disrupt the relationship that is established between young John and young Dale, which is in essence a sibling-type relationship, and it would most importantly disrupt the relationship between young John and his grandmother, which is the only maternal influence that he has had during his entire life." Tr. of Oral Arg., at 16.

The city did not dispute these representations, and it is clear that this case was argued from the outset as requiring decision in this context.

STYLISTIC CHANGES

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

5/13/77

SUPREME COURT OF THE UNITED STATES

No. 75–6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[May —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion. I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing[1] a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old.[2] I do not question that a municipality may constitutionally zone to alleviate noise and traffic congestion and to prevent overcrowded and unsafe living conditions, in short to enact reasonable land-use restrictions in furtherance of the legitimate objectives East Cleveland claims for its ordinance. But the

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[2] Brief for Appellant, at 4. In addition, we were informed by appellant's counsel at oral argument that,

"application of this ordinance here would not only sever and disrupt the relationship between Mrs. Moore and her own son, but it would disrupt the relationship that is established between young John and young Dale, which is in essence a sibling-type relationship, and it would most importantly disrupt the relationship between young John and his grandmother, which is the only maternal influence that he has had during his entire life." Tr. of Oral Arg., at 16.

The city did not dispute these representations, and it is clear that this case was argued from the outset as requiring decision in this context.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 23, 1976

Re: No. 65-6289 --
Moore v. City of East Cleveland

Dear Chief,

I agree with the basic analysis contained in your memorandum to the Conference, although I would not myself place much emphasis on the failure to exhaust the variance procedures in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 10, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-6289, Moore v. East Cleveland

As may be observed, the enclosed opinion plagiarizes generously from the memoranda of the Chief Justice and of John Stevens. To each of them I acknowledge my indebtedness and thanks.

P.S.

P. S.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: FEB 10 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.
} On Appeal from the Supreme Court of Ohio.

[February —, 1977]

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single housekeeping unit; it forbade occupancy by any group of three or more persons who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the Fourteenth Amendment nor infringe any other rights or freedoms protected by the Constitution.

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 that defines "family" to include only certain combinations of blood relatives. The question presented 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.

I

The city of East Cleveland is a residential suburb of Cleveland, Ohio. It has enacted a comprehensive housing code,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 16, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-6289, Moore v. East Cleveland

At an appropriate place toward the end of my opinion in this case, I am contemplating adding a paragraph along the following lines:

> In view of MR. JUSTICE BRENNAN's dissenting opinion, a final word is appropriate. His dissenting opinion seeks to convey the invidious message that the ordinance before us is racially discriminatory. Nothing could be further from the truth. The population of East Cleveland is over ninety percent Negro. Its City Manager and the members of its City Commission are Negroes. It is that municipal government that is asking the Court to uphold the constitutional validity of this ordinance. And that municipal government, far better than can any member of this Court, understands and meets the needs and aspirations of the people who live in East Cleveland. In view of these demographic facts, MR. JUSTICE BRENNAN's dissenting opinion boils down to the proposition that the people of the Negro community of East Cleveland are prevented by the Constitution from trying to escape the racial stereotypes of the "subculture" that his dissenting opinion describes. Surely, that strange proposition can only evoke "shocked disbelief."

P.S.

VJ

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 12, 1977

No. 75-6289, Moore v. City of East Cleveland

Dear Chief,

In view of John Stevens' memorandum of yesterday, the opinion in this case should be re-assigned.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: MAY 12 1977

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[May —, 1977]

MR. JUSTICE STEWART, dissenting.

In *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single housekeeping unit; it forbade occupancy by any group of three or more persons who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the Fourteenth Amendment nor infringe any other rights or freedoms protected by the Constitution.

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 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.

The city of East Cleveland is a residential suburb of Cleveland, Ohio. It has enacted a comprehensive housing code, one section of which prescribes that "[t]he occupancy of any

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT Recirculated: MAY 17 1977

SUPREME COURT OF THE UNITED STATES

No. 75–6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.
} On Appeal from the Supreme Court of Ohio.

[May —, 1977]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

In *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single housekeeping unit; it forbade occupancy by any group of three or more persons who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the Fourteenth Amendment nor infringe any other rights or freedoms protected by the Constitution.

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 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.

The city of East Cleveland is a residential suburb of Cleveland, Ohio. It has enacted a comprehensive housing code, one section of which prescribes that "[t]he occupancy of any

Pp. 6, 9-10, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

3rd DRAFT

Recirculated: MAY 25 1977

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[May —, 1977]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 23, 1976

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Chief:

My vote is still to affirm in this case, and it is likely that I could join an opinion generally reflecting the views you have expressed in your memorandum.

Sincerely,

The Chief Justice

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 4-8-77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[April —, 1977]

MR. JUSTICE WHITE, concurring in the judgment.

The Fourteenth Amendment forbids any State to "deprive any person of life, liberty, or property, without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws." Both provisions are invoked in this case in an attempt to invalidate a city zoning ordinance.

I

The emphasis of the Due Process Clause is on "process." As Mr. Justice Harlan once observed, it has been "ably and consistently argued in response to what were felt to be abuses by this Court of its reviewing power . . . ." that the Due Process Clause should be limited "to a guarantee of procedural due process." *Poe* v. *Ullman,* 367 U. S. 497, 540 (1961) (Harlan, J., dissenting). These arguments had seemed "persuasive" to Justices Brandeis and Holmes, *Whitney* v. *California,* 274 U. S. 357, 373 (1927), but they recognized that the Due Process Clause, by virtue of case-to-case "judicial inclusion and exclusion," *Davidson* v. *New Orleans,* 96 U. S. 97, 104 (1877), had been construed to proscribe matters of substance, as well as inadequate procedures, and to protect from invasion by the States "all fundamental rights comprised within the term liberty." *Whitney* v. *California, supra,* at 373.

Mr. Justice Black also recognized that the Fourteenth Amendment had substantive as well as procedural content.

pp 1, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

2nd DRAFT

Recirculated: 5-20-77

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[April —, 1977]

MR. JUSTICE WHITE, dissenting.

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Mr. Justice Black also recognized that the Fourteenth Amendment had substantive as well as procedural content,

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6, 8, 9

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 5-25-77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[May —, 1977]

MR. JUSTICE WHITE, dissenting.

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Mr. Justice Black also recognized that the Fourteenth Amendment had substantive as well as procedural content,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 23, 1976

Re: No. 75-6289 -- Moore v. City of East Cleveland

Dear Chief:

I cannot agree with your conclusion that there is no constitutionally protected right -- whether phrased in terms of association or privacy -- for a grandmother to perform the duties of a mother for her grandchildren. I do not agree with you that our cases have narrowly limited the concept of "family" to "parents and their offspring." Personal decisions of individuals bound by family ties to live with each other should not be subject to state interference except to insure that basic health and safety standards are met, as they admittedly are in this case. I have seen too many situations where a strong grandparent literally held the family together and was responsible for the education and upbringing of decent, law-abiding yountsters, to agree as a matter of constitutional law that the "nuclear" family is "the basic building block of our society." That is a middle class norm that government has no business foisting on those to whom economic or psychological necessity dictates otherwise.

I do agree that Mrs. Moore's problem was unfortunately turned into a lawyer's test case by the failure to appeal to the zoning board, but I cannot subscribe to a rationale that would require exhaustion of administrative remedies as a prerequisite to raising a constitutional defense in a criminal prosecution. Moreover, if it was so clear that the variance would be granted, a matter I consider very doubtful despite counsel's self-serving claim, the City should have made an express offer to that effect in municipal court.

Sincerely,

T.M.

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 10, 1977

Re: No. 75-6289, Moore v. East Cleveland

Dear Potter:

I shall await the dissents.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 11, 1977

Re: No. 75-6289, Moore v. City of East Cleveland

Dear Lewis:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 14, 1977

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

1st DRAFT

Circulated: FEB 16 1977

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.
On Appeal from the Supreme Court of Ohio.

[February —, 1977]

MR. JUSTICE MARSHALL, dissenting.

I agree entirely with the opinions of MR. JUSTICE BRENNAN and MR. JUSTICE POWELL. I would add just a few more words.

Only the most tortured reading and scholastic distinctions allow the Court today to read our earlier cases to enshrine the nuclear family as the only familial structure protected by the Constitution. I cannot agree that the norms of middle-class suburban life set the standards of constitutional law for all people at all times. For many in our society, particularly among immigrant groups, the poor, and blacks, strong grandparents have held families together and have been responsible for the education and upbringing of decent, law-abiding children. The personal decisions of individuals bound by family ties to live with each other should never be subject to state interference except to ensure basic health and safety standards. I have no doubt that to send an elderly grandmother to jail for the crime of raising her young grandsons violates fundamental rights "implicit in the concept of ordered liberty." See Opinion of the Court, *ante*, p. 7. Indeed, I fear there would be little "ordered liberty" left in modern society were the majority's expansive acceptance of state power and its truncated view of the family ultimately to prevail. I dissent from the Court's blind repudiation of some of the most fundamental values of our society.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 11, 1977

Re: No. 75-6289, Moore v. City of East Cleveland

Dear Lewis:

Please join me.

Sincerely,

T.M.

T. M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 11, 1977

Re: No. 75-6289, Moore v. City of East Cleveland

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 24, 1976

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Chief:

I shall adhere to my vote to reverse.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 11, 1977

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Potter:

I could not join the opinion as presently written. I therefore shall also await the dissent.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 14, 1977

Re: No. 75-6289 - Moore v. City of East Cleveland, Ohio

Dear Lewis:

Please join me in your dissent. I also shall file a short separate dissent.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 2/17/77

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[February —, 1977]

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE POWELL's dissent and his devastating analysis of the destructive character of the East Cleveland ordinance and of that ordinance's hollow defense against constitutional challenge. I add only that, as I read the Court's opinion, particularly its observation, *ante*, p. 8, that the city has "the power to say what a 'family' is," it would follow that East Cleveland also constitutionally *could* ordain that only families without children may reside in the city. That, too, would be linedrawing. That kind of thing might do for a privately owned apartment building, but such family decimation has no constitutional place in city zoning.

I might add the observation that the Carter White House, as presently occupied, apparently would not be permitted in East Cleveland, Ohio.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 3/15/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[February —, 1977]

MR. JUSTICE BLACKMUN, dissenting.

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I might add the observation that the Carter White House, as presently occupied, surely an understandable and happy arrangement, apparently would not be permitted in East Cleveland, Ohio.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1977

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Lewis:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1977

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Lewis:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

P.S. (to LFP only): On page 10, 4th line, would it be advisable to replace "Government" with the word "State"?

November 30, 1976

No. 75-6289 Moore v. City of Cleveland

Dear Chief:

Although your thorough memorandum of November 22 makes some rather persuasive points, I think I will stand by my vote at Conference.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States
Washington, D. C. 20543

January 3, 1977

No. 75-6289 Moore v. City of East Cleveland

Dear Bill:

Over the "holidays" I have prepared a first rough draft of a dissenting opinion in the above case.

I will await, of course, circulation of the Court's opinion before putting my dissent in final form. But I hope to be able to circulate it promptly.

I thought it might be helpful to you, and our other colleagues in dissent, to know that I expect to have an opinion.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: Mr. Justice Marshall
Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 10, 1977

No. 75-6289 Moore v. City of East Cleveland

Dear Potter:

In due time I shall circulate a dissent.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

1st DRAFT

Circulated: FEB 11 1977

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[January —, 1977]

MR. JUSTICE POWELL, dissenting.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. § 1351.02.[1] But the ordinance contains a complicated definitional section—one may hope it is unique—that recognizes as a "family" only a few erratically patterned categories of related individuals. § 1341.08.[2] Appellant's family, living together in her home, fits none of them. Specifically, the city considers her in violation of the ordinance because she permitted her young grandson, John Moore, Jr., to live with her, while at the same time his first cousin, Dale Moore, Jr., and uncle, Dale, Sr., remained in the same household.[3] She was cited for a violation of the ordinance, and when she failed to correct the violation, the city brought criminal charges. Her defense was that § 1341.08 violates the equal protection and due process guaranties of the Fourteenth Amendment. The Ohio courts disagreed, and she was sentenced to five days in jail and a $25 fine.

[1] All citations solely by section number refer to the Codified Ordinances of the City of East Cleveland, Ohio.

[2] The ordinance is reprinted in the Court's opinion, *ante*, at 2.

[3] The boy's father, John Moore, Sr., has apparently been living with the family at least since the time of trial. Whether he was living there when the citation was issued is in dispute. Under the ordinance, his presence too would be a violation. But I take the case as the city has framed it. The citation that led to prosecution recited only that John Moore, Jr., was in the home in violation of the ordinance. Mrs. Moore's failure to have her grandson leave was what led to her conviction.

Stylistic Changes Throughout.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: FEB 15 1977

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[January —, 1977]

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: MAR 25 1977

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[January —, 1977]

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: APR 28 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[May —, 1977]

MR. JUSTICE POWELL announced the judgment of the Court.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. § 1351.02.[1] But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals. § 1341.08.[2] Because her family, living together in her home,

[1] All citations by section number refer to the Codified Ordinances of the City of East Cleveland, Ohio.

[2] Section 1341.08 provides:

"'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who

2-3, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: MAY 18 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.

On Appeal from the Supreme Court of Ohio.

[May —, 1977]

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"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who

— 3,9

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT Recirculated: MAY 24 1977

SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant,
v.
City of East Cleveland, Ohio.
} On Appeal from the Supreme Court of Ohio.

[May —, 1977]

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"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 23, 1976

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Chief:

I agree entirely with the views contained in your memorandum to the Conference in this case. I agree with your discussion of the petitioner's failure to seek a variance, although like Potter I think it is difficult to incorporate that with the rest of your analysis of the merits.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 15, 1977

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Potter:

Please join me.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 12, 1977

Re: No. 75-6289 - Moore v. City of East Cleveland

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 23, 1976

Re: 75-6289 - Moore v. City of East Cleveland

Dear Chief:

The general thrust of your memorandum is consistent with the reasons which persuaded me to vote to affirm. My position has not changed. Your memorandum does suggest the possibility, however, that the failure to take advantage of a specific provision in the ordinance authorizing variances in a case like this is itself a sufficient reason for sustaining the constitutionality of the statute. Under this rationale, it might not be necessary to analyze the constitutional issues which would be presented if there was no such "escape hatch" in the ordinance.

Respectfully,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 11, 1977

Re: 75-6289 - Moore v. City of East Cleveland

MEMORANDUM TO THE CONFERENCE

My initial analysis of this case was precisely that expressed in Potter's opinion. After the argument, however, it occurred to me that there must be a body of State zoning cases which would shed some light on the kinds of definition of the term "family" which have been generally accepted. My Law Clerk, David Kirby, and I therefore reviewed a large number of State cases involving "single family" zoning ordinances. We found that the ordinances are basically of two kinds.

The first merely limits the kind of structure that can be erected on vacant property to one that will accommodate a single housekeeping unit. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365, 382, 388.

The second limits the kind of group that may occupy the premises. Although this kind of limitation takes a variety of forms, it typically limits the occupancy to persons related by blood, adoption, or marriage, and then allows some exception from that broad limitation. See, e.g., Village of Belle Terre v. Boras, 416 U.S. 1,2. Apart from the present case, there appears to be no precedent for a limitation which prevents the owner of a residence from having any of his relatives living with him on a permanent basis. The litigation involving these ordinances invariably involves the question whether the use by some unrelated person is permissible.

The State courts have regularly held that a general restriction to related persons, plus a few exceptions, is a proper way to proscribe uses that cater to transients--such as boarding houses, fraternity houses, or even rental to a

group of college students as in Belle Terre. On the other hand, uses which do not threaten the stable character of a neighborhood have been tolerated even though the group of occupants does not come within the literal definition of a family. (See, e.g., City of White Plains v. Ferraioli, 313 N.E.2d 756 (N.Y. 1974)(foster family); City of Des Plaines v. Trottner, 216 N.E. 2d 116 (Ill. 1966)(four adult men)). The concern--as in the law of nuisance--seems to be whether the particular use may adversely affect the enjoyment of neighboring property.

For the reasons which Potter states in his opinion, I am persuaded that Belle Terre forecloses the challenge to the ordinance based on the occupants' right to associate with one another. But the State cases persuade me that we have not adequately considered the need for a justification for this restriction on an owner's right to use his property in a way that does not have any adverse effect on his neighbors.

It is significant, I believe, that only the constitutional claims of the tenants were adjudicated in Belle Terre. No one--not even Thurgood's dissent (see 416 U.S., at 13)--regarded the Belle Terre ordinance as an impermissible invasion of the owner's property rights. That restriction was an accepted method of curtailing property uses of a transient character in a stable neighborhood.

The more restrictive ordinance involved in this case does not have the same justification. If we resort to the tests as stated in Euclid, 272 U.S., at 387-388, 395, and Nectow v. Cambridge, 277 U.S., at 188-189, and view the case from the standpoint of an owner deciding which of his relatives may live with him on a permanent basis, I can find no justification for a rule that permits two grandchildren to live with the owner if they are brothers but not if they are cousins.

Until I reviewed some of the State cases, I had assumed that it was customary to define the word "family" in terms of degrees of consanguinity. On that assumption, I was convinced that the specific form of the definition was a matter to be left to legislative choice by the municipality. But I am now convinced that there is no justification for excluding any related persons from the group that is eligible to occupy a residence on a permanent basis.* No other ordinance, to the best of my knowledge,

*Of course, a limit on the number of occupants would be permissible, but the municipality has no interest in which members of the eligible group the owner may invite to live with him.

has ever done so, and the City in this case has not come forward with any justification for doing so.

In these circumstances, I do not think we can properly say that the City has satisfied even the minimal burden imposed by Euclid and Nectow. I have therefore finally concluded that the parties addressed the wrong issue. As I now view the case, the critical question is not a matter of "privacy," "liberty," or "freedom of association," but rather is whether this particular zoning ordinance is a permissible restriction on an owner's right to use his property as he sees fit so long as he does not impair the enjoyment of his neighbors' property. Unless we are to abandon all review of the substance of zoning ordinances, I have concluded that this one must be invalidated.

I am, of course, conscious of the force of Byron's comments on substantive due process but I believe a measure of substantive due process is inherent in the standard of review that Euclid and Nectow prescribe for zoning cases. Moreover, as long as the huge body of zoning litigation in the State courts is used as a frame of reference, I doubt that the property concept is as open-ended as reliance on "liberty," or "privacy." In all events, with apologies for having taken so much time with this case, I have decided to vote to reverse.

Respectfully,

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAY 24 1977

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SUPREME COURT OF THE UNITED STATES

No. 75-6289

Inez Moore, Appellant, *v.* City of East Cleveland, Ohio. | On Appeal from the Supreme Court of Ohio.

[May —, 1977]

MR. JUSTICE STEVENS, concurring.

In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit.

Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property. This basic right has always been limited by the law of nuisance which proscribes uses that impair the enjoyment of other property in the vicinity. But the question whether an individual owner's use could be further limited by a municipality's comprehensive zoning plan was not finally decided until this century.

The holding in *City of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits.

In his opinion for the Court, Mr. Justice Sutherland fused the two express constitutional restrictions on any State interference with private property—that property shall not be taken without due process nor for a public purpose without