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## Moore's Potential

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## MOORE'S POTENTIAL

June Carbone\* & Naomi Cahn\*\*

### INTRODUCTION

Underlying the U.S. Supreme Court's decision in *Moore v. City of East Cleveland*<sup>1</sup> are long-term changes in the relationship between the family and the state. These changes upended the reciprocities between the state definition of legitimate families and the basis for claims of state recognition and support. Today, in contrast, many view the determination of what constitutes a family as a matter of personal self-definition to which the state should defer, producing even greater division in the relationship between families—however they are defined—and claims to state support.

These issues have become the subject of an intense culture war.<sup>2</sup> On the one hand, conservatives continue to view married, gendered, two-parent families as essential to societal well-being; thus, they favor traditional family values in the public square and the provision of state support to families only in the context of shared community values.<sup>3</sup> Liberals, in contrast, emphasize tolerance in the public square and promote greater state support for all children regardless of family structure, viewing it as necessary to realizing the promises of equality and participatory citizenship in a democracy.<sup>4</sup>

The Supreme Court decided *Moore* before the modern cultural divide on the structure of the family fully took hold; thus, *Moore*'s various opinions do

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\* Robina Chair of Law, Science and Technology, University of Minnesota. We thank Clare Huntington, Robin Lenhardt, and all of the participants at the *Fordham Law Review* Family Law Symposium entitled *Moore Kinship* held at Fordham University School of Law. For an overview of the symposium, see R.A. Lenhardt & Clare Huntington, *Foreword: Moore Kinship*, 85 FORDHAM L. REV. 2551 (2017).

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

2. See NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 1 (2010).

3. Scholars term this system, which treats gendered, two-parent marriages as critical to children's support, as the privatization of dependency. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 161–62 (1995).

4. See June Carbone, "*Blue*" *Morality and the Legitimacy of the State—Ed Rubin's Soul, Self, and Society: The New Morality and the Modern State*, LAW & SOC. INQUIRY (Aug. 25, 2016) (reviewing EDWARD L. RUBIN, *SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE* (2015)), <http://onlinelibrary.wiley.com/doi/10.1111/lsi.12223/full> [https://perma.cc/7AUL-SC6J].

not directly address this culture divide. Yet, in two critical parts of the decision, the Court seemed to have anticipated this culture conflict, foreshadowing the tension between the growing desire of individuals to define “family” in terms of their own choosing and the state’s power to define what constitutes a legitimate family form and, thus, to decide who is entitled to state support.

First, in granting Inez Moore a constitutional right to live with a family that included both of her grandchildren, the plurality based its decision on tradition, not autonomy.<sup>5</sup> At the time, judicial conservatives had not yet hijacked tradition as support for constitutional originalism and judicial liberals had not yet unequivocally embraced individual choice as a source of protection for alternative families. Thus, *Moore* is a methodologically conservative opinion that celebrates the traditional institution of the family through the vehicle of a grandmother-headed extended family. In this sense, *Moore* has much in common with *Obergefell v. Hodges*,<sup>6</sup> which reconciled an alternative family with mainstream institutions.<sup>7</sup>

Second, while embracing Moore’s extended family as part of a longstanding tradition, *Moore* only narrowly accords recognition to the “traditional family” in this extended family form as entitled to constitutional protection.<sup>8</sup> Instead, the various opinions saw this particular family structure as a fallback option that served as a privatized form of insurance to provide for children in times of financial or other family stress.<sup>9</sup> Notably, none of the opinions discuss the circumstances that led to the grandchildren’s residence with their grandmother, other than noting the death of one of the children’s mothers.<sup>10</sup> Rather, the case honors a worthy individual—a grandmother who takes in her multiple grandchildren—without fully exploring the relationship between family and economic well-being in the changing American landscape. Thus, while crafting an opinion that does not challenge the deference due to land use decisions, the Justices also avoided laying a foundation for alternative families to claim state support in either practical or doctrinal terms.

At the time of the decision, single-family zoning restrictions, which might not have been controversial in other eras, were emerging as markers of race and class and were facing mounting legal challenges.<sup>11</sup> Today, studies indicate that racially and economically integrated communities tend to enhance the well-being and achievement of poor families without

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5. See *Moore*, 431 U.S. at 504–06.

6. 135 S. Ct. 2584 (2015).

7. *Id.* at 2595–96.

8. *Moore*, 431 U.S. at 503–05.

9. See *id.* at 505.

10. *Id.* at 496–97.

11. See, e.g., *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

undermining those who are better off.<sup>12</sup> Yet, local zoning laws, particularly when tied to family characteristics, tend to encourage racial and financial segregation, compounding the disadvantages of poor communities of color.<sup>13</sup> In particular, these laws give *every* community an incentive to adopt zoning restrictions that attract stable, higher-income families and exclude those likely to be poorer, needier, and a drain on community desirability or resources.<sup>14</sup> In the face of the widespread adoption of such exclusionary practices, communities that adopt broader definitions of acceptable households may find themselves at a disadvantage in sustaining an appropriate mix of households. Thus, East Cleveland, a heavily African-American community struggling to maintain its middle-class status, adopted the zoning laws at issue in *Moore* in an effort to stave off a downward cycle in the community's fortunes.<sup>15</sup> The opinions in *Moore*, however, never acknowledged this community dynamic at work.

Part I of this Article briefly explores the culture wars that have consumed American politics since *Moore*. Part II discusses *Moore*'s uneasy position within the conception of family as a matter of choice versus tradition. Then, to the extent that the *Moore* Court addressed the changing family, Part III shows how it did so by treating the extended family as a manifestation of traditional family values, not the newly emerging substantive family values that valorize delay in childbearing and financial independence.<sup>16</sup> Finally, Part IV considers *Moore*'s missed opportunities to examine the relationship between family form, race, and class.

### I. CULTURE WARS REVISITED

Scholars routinely describe American politics—and the disputes about family values—as a culture war.<sup>17</sup> While there is no popularly accepted definition of what that culture war is about, it certainly includes differences about the source of moral values,<sup>18</sup> the increasing ideological identification

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12. See, e.g., Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* 73 (2015), [http://scholar.harvard.edu/files/hendren/files/nbhds\\_paper.pdf](http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf) [https://perma.cc/UC44-8XCQ].

13. See generally J. Peter Byrne, *Are the Suburbs Unconstitutional?*, 85 GEO. L.J. 2265 (1997).

14. See *id.* at 2269 (reviewing CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996), and DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995)) (describing the social and economic incentives for exclusionary zoning as “the political independence of suburban jurisdictions, the near-complete delegation of zoning power by the state to the locality, the reliance on local taxes to fund local government services (particularly education), and national policies facilitating and subsidizing suburban development on a scale never undertaken before”).

15. See Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 389.

16. The authors term this distinction as red versus blue family values. See generally CAHN & CARBONE, *supra* note 2.

17. See *infra* notes 18–22.

18. See generally EDWARD L. RUBIN, *SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE* (2015).

of American political parties,<sup>19</sup> deeply rooted personality differences in values orientation,<sup>20</sup> differences in forms of expression,<sup>21</sup> and the role of the family in civic life.<sup>22</sup>

However the culture wars are defined, the family has been a central part of that dispute, which can be described as a clash between “red” versus “blue” family values—or, more generally, as part of a traditionalist versus modernist cultural divide. At the core of the divide are two different worldviews with overlapping political and family consequences. The blue system combines “public tolerance with private discipline.”<sup>23</sup> In this modernist system, people choose individually crafted values, central to self-definition and personal self-worth.<sup>24</sup> In contrast, the red system advocates public orthodoxy and private forgiveness.<sup>25</sup> In this traditionalist system, values must be externally derived—from God, from authority grounded in tradition, or from human nature—to have meaning, and they should accordingly be upheld in the public square.<sup>26</sup> Repentance, forgiveness, and reconciliation with the community occur in private.<sup>27</sup>

The differences between these two systems have implications for both legal justifications and content. Blue legal justifications uphold individual choice; red justifications look to sources of value outside the individual, such as tradition, authority, or community consensus.<sup>28</sup> In terms of content, blue analysis favors a functional approach that looks at the importance of family roles, while red analysis favors time-honored definitions of family regularity.<sup>29</sup> Thus, blue analysis is less tied to either continuity or institutional regularity.<sup>30</sup>

Using these differing approaches, one can evaluate the family transformations in the latter part of the twentieth century. Values about family form changed from a uniform emphasis on the necessity of heterosexual marriage (i.e., the traditionalist red system) to the acceptability

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19. See John T. Jost, *The End of the End of Ideology*, 61 AM. PSYCHOLOGIST 651, 654 (2006).

20. See DONALD BRAMAN ET AL., CULTURAL COGNITION PROJECT AT YALE LAW SCH., THE SECOND NATIONAL RISK AND CULTURE STUDY: MAKING SENSE OF—AND PROGRESS IN—THE AMERICAN CULTURE WAR OF FACT 16 (2007).

21. See GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 1–29 (2014); GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 143–52 (2d ed. 2002).

22. See generally CAHN & CARBONE, *supra* note 2.

23. See *id.* at 3–4.

24. See *id.* at 44.

25. See Carbone, *supra* note 4, at 4–5.

26. See *id.*

27. See *id.* at 16.

28. See *id.* at 2 n.1.

29. See CAHN & CARBONE, *supra* note 2, at 6–7.

30. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015) (plurality opinion) (accepting changes over time in the meaning of marriage), with *id.* at 2612–16 (Roberts, C.J., dissenting) (treating marriage as an unchanging, time-honored system).

of alternative family forms (i.e., the modernist blue system).<sup>31</sup> At the same time, the pathways into the middle class changed from shepherding couples into early marriages to encouraging lengthy delays in family formation that better prepared parents for the responsibilities of family life.<sup>32</sup> The process of transformation and the conflicts between the two systems exacerbate racial and class differences<sup>33</sup> and frame the perspectives that underlie *Moore*.

## II. CHOICE VERSUS TRADITION AS A SOURCE OF VALUES

The facts of *Moore* are straightforward. Sixty-three-year-old Inez Moore shared her home with her adult son, Dale Sr., and her two young grandchildren, Dale Jr. and John Jr.<sup>34</sup> Six years after John Jr. came to live with his grandmother following his mother's death, the City of East Cleveland prosecuted Moore for violating the city's single-family zoning ordinance.<sup>35</sup> The Ohio state courts upheld the conviction, but the U.S. Supreme Court struck down the ordinance in what should have been a relatively easy decision, given the harshness of the impact on a sympathetic grandmother.<sup>36</sup> Nonetheless, the result sharply divided the Court and obscured the case's broader significance for the legal recognition of families and for the interactions among race, class, and family orthodoxy.

The Supreme Court declared the ordinance unconstitutional on its face but only by a vote of five to four and with disagreement among the five Justices in the majority on the basis for doing so. In total, the Justices filed six separate opinions. This part focuses on three of those opinions: (1) Justice John Paul Stevens's concurring opinion, (2) Justice Lewis Powell's plurality opinion, and (3) Justice Potter Stewart's dissenting opinion.

### A. Justice Stevens's Concurrence

Writing only for himself, Justice Stevens issued the most far-reaching opinion, concurring only in the judgment.<sup>37</sup> While his concurrence is viewed as idiosyncratic, Stevens may well have anticipated later judicial developments in his desire to avoid a publicly imposed definition of family. Unlike any of the other Justices, Stevens described the case as one that started with Moore's choice of how to constitute her family. He thus framed the case in terms of the arbitrariness of the ordinance, observing that the "city

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31. See CAHN & CARBONE, *supra* note 2, at 33–46.

32. See *id.*

33. See generally *id.*

34. *Moore v. City of East Cleveland*, 431 U.S. 494, 496 (1977).

35. *Id.* at 497. John Jr., who was ten years old by the time the Supreme Court decided the case, had lived with his grandmother since his mother died when he was less than a year old, and his father, John Sr., apparently lived with the family as well. *Id.* at 497 n.4; see Brief for Appellant at 4, *Moore*, 431 U.S. 494 (No. 75-6289), 1976 WL 178722, at \*4.

36. See *Moore*, 431 U.S. at 507 (Brennan, J., concurring) (“[T]he zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life.”).

37. See *id.* at 513–21 (Stevens, J., concurring).

has failed totally to explain the need for a rule that would allow a homeowner to have two grandchildren live with her if they are brothers but not if they are cousins.”<sup>38</sup> In emphasizing Moore’s ability to choose her family form, however, Stevens faced a dilemma: if Moore could define family in whatever terms she chooses, it would be hard to associate her particular definition of family with constitutional protection. Stevens skirted this issue by according Moore constitutional protection as a *homeowner*, rather than on the basis of her family form.<sup>39</sup> Stevens wrote that Moore’s interest in her ability to live with both grandsons was particularly important with respect to a rule that cuts “deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property.”<sup>40</sup>

Stevens’s decision not to define the “family” that is entitled to constitutional protection encouraged him to take on an issue the other Justices in the majority wished to avoid: the standard of deference due to state zoning decisions.<sup>41</sup> The *Moore* dissent, much like the Supreme Court’s 1974 decision in *Village of Belle Terre v. Boraas*,<sup>42</sup> accorded such ordinances substantial deference, requiring only a rational relationship to a permissible state objective.<sup>43</sup> In contrast, Stevens wrote that, because the ordinance

ha[d] not been shown to have any “substantial relation to the public health, safety, morals, or general welfare” of the city of East Cleveland, and . . . it must fall under [this Court’s] limited standard of review of zoning decisions[,] . . . East Cleveland’s unprecedented ordinance constitutes a taking of property without due process and without just compensation.<sup>44</sup>

Such a standard—requiring a showing of a “substantial” rather than a “rational” relationship between a zoning regulation and public policy concerns—would have substantially increased the scrutiny applicable to local zoning ordinances that infringed on property owners’ associational rights. By tying his decision to the Takings Clause of the Constitution, Stevens did not depend on a particular construction of the constitutional rights accorded families. Instead, Stevens emphasized that the state had a legitimate interest in regulating “the identity, as opposed to the number, of persons who may compose a household only to the extent that the ordinances require such households to remain nontransient, single-housekeeping units.”<sup>45</sup> Had his opinion been the majority, it would have provided the basis for challenging restrictive zoning provisions throughout the country, in effect limiting, though not necessarily overturning, the Court’s decision in *Belle Terre*, which upheld a similar single family zoning restriction as it applied to

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38. *Id.* at 520–21.

39. *Id.* at 520.

40. *Id.*

41. *Id.* at 519–21.

42. 416 U.S. 1 (1974).

43. *Moore*, 431 U.S. at 538–39 (Stewart, J., dissenting).

44. *Id.* at 520–21 (Stevens, J., concurring).

45. *Id.* at 519.

unrelated individuals.<sup>46</sup> The ordinance in *Belle Terre* appeared to be aimed primarily at restricting the number of college students in the area;<sup>47</sup> it would not have prevented Moore from living with her grandsons.<sup>48</sup>

*B. Justice Powell's Plurality Opinion*

In contrast, Justice Powell, joined by three other Justices, wrote a plurality opinion emphasizing the constitutional protection afforded *families*<sup>49</sup> and grounding the definition of "families" in tradition.<sup>50</sup> In subjecting the East Cleveland ordinance to greater scrutiny than that associated with a rational relationship test, the plurality shifted its emphasis away from property rights, where it viewed a rational relationship test as appropriate, and toward the intrusion on family.<sup>51</sup> The Court observed that East Cleveland "has chosen to regulate the occupancy of its housing by slicing deeply into the family itself,"<sup>52</sup> making it "a crime of a grandmother's choice to live with her grandson in circumstances like those presented" in the case.<sup>53</sup> The plurality opinion thus based its analysis on the Due Process Clause, holding that the "Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."<sup>54</sup> In turn, this analysis required the Court to provide a definition of the family to be accorded constitutional protection; the plurality adopted a conservative definition.<sup>55</sup>

In articulating a notion of the family that justified constitutional protection, the plurality looked to tradition and observed that the extended family was at least as deeply rooted in tradition as the nuclear family, if not more so.<sup>56</sup> The nuclear family, in contrast, was a recent development.<sup>57</sup> The plurality then noted that "[e]ven if conditions of modern society have brought about a decline in extended family households,"<sup>58</sup> it remains true that "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."<sup>59</sup> The opinion found this tradition in "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the

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46. *Belle Terre*, 416 U.S. at 1.

47. *See id.*

48. *Moore*, 431 U.S. at 519 n.15.

49. *See generally* Brief for Appellant, *supra* note 35.

50. *Moore*, 431 U.S. at 503–05 (plurality opinion).

51. *Id.* at 498–500.

52. *Id.* at 498.

53. *Id.* at 499.

54. *Id.* (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

55. *Id.* at 505.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 504.



family.”<sup>60</sup> The Justices thus treated as commonplace the recognition of extended relatives as family and viewed the grandmother’s actions in taking in both of her grandchildren as admirable. In doing so, the plurality adopted a normative vision of the family entitled to constitutional protection—a fundamentally different approach from Stevens’s modernist embrace of choice. Accordingly, the Court acknowledged that affording constitutional protection to families required providing a substantive definition of what constituted a family.<sup>61</sup> Moreover, the plurality did not question the ability of governmental authorities to define what they meant by family; the opinion simply required that the definition accept families determined by blood, adoption, and marriage.

### C. Justice Stewart’s Dissent

Justice Stewart’s dissent, joined by Justice William Rehnquist, sought both to narrow the definition of the family and to limit the constitutional protection accorded to such families.<sup>62</sup> In doing so, it turned the plurality’s emphasis of the result’s arbitrariness on its head. Stewart wrote that the

interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise [to the level of a constitutionally protected interest]. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.<sup>63</sup>

Stewart’s belittling comments, which assumed that Moore could simply have some of the family live in the other dwelling unit she owned in the same building,<sup>64</sup> suggested that Stevens’s associational interests were not worthy of constitutional protection and that Moore’s choices about which relatives to invite into her residence had nothing to do with the definition of a constitutionally protected family.<sup>65</sup> In short, the Constitution did not protect “choice” in the modernist sense at all.

A fuller embrace of the idea of choice would come decades in the future. Consider, as a point in contrast, Justice Kennedy’s opening paragraph in *Lawrence v. Texas*,<sup>66</sup> which struck down a statute criminalizing same-sex sodomy. Justice Kennedy wrote:

Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves

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60. *Id.* at 505. As a matter of constitutional jurisprudence, *Moore* and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), are based on similar views of how to find the traditions protected by the Due Process Clause.

61. *Moore*, 431 U.S. at 503–05.

62. *Id.* at 531–41 (Stewart, J., dissenting).

63. *Id.* at 537.

64. *Id.* at 533 & n.4.

65. *Id.* at 537.

66. 539 U.S. 558 (2003).

liberty of the person both in its spatial and in its more transcendent dimensions.<sup>67</sup>

Justice Stevens's concurrence would be as close as the *Moore* Court would come to the modernist embrace of an individual right of self-definition.<sup>68</sup>

### III. MOORE AND TWENTIETH-CENTURY FAMILY TRANSFORMATION

The *Moore* opinion, in addition to its refusal to embrace the rhetoric of family choice, also skirted the substantive family transformation that was taking place in the latter part of the twentieth century. That transformation involved a shift from marriage as part of a universal transition from adolescence into adulthood to family formation as a choice best made by those who have attained emotional maturity and financial independence.<sup>69</sup> The change required an embrace of contraception and, if necessary, abortion as critical to the postponement of childbearing, greater acceptance of nonmarital sexuality, and the redefinition of what had been gendered family roles.<sup>70</sup>

*Moore* could have been cast in such terms. Doing so, however, would have required shifting the focus from the grandmother, who is sympathetic under any definition of family values, to her two sons, the fathers of her grandchildren. We know relatively little about the sons. We know that the first son, Dale Sr., and his child, Dale Jr., were living with Moore before the case arose.<sup>71</sup> Only when the second grandson, John Jr., joined the household did the family violate the East Cleveland ordinance.<sup>72</sup> John Jr. came to live with Moore when his mother died.<sup>73</sup> The opinion, however, tells us nothing about the circumstances. These issues are irrelevant to the Supreme Court's opinion in *Moore*—the Court addressed only the application of the East Cleveland ordinance to the grandmother's decision to live with both of her grandchildren.

Instead, *Moore* ties the extended family to a tradition that privatizes family support. Moore is a homeowner, and there was no indication that she received public benefits to care for her grandchildren. When her sons needed assistance with the care of their children, whether because of John Jr.'s mother's death or their own financial needs, they turned to a family member—not the state—for assistance. These factors make *Moore* part of a

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67. *Id.* at 562.

68. The question of whether the Supreme Court has ever embraced a modernist definition of family formation as a matter of individual expression is complex. For critiques of *Lawrence*, which unmoors its analysis from blood, marriage, and adoptions but still relies on traditionalist tropes of what an intimate relationship constitutes, see Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004).

69. CAHN & CARBONE, *supra* note 2, at 20–22.

70. *Id.* at 19–46.

71. *Moore v. City of East Cleveland*, 431 U.S. 494, 533 (1977) (Stewart, J., dissenting).

72. *Id.* at 496–97 (plurality opinion).

73. *Id.*

long-standing tradition of neoliberal family support, and the Justices who join in the plurality opinion championing Moore's position do so in precisely these terms.

Justice Powell, writing for the plurality, had grounded constitutional protection of the family in its deep roots "in this Nation's history and tradition."<sup>74</sup> He acknowledged that extended families had become less likely to live together but emphasized that they still came together in times of need.<sup>75</sup> He treated the extended family as a fallback option, a form of insurance policy designed to protect the children from the failings of their parents. This reasoning thus broke little new ground in the definition of the family.

Justice William Brennan filed a concurrence, together with Justice Thurgood Marshall, that went further than the plurality in acknowledging the roots of family diversity. The concurrence agreed with the plurality that the ordinance impermissibly infringed upon Moore's choice of what constituted family and that the plurality's acceptance of the extended family by blood had deeply embedded roots.<sup>76</sup> Brennan, however, emphasized that the East Cleveland ordinance displayed "a depressing insensitivity toward the economic and emotional needs of a very large part of our society."<sup>77</sup> Brennan's concurrence linked the extended family to generations of immigrant families and to class and racial differences, noting:

Even in husband and wife households, 13% of black families compared with 3% of white families include relatives under 18 years old, in addition to the couple's own children. In black households whose head is an elderly woman, as in this case, the contrast is even more striking: 48% of such black households, compared with 10% of counterpart white households, include related minor children not offspring of the head of the household.<sup>78</sup>

The concurrence thus saw the East Cleveland ordinance as arbitrarily refusing to recognize not only a long-established family form but also a family form associated with poor and minority families and of continuing importance to those experiencing financial stress.<sup>79</sup> In short, the extended

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74. *Id.* at 503.

75. *Id.* at 505.

76. *Id.* at 511 (Brennan, J., concurring).

77. *Id.* at 508.

78. *Id.* at 509–10; *see also* Brief for Appellant, *supra* note 35, at 12.

79. Indeed, Brennan's concurrence, which went further than the other opinions in endorsing the benefits of extended families, also saw extended families as a consequence of economic stress, observing:

The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household.

*Id.* at 508.

family is a consequence of compulsion rather than choice, and the conclusion of both the plurality opinion and the concurrence is that the ordinance is arbitrary, if not counterproductive. The plurality, by grounding its analysis in tradition, could accordingly strike it down without influencing either the likely course of family evolution or the patterns of racial and economic segregation that affect American cities.

The four dissenting Justices also faced a dilemma. They, too, should have viewed Moore approvingly. Yet, they wanted to preserve the ability of zoning boards to reinforce the links between property values and mainstream families, however the particular community defined them. They therefore did not want to address the definition of family at all.<sup>80</sup> These opinions, while sharing Stevens's determination not to embed a definition of family in the Constitution, disagreed with his expansion of the constitutional rights of homeowners vis-à-vis the state and thus sought ways to allow the Court to look the other way.<sup>81</sup>

The multiple opinions in *Moore*, while disagreeing sharply with each other in the framing of the issues and in their conclusions about the result, do not challenge the definition of what constitutes a family nor the ability of zoning authorities to define families and to channel<sup>82</sup> appropriate residential behavior. To the extent any of the opinions extended constitutional protection to families, they did so on the basis of blood ties rather than choice.<sup>83</sup> The four Justices who joined the plurality opinion grounded their conclusion not only in tradition but also in the practicalities of a private system of family support.<sup>84</sup> A grandmother who comes to the aid of her grandchildren, after all, vindicates both traditionalist and modernist family values. Although *Moore* breaks new ground in protecting a grandmother from the vagaries of a local zoning ordinance, it does not fundamentally change the understandings of what constitutes a family—nor do much to restrict exclusionary zoning laws.

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80. *Id.* at 521–22 (Burger, C.J., dissenting) (suggesting that the right solution was for Moore to seek a variance from the local zoning officials).

81. *See, e.g., id.* at 550–51 (White, J., dissenting) (adopting a deferential standard of review toward zoning ordinances). In fact, many states have dealt with exclusionary zoning provisions in exactly this way, keeping such restrictions on the books and then backing down only in the face of determined (or embarrassing) opposition. Such challenges, though, may be beyond the reach of financially stressed extended families. *See* Kent W. Bartholomew, Comment, *The Definition of "Family" in Missouri Local Zoning Ordinances: An Analysis of the Justifications for Restrictive Definitions*, 52 ST. LOUIS U. L.J. 631, 665–66 (2008).

82. *See generally* June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859 (2011); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

83. In this sense, Stevens's opinion grounds its protection of Moore on her rights as a homeowner, not on a right extended to families per se. *See supra* Part II.A.

84. *Moore*, 431 U.S. at 505 (plurality opinion).

IV. THE RELATIONSHIP BETWEEN FAMILY, CLASS, AND RACE:  
THE UNFINISHED DISCUSSION

*Moore* is indubitably about the intersection of family, class, and race. Brennan's concurrence observed that the nuclear family is a pattern associated with "white suburbia"<sup>85</sup> and stressed that the "Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living."<sup>86</sup> It documented the dramatically greater association of extended families in African-American communities than in white communities. It also commented that this may reflect "the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended, for nuclear, living patterns."<sup>87</sup>

None of the opinions acknowledge, however, the role of the changing family in exacerbating race and class disparities. The plurality celebrated the traditional extended family without noting its association with marriage.<sup>88</sup> In some communities, extended families permitted earlier marriages, with the new bride and groom moving in with their parents, or they contributed to the ability of working-class mothers to work outside the home or to care for elderly or disabled relatives. And they have long served as the fallback helping to deal with the consequences of death or divorce.<sup>89</sup>

By the late 1970s, however, extended families were also dealing with a national decline in marriage.<sup>90</sup> Both better-off and poorer women had become more sexually active, and the importance of the shotgun marriage was decreasing for both.<sup>91</sup> Ambitious women responded by embracing contraception and abortion, while working class women became more likely to give birth without marrying. Extended families, especially in African-American communities, were associated with "matrifocal families."<sup>92</sup>

This created a dilemma for zoning boards. East Cleveland was a predominately African-American community, with an African-American city manager and city commission.<sup>93</sup> Robert Burt observed that "the purpose of the ordinance was quite straightforward: to exclude from a middle-class, predominantly black community, that saw itself as socially and economically upwardly mobile, other black families most characteristic of lower-class ghetto life."<sup>94</sup> This purpose does not make sense if extended families simply

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85. *Id.* at 508 (Brennan, J., concurring).

86. *Id.*

87. *Id.* at 509.

88. *Id.* at 503–06 (plurality opinion).

89. JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000).

90. See CAHN & CARBONE, *supra* note 2, at 19–32.

91. *Id.* at 34–37.

92. Burt, *supra* note 15, at 388.

93. *Moore*, 431 U.S. at 537 n.7 (Stewart, J., dissenting).

94. Burt, *supra* note 15, at 389.

served as fallback options for nuclear families experiencing hardships, such as the death of a child's mother. Instead, Burt emphasized that the problem with these extended families was not so much that they were multigenerational but that they were female headed and "disproportionately characteristic of black lower-income households."<sup>95</sup>

By adopting this ordinance, East Cleveland thus sought to preserve its middle-class character, not its racial character. Moore may also have been trying to preserve her family's middle-class status by including her grandchildren in the home she owned in a better part of town than may have been available to her sons if they sought to live with their children on their own. Justice Stewart dismisses the importance of Moore's interest in living in East Cleveland, describing the city as "an area with a radius of three miles and a population of 40,000" and suggesting that Moore could move with her grandchildren to some other part of town.<sup>96</sup> Yet, none of the opinions tell us how easy that would have been, given the racial composition of the rest of the area, or how easy it would have been for Moore to sell her home or find a similar house she could afford elsewhere. Moreover, moving would have almost certainly been disruptive for her and her grandchildren.<sup>97</sup>

The fundamental socioeconomic question underlying the case involves the role of economic and racial segregation in limiting social mobility and compounding the effects that may be associated with family form. Modern research indicates that, holding constant for other factors, some communities promote social mobility better than others.<sup>98</sup> The communities that provide the greatest advantages have "lower rates of residential segregation by income and race, lower levels of income inequality, better schools, lower rates of violent crime, and a larger share of two-parent households."<sup>99</sup> Moreover, children who move from less-advantaged to more-advantaged communities enjoy significant advantages even if their parents remain poor and they continue to live in single-parent families.<sup>100</sup> Ironically, therefore, Moore had strong interests—to preserve the value of the property she owned and to provide a decent life for her grandchildren—in living in an area with more nuclear family households. And East Cleveland, in turn, best served Moore's interests by allowing her to remain without (again, ironically) attracting many more families like hers.<sup>101</sup>

Given these realities, neither the Supreme Court nor the City of East Cleveland nor Moore had any good options in addressing this issue, and none

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95. *Id.* at 388.

96. *Moore*, 431 U.S. at 550 (White, J., dissenting).

97. See William G. Austin, *Relocation, Research, and Forensic Evaluation, Part I: Effects of Residential Mobility on Children of Divorce*, 46 FAM. CT. REV. 137, 140 (2008) (demonstrating the harmful effects of residential mobility on children).

98. See generally CAHN & CARBONE, *supra* note 2.

99. CHETTY & HENDREN, *supra* note 12, at 7.

100. *Id.*

101. This is true so long as extended families in fact serve the role, as described in Justice Brennan's plurality opinion, of providing a privatized way of dealing with family stress.

of the *Moore* opinions discuss the community effects underlying the case. The dissent wished to affirm the validity of local zoning laws without acknowledging the role such ordinances play in promoting racial and economic segregation. The plurality wished to affirm the legitimacy of extended family households without acknowledging that a concentration of single-parent families tends to undermine community well-being.<sup>102</sup> Justice Stevens, in giving homeowners a right to association without tying it to constitutional protection for families, penned the most radically individualistic opinion, elevating property rights over community efforts to enhance property values. Yet, it seems closer in spirit to objections to the exercise of the power of eminent domain<sup>103</sup> than to cases like *Lawrence* that grant a right of intimate association. Considered in retrospect, *Moore* stands as a common sense invalidation of an arbitrary definition of single family applied to produce unsupportable results in the case of a sympathetic grandmother. It has not contributed, however, to any greater appreciation of how the constitution of families<sup>104</sup> interacts with the constitution of communities to determine societal well-being.

#### CONCLUSION

In the years after *Moore*, the cultural, racial, and economic divisions centered on the family have increased. A large number of states have struck down restrictive zoning measures based on family form, while a significant number of other states have refused to do so.<sup>105</sup> In 1979, less-traditional families were still largely associated with race; today, they have increasingly also become a marker of class as poor and working-class white families have adopted some of the same practices.<sup>106</sup> A number of states, such as California, override local zoning laws to ensure that all communities include affordable housing, while other states have allowed racial and economic segregation to become more entrenched.<sup>107</sup>

Today, as much as in 1979, there is no agreement about whether the relationship between the constitution of family and the constitution of community should involve a red embrace of established values in the public

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102. This may be true for many reasons, including their association with poverty.

103. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005).

104. See Burt, *supra* note 15.

105. See Katia Brener, Note, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 75 N.Y.U. L. REV. 447, 454 (1999).

106. See generally JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014); CHARLES MURRAY, *COMING APART* (2012).

107. See CAL. GOV'T CODE §§ 65580–65589.8 (West 2017) (requiring localities to meet their “fair share” of the need for housing at all income levels, specifically including the need for very low-, low-, and moderate-income housing); CHETTY & HENDREN, *supra* note 12 (ranking municipalities in terms of their opportunities for social mobility).

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MOORE'S *POTENTIAL*

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square or a blue celebration of individual choice coupled with the construction of communities designed to support all of our children.