

SHARING A HOUSE BUT NOT A HOUSEHOLD: EXTENDED FAMILIES AND EXCLUSIONARY ZONING FORTY YEARS AFTER *MOORE*

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INTRODUCTION

*Moore v. City of East Cleveland*¹ is undeniably a victory for extended families that do not conform to the nuclear family form because the state can no longer prevent them from living together in one household. In particular, it is a victory for families of color, immigrants, and economically vulnerable families who are more likely to reside with extended family members for cultural and economic reasons. Justice Lewis Powell, writing for the plurality, recognized the American tradition of extended family members living in one household,² and Justice William Brennan (joined by Justice Thurgood Marshall) further noted that the extended family “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.”³

Like most decisions, however, *Moore* is not without its critics. As my students point out each year, the Court’s distinction between the City of East Cleveland’s narrow definition of a family and ordinances that allow anyone who is related by blood, marriage, or adoption to live together in a single-family household⁴ suggests that the *Moore* Court would exclude de facto parents, cohabiting partners, or close friends sharing a home from its definition of family. A definition of family that requires blood, marriage, or adoption is unnecessarily narrow and is not consistent with modern conceptions of family.

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

2. *See id.* at 505 (stating that “[o]ut of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home”).

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

4. *See id.* at 498 (plurality opinion) (distinguishing East Cleveland’s ordinance from the ordinance at issue in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)); *see also infra* note 42 and accompanying text (discussing the language of East Cleveland’s ordinance).

Moore also failed to protect families from the economic burdens some municipalities place on extended family members who share a house but not a household. While some extended family members live together in a single household (such as an apartment or single-family house), others live in two-family homes with parents, children, grandchildren, aunts, uncles, and cousins.⁵ Two-family homes allow extended families to pool resources and obtain the economic, social, and emotional support that, as *Moore* recognized, extended family members living in a single household have traditionally relied upon.⁶ Two-family homes also reduce the likelihood of overcrowding and lack of privacy that may result when large extended families share a single-family home. Inez Moore lived in such a home. She owned (or was a partial owner of) a two-family home and occupied one unit with her adult son, his son, and another grandson (the son of another one of Moore's children). The other unit was occupied by Moore's daughter Carol and Carol's son.⁷

Despite the benefits that two-family homes may provide to extended families, many towns' zoning ordinances exclude two-family homes from the most desirable blocks, instead zoning them for single-family homes only. This Article argues that despite *Moore*'s recognition of the constitutional right to reside with extended family members, zoning laws penalize individuals who reside with extended family members in two-family homes. As Justice Brennan recognized, the "extended" [family] form is especially familiar among black families" who would be economically disadvantaged if zoning laws required them to live in nuclear families.⁸ African Americans, Latinos, Asian Americans, and immigrants—all groups that are more likely than whites to live with extended family members⁹—are disadvantaged by zoning laws that exclude two-family homes from the most desirable neighborhoods or blocks.

This Article proceeds in three parts. Part I briefly recounts the evolution of zoning laws and their effect on racial minorities. Next, Part II demonstrates how single-family zoning laws disproportionately exclude racial minorities from the most desirable blocks. Part II also examines how these laws economically and socially disadvantage minorities and hinder efforts to integrate neighborhoods and schools. Then, Part III uses *Moore* to explore potential solutions and concludes that, at minimum, zoning laws

5. A two-family home is a house with two separate living units or apartments.

6. See *Moore*, 431 U.S. at 508 (Brennan, J., concurring) (noting that the extended family "provided generations of early Americans with social services and economic and emotional support in times of hardship"); see also MICHELE ZONTA, CTR. FOR AM. PROGRESS, HOUSING THE EXTENDED FAMILY 10 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/10/18155730/ExtendedFamilies-report.pdf> (reporting that extended families are more likely to be poor than nuclear families) [<https://perma.cc/Q4FW-VBDV>]; Sonia M. Gipson Rankin, *Black Kinship Circles in the 21st Century: Survey of Recent Child Welfare Reforms and How It Impacts Black Kinship Care Families*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1 (2013).

7. See Peggy Cooper Davis, *Moore v. East Cleveland: Constructing the Suburban Family*, in FAMILY LAW STORIES 77, 77–78 (Carol Sanger ed., 2008).

8. *Moore*, 431 U.S. at 509 (Brennan, J., concurring).

9. See ZONTA, *supra* note 6, at 8–9.

cannot exclude two-family homes that are occupied by extended family members. It also shows how *Moore* may support a more inclusionary approach to zoning.

I. THE EVOLUTION OF EXCLUSIONARY ZONING

Family law scholars and land use scholars do not often meet. They rarely attend the same conferences or collaborate on joint projects. *Moore* demonstrates that they probably should. Zoning laws have always affected families. They may define who is a family member, and by determining where families can live, zoning laws influence who children will meet, go to school with, and ultimately date and choose as a life partner.

The first zoning laws at the beginning of the twentieth century sought to protect residential areas from pollution, unsanitary conditions, and industrial nuisances.¹⁰ However, zoning soon became a “mechanism for protecting property values and excluding the undesirables,” specifically “immigrants and African-Americans.”¹¹ Explicitly race-based zoning laws were used to enforce Jim Crow laws until 1917 when the U.S. Supreme Court ruled these laws unconstitutional in *Buchanan v. Warley*.¹² Although after *Buchanan* zoning laws could not explicitly segregate by race, facially neutral laws had the same effect. These laws set forth minimum requirements for “width of lots, front, side and rear yards”¹³ and separated single-family homes from two-family homes and apartment buildings. These requirements, in practice, excluded low- and moderate-income families, who are disproportionately racial minorities, from the most desirable residential blocks.¹⁴ These laws were enacted not only in the southern states that had used zoning laws to expressly exclude African Americans, but all across the country.¹⁵

Just nine years after striking down racial zoning laws as unconstitutional in *Buchanan*, the Supreme Court upheld a comprehensive zoning plan. In *Village of Euclid v. Ambler Realty Co.*,¹⁶ the Court upheld a zoning plan that divided the Village of Euclid (a suburb of Cleveland) into single-family, two-family, and multifamily zones (including apartment buildings), as well as commercial and industrial zones.¹⁷ In upholding the ordinance,

10. Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1406 (2015).

11. Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY IN THE SHADOWS 23, 24 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

12. 245 U.S. 60 (1917); *see id.* (striking down as unconstitutional an ordinance that prohibited African Americans from buying property or residing on a block where the majority of residents were white).

13. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 382 (1926) (describing the zoning ordinance at issue as representative of zoning ordinances across the country).

14. Oliveri, *supra* note 10, at 1433.

15. Silver, *supra* note 11, at 34.

16. 272 U.S. 365 (1926).

17. *See id.* at 384–85.

the Court accepted the Village's argument that apartments should be separated from houses:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, . . . that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.¹⁸

The Court concluded that the reasons for the ordinance were “sufficiently cogent to preclude us from saying . . . that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁹

Since *Euclid*, municipalities have enacted zoning ordinances that designate certain residential areas for single-family homes only.²⁰ As in *Euclid*, these ordinances are justified as necessary to preserve the area's “residential character,” to provide a suitable place for children, and to prevent noise, traffic, and overcrowding.²¹ They are also justified as necessary “to protect property values.”²²

Five months before issuing its opinion in *Moore*, the Supreme Court decided another zoning case, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²³ There, the Court rejected a Fourteenth Amendment equal protection challenge to the Village's refusal to rezone a fifteen-acre parcel zoned for single-family homes to allow for construction of low- and moderate-income multifamily housing.²⁴ In rejecting the plaintiffs' argument that the denial was racially discriminatory,²⁵ the Court

18. *Id.* at 394.

19. *Id.* at 395.

20. Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1257 n.137 (2005) (“Ninety-eight percent of all cities with populations greater than ten thousand, and nearly ninety percent of suburban municipalities with populations larger than five thousand have adopted some form of zoning.”); see also Amanda C. Micklow & Mildred E. Warner, *Not Your Mother's Suburb: Remaking Communities for a More Diverse Population*, 46 URB. LAW. 729, 731 (2014) (reporting that “70% of suburban housing is single-family”).

21. See *Euclid*, 272 U.S. at 394–95; Oliveri, *supra* note 10, at 1409.

22. Oliveri, *supra* note 10, at 1417.

23. 429 U.S. 252 (1977).

24. See *id.* at 254, 264–65.

25. The plaintiffs were the nonprofit developer, another nonprofit corporation, three African Americans, and one Mexican American. *Id.* at 258.

concluded that despite the fact that only 27 of the Village's 64,000 residents were African American and the refusal to rezone would disproportionately affect racial minorities,²⁶ the plaintiffs had not shown "that discriminatory purpose was a motivating factor in the Village's decision."²⁷ The Court held that even if a zoning law "bear[s] more heavily on racial minorities," absent proof of racially discriminatory purpose, it does not violate the Equal Protection Clause.²⁸

While the Court in *Arlington Heights* found no evidence of discriminatory purpose, other zoning laws enacted before and after this decision demonstrate intent to exclude minorities. For example, in 1997, the Department of Justice sued the Town of Cicero, Illinois, alleging that it had enacted a zoning ordinance with prohibitively low maximum occupancy restrictions to exclude Latino families that tend to have more members.²⁹ In 2005, almost three decades after *Moore*, the City of Manassas, Virginia, amended the definition of family in its housing code to include only "immediate relatives," a change that has been described as making "a common Hispanic family structure illegal."³⁰ Although the ordinance was repealed months later, in the short period it was in effect, almost all of the home inspections conducted involved Latino households.³¹ The City of Manassas only changed its policies when it was sued, and as part of a settlement, it agreed to hire a housing manager to address Latino residents' claims that they were being illegally targeted.³²

26. Forty percent of Chicago area residents eligible to become tenants of the proposed development (based on low and moderate income) were racial minorities. *Id.* at 259.

27. *Id.* at 270. Numerous scholars have been critical of the Court's decision. *See, e.g.*, DAVID DANTE TROUTT, *THE PRICE OF PARADISE* 81, 84–85 (2013); Elise C. Boddie, *Racial Territoriality*, 58 *UCLA L. REV.* 401, 415–16 (2010); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841, 1874 (1994); Daria Roithmayr, *Locked in Segregation*, 12 *VA. J. SOC. POL'Y & L.* 197, 240–41 (2004).

28. *Arlington Heights*, 429 U.S. at 269. *But see* *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724–25 (N.J. 1975) (striking down a zoning ordinance that permitted only single-family homes on large lots where it had the effect of precluding construction of low- and moderate-income housing).

29. *See, e.g.*, Oliveri, *supra* note 10, at 1417–18; Daniel Eduardo Guzmán, Note, "There Be No Shelter Here": *Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 *CORNELL J.L. & PUB. POL'Y* 399 (2010). Overcrowding in housing tends to be more prevalent in Latino communities. *See* OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., *MEASURING OVERCROWDING IN HOUSING* 12, 15 (2007), https://www.huduser.gov/publications/pdf/measuring_overcrowding_in_hsg.pdf (finding that Latino households have the highest rate of overcrowding) [<https://perma.cc/S6CG-YBC2>]; *see also* *Overcrowding Rate by Race/Ethnicity*, DIVERSITYDATA.ORG, <http://diversitydata-archive.org/Data/Rankings/Show.aspx?ind=92> (last visited Apr. 14, 2017) [<https://perma.cc/MJ62-C22J>].

30. Guzmán, *supra* note 29, at 415–16 (quoting Press Release, Equal Rights Ctr., Civil Rights Lawsuit Filed Against the City of Manassas, VA and Its School System for Discriminating Against Hispanic Residents (Oct. 16, 2007), https://equalrightscenter.org/pr-archives/2007/04-10.16.07_Civil_Rights_Lawsuit_Filed_Against_the_City_of_pdf [<https://perma.cc/9U62-QCYW>]).

31. *See id.* at 415.

32. *See id.* at 416.

Other cities in Virginia and Georgia have similarly amended their zoning ordinances to exclude extended family members despite *Moore*'s holding.³³ Although officials claim that they were seeking to address overcrowding problems, and not to exclude extended family members or target Latinos and immigrants, the ordinances themselves demonstrated otherwise.³⁴ For example, towns in Virginia narrowed their definition of a family in their zoning ordinances to "immediate relatives" even when the total number of individuals in a household did not exceed the maximum number of occupants permitted.³⁵ Zoning enforcement officials received hundreds of overcrowding complaints from residents, and one county conducted more than 7,000 home inspections in one year.³⁶ Interestingly, no zoning violations were found in 80 percent of cases.³⁷ In one county in Georgia, 95 percent of the complaints were brought by white residents against Latino residents.³⁸ Partly in response to these complaints, the town amended its definition of "family" to include only parents, children, siblings, grandparents, and grandchildren.³⁹ Other counties in Georgia did the same.⁴⁰

The zoning ordinance in *Moore* was race conscious but lacked any intent to exclude on the basis of race. To the contrary, the ordinance was enacted to stem middle-class white flight and attract middle-class African Americans in an effort to create a racially integrated community.⁴¹ The ordinance defined family to include spouses and their parents and children. It also included grandchildren but only if the grandchildren were siblings. Specifically, the ordinance provided that "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."⁴² Inez Moore's adult son Dale Sr., his son Dale Jr., and another grandson John Jr. (the son of another adult son, John Sr.) lived with her, but the grandchildren were first cousins, not siblings. As such, Moore was criminally charged and fined for violating the ordinance and ordered to remove her grandson John Jr., "an illegal occupant," from the home.⁴³ Moore challenged the ordinance as unconstitutional, and the Court, reminding us that it "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

33. *See id.* (discussing the City of Herndon and Loudon County in Virginia).

34. *See id.* at 416–21 (listing examples).

35. *See id.* at 416 (discussing the City of Herndon).

36. *Id.* at 417.

37. *See id.* at 416–17 (discussing the City of Herndon and Loudon County).

38. *See id.* at 420 (discussing Cobb County, Georgia).

39. *See id.* at 421 (discussing Cobb County, Georgia).

40. *See id.* (discussing Roswell, Georgia). One city's ordinance expressly excluded cousins from its definition of family. *Id.*

41. Davis, *supra* note 7, at 82–84. East Cleveland sought to avoid not only the problems of overcrowding but also the perceived pathologies, as expressed in the Moynahan Report and others, of single-parent households. *See id.*

42. *Moore v. City of East Cleveland*, 431 U.S. 494, 496 n.2 (1977).

43. *Id.* at 497.

Fourteenth Amendment,”⁴⁴ struck down the ordinance that intruded on Moore’s family life. The Court also expressly recognized the importance of the extended family to our children. It noted:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The 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. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it.⁴⁵

Despite *Moore*’s recognition of the right of extended family members to live together, some municipalities have continued to amend their zoning laws to the contrary.⁴⁶ But even when there is no such intent, zoning laws may disproportionately exclude racial minorities. The exclusion of two-family residences from single-family zoning districts illustrates the racially disparate effect of facially neutral zoning laws.

II. THE HARMS OF SINGLE-FAMILY ZONING

Similar to the ordinance in *Euclid*, many municipalities make a distinction between single-family and two-family residences for zoning purposes. The exclusion of two-family homes from single-family zones harms the residents of two-family homes in myriad ways. The bulk of desirable residential areas in many suburbs are zoned for single-family residences, thereby requiring that two-family residences be clustered into relatively few zones.⁴⁷ For example, it is not uncommon to find two-family homes in affluent suburbs in New Jersey clustered into a few blocks.⁴⁸ The clustering of two-family homes increases the likelihood of overcrowding, noise, lack of parking, criminal mischief, and other ills that have been cited

44. *Id.* at 499.

45. *Id.* at 504–05 (internal citations omitted).

46. *See infra* notes 47–49 and accompanying text.

47. For example, in Westfield, New Jersey, an affluent suburb with zoning laws similar to that of other affluent towns in the state, seven of the thirteen residential zone districts are for single-family residences only. Four districts allow two-family and duplex homes, and another two districts are zoned for multifamily residences. Single-family homes are allowed in two-family and multifamily residential zones, meaning that single-family homes are allowed in all thirteen residential zone districts, but two-family homes are permitted in only six districts. *See* WESTFIELD, N.J., THE LAND USE ORDINANCE OF THE TOWN OF WESTFIELD art. 11 (2013); *see also* OAK PARK, IL., ZONING ORDINANCE art. 3 (2016) (providing for four residential zones for single-family residences but only one residential zone for two-family residences); SUMMIT, N.J., DEVELOPMENT REGULATIONS art. 4 (2016) (providing for five residential zones for single-family residences only but only one residential zone for two-family residences).

48. *See* Stephen Stirling, *This Map Shows the Racial Makeup of Every Block in NJ*, NJ.COM (Oct. 15, 2015), http://www.nj.com/news/index.ssf/2015/10/this_map_shows_a_racial_breakdown_of_every_person.html [<https://perma.cc/U7GW-PCV8>]. In many suburbs, African Americans and Latinos are clustered in a few blocks and the rest of the town is white. *See* Matthew Block et al., *Mapping Segregation*, N.Y. TIMES (July 8, 2015), <https://www.nytimes.com/interactive/2015/07/08/us/census-race-map.html> [<https://perma.cc/LM8R-LTMD>].

as justifications for zoning regulations. Not only is the total area zoned for two-family homes small relative to the areas zoned for single-family homes, but in many towns, two-family-home zones also serve “as a transition zone between the single-family residential zones and the commercial districts.”⁴⁹ In other words, two-family zoning serves as a buffer between the pristine single-family residential districts and the noise and traffic of the commercial district. This means that residents of two-family homes (including extended family members who live together in those homes) do not enjoy the peace and quiet that single-family home dwellers enjoy. The clustering and placement of two-family homes (adjacent to apartment buildings, commercial areas, and congestion) also decreases their value and potential for appreciation.⁵⁰ As such, it contributes to the economic inequality between owners of two-family and single-family homes.

African Americans, Latinos, and immigrants are more likely than whites to reside in two-family homes.⁵¹ They are also more likely to reside with extended family members.⁵² Consequently, although only a small percentage of the population in most affluent suburbs is nonwhite, the residents of two-family zoned blocks are disproportionately African American and Latino.⁵³ By excluding two-family homes from single-

49. GARWOOD, N.J., GENERAL LEGISLATION ch. 106, art. VIII, § 106-93 (2016); *see* SUMMIT, N.J., DEVELOPMENT REGULATIONS art. 4 (providing for five residential zones for single-family residences only but only one residential zone for two-family residences, located right next to the multifamily and business districts); *see also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 258 (1977) (noting that under the zoning ordinance at issue, the areas zoned for multifamily dwellings were “primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts”).

50. *See* Mark Obrinsky & Debra Stein, *Overcoming Opposition to Multifamily Rental Housing* 12 (JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., Working Paper No. RR07-14), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rr07-14_obrinsky_stein.pdf [<https://perma.cc/9M7A-T5ZQ>]; Michael Estrin, *Do Rentals Decrease Nearby Home Values?*, BANKRATE (Nov. 4, 2013), <http://www.bankrate.com/finance/real-estate/do-rentals-decrease-home-values.aspx> [<https://perma.cc/N3W7-7WVE>].

51. *See* Matthew C. Marlay, *A Dream Deferred: Residential Attainment Among Minority and Immigrant Groups in the United States* 55–56 (July 29, 2008) (unpublished Ph.D. dissertation, The Pennsylvania State University), <https://etda.libraries.psu.edu/catalog/8872> [<https://perma.cc/36AW-W4P4>].

52. In 2014, 15 percent Americans lived in multigenerational households (i.e., grandparents, parents, and children) in 2014 as compared to 28 percent of Asian Americans and 25 percent of African Americans and Latinos. *See* D’vera Cohn & Jeffrey S. Passel, *A Record 60.6 Million Americans Live in Multigenerational Households*, PEW RES. CTR. (Aug. 11, 2016), <http://www.pewresearch.org/fact-tank/2016/08/11/a-record-60-6-million-americans-live-in-multigenerational-households/> [<https://perma.cc/4HPG-KYGP>]. Immigrants are more likely than the U.S. born to live with extended family members, which contributes to the higher percentage of Latinos and Asian Americans who reside in multigenerational households. *Id.*

53. African Americans and Latinos make up only 1.7 and 4.6 percent, respectively, of the population in the 1,000 most affluent neighborhoods in the United States. *See* Richard Florida, *America’s 1000 Richest Neighborhoods*, CITYLAB (Mar. 13, 2014), <http://www.citylab.com/housing/2014/03/americas-1000-richest-neighborhoods/8610/> [<https://perma.cc/6F93-QWP5>]. One study found that 377 of the 1,000 wealthiest neighborhoods are 95 percent white. *See* Stephen Higley, *A Racial Summary*, HIGLEY 1000, <http://higley1000.com/about-this-site/racial-barchart> [<https://perma.cc/T6WE-NEKQ>].

family zones, zoning laws maintain racial segregation within towns, as families of color (who are more likely to reside with extended family members) are restricted to blocks with disproportionately minority residents. These blocks are then stigmatized as “minority blocks,” which further drives down property values, as studies have repeatedly found that whites do not wish to live in neighborhoods where African American residents make up more than 10 percent of the population.⁵⁴ Segregation by block also hinders children’s ability to develop interracial friendships, even if they live in the same town and attend school with children of other races. They might also be stigmatized as the children who live on an undesirable block.

Moore recognized the constitutional right to live with extended family members and the benefits that such households provide to all Americans, especially racial minorities and immigrants.⁵⁵ However, zoning laws economically and socially burden extended families that live together in two-family homes. The next part explores how *Moore* can remedy these inequities.

III. EXTENDING *MOORE* TO EXTENDED FAMILIES IN TWO-FAMILY HOMES

Many scholars have demonstrated how zoning laws that prevent construction of apartment buildings are a barrier to residential integration.⁵⁶ Courts have also struck down single-family zoning ordinances that have the effect of precluding low- and moderate-income housing.⁵⁷ While some of the objections to apartment buildings, especially low-income housing, are

54. See Michael O. Emerson et al., *Does Race Matter in Residential Segregation?: Exploring the Preferences of White Americans*, 66 AM. SOC. REV. 23 (2001); see also Dorothy Brown, *How Home Ownership Keeps Blacks Poorer Than Whites*, FORBES (Dec. 10, 2012, 12:28 PM), <http://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/#6a9eaa1b7e57> (“Evidence indicates that it is the presence of blacks, and not just neighborhood conditions often associated with black neighborhoods (e.g., bad schools, high crime), that accounts for white aversion to such areas. In one survey, whites reported that they would be unlikely to purchase a home that met their requirements in terms of price, number of rooms, and other housing characteristics in a neighborhood with good schools and low crime rates if there was a substantial representation of African Americans.”) [<https://perma.cc/QYG6-YGHP>].

55. *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) (Brennan, J., concurring) (“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.”).

56. See, e.g., Arthur C. Nelson et al., *The Effect of Urban Containment and Mandatory Housing Elements on Racial Segregation in US Metropolitan Areas 1990–2000*, 26 J. URB. AFF. 339 (2004); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS’N 125 (2000); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779 (2009).

57. *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724–25 (N.J. 1975).

based on negative stereotypes about the families who would reside in them, some of the concerns may be legitimate. One need not agree with the *Village of Euclid*'s characterization of apartments as "mere parasite[s]" to acknowledge that apartments may bring increased noise, traffic, and reduce the spaces available to children for play.⁵⁸ However, these concerns are significantly reduced when the dwelling is a two-family home. Building two-family homes on the same blocks as single-family homes is unlikely to lead to crowding or increased noise, especially if they are interspersed with single-family homes throughout the town and are not crowded into a few blocks. So what explains the distinction between single-family and two-family homes for purposes of zoning? One explanation is that homeowners do not want properties that might alter the character, including the aesthetic feel, of their block. Single-family homeowners may not want tall structures on their block or may not want homes that lack a front yard. Some homeowners associations prohibit exterior home paint colors that clash with other homes, and municipalities enforce rules requiring front lawn maintenance for aesthetic reasons.⁵⁹ These may be legitimate concerns, but ordinances can require that two-family homes in single-family zones comply with the same requirements as other homes to ensure that these homes do not detract from the appeal of the block.

Most Americans prefer to live in a single-family home, but the prevalence of these preferences varies by race. One study found that whites have stronger preferences for single-family detached homes than other groups, while African Americans, who are more likely to reside in two-family homes, are more accepting of attached townhouses or two-family homes.⁶⁰ Only 8 percent of whites, as compared to 22 percent of African Americans and 17 percent of Latinos, described a duplex or two-family house as ideal for their needs, even though white households tend to have fewer members than African American or Latino households.⁶¹ While individuals' preference for single-family homes are often based on their desire for peace, quiet, and open spaces associated with single-family blocks, their preferences may be derived from biases against the residents of two-family homes. Studies have found that individuals make negative assumptions about families who live in two-family homes. They assume that the residents earn low incomes and cannot afford a single-family home.⁶² They also assume that the residents are renters and will not take care of the property, because they do not own it, or they will depend on

58. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

59. For example, when I first moved to my suburb, I neglected to cut the front lawn for a few weeks as I was busy unpacking and making necessary repairs inside the home. I received a citation from the municipality requiring me to cut the lawn within five days or else I would receive a fine. At the bottom of the citation was a reminder to keep the town "a nice place to live."

60. See Marlay, *supra* note 51, at 55–56.

61. *Id.*

62. *Id.*; see also Corianne Payton Scally, *The Nuances of NIMBY: Context and Perceptions of Affordable Rental Housing Development*, 45 URB. AFF. REV. 718, 721 (2012).

public assistance for their support.⁶³ These are the same reasons why individuals object to construction of low- and moderate-income housing in their neighborhoods.

These assumptions are not valid justifications for excluding extended family members who live together in two-family homes from a neighborhood or block under *Moore*.⁶⁴ Indeed, the *Moore* Court rejected the City of East Cleveland's attempts to justify its narrow definition of family "as a means of preventing overcrowding, minimizing traffic and parking congestion."⁶⁵ The Court concluded that the ordinance served these goals "marginally at best," in part because East Cleveland could address these concerns through its maximum occupancy laws that limited the number of individuals that could reside in a dwelling based on the dwelling's size.⁶⁶ Given the harms of excluding two-family homes from single-family zones, municipalities should address concerns about overcrowding, congestion, and noise through their maximum occupancy laws rather than through separate zoning districts.

After *Moore*, a municipality cannot use its zoning laws to prevent extended family members from living together in a single household so long as the number of members does not exceed occupancy limits. This Article contends that a two-family home, when occupied by extended family members, is the equivalent of a single-family home. *Moore* recognized that extended family members pool resources and "participate in the duties and the satisfactions of a common home."⁶⁷ These benefits and duties are not eliminated when extended family members choose to live in two units in a two-family home. The economic, social, and emotional support that extended families have relied upon for generations are no less important because a grandmother or a sister and her children live in the apartment upstairs. Consequently, this Article contends that under *Moore*, a town cannot constitutionally treat extended family members who occupy a two-family home differently than extended family members who live together in a single-family home.

Municipalities have always zoned certain categories of multigenerational homes as single-family homes. For example, mother-daughter homes are permitted in single-family zones, and, in recent years, home builders have offered buyers the option of homes with separate living spaces for extended family members such as grandparents or adult children.⁶⁸ These new

63. See Scally, *supra* note 62, at 721.

64. We should resist these justifications, which are based on stereotypes, even if the residents are not family members. However, *Moore* only expressly supports the constitutional right of family members to live together, so this Article only addresses how *Moore* can remedy the zoning disadvantages that affect extended family members who exercise their constitutional right to live together.

65. *Moore v. City of East Cleveland*, 431 U.S. 494, 499–500 (1977).

66. *Id.* at 500 n.7.

67. *Id.* at 505.

68. See Chris Farrell, *The Sensible Resurgence of the Multigenerational Home*, BLOOMBERG (Aug. 13, 2014), <https://www.bloomberg.com/news/articles/2014-08-13/college-graduates-live-with-parents-why-not> [<https://perma.cc/7KW9-HBXA>].

multigenerational homes, known as “NextGen,” include a separate entrance, bedroom, bathroom, living room, kitchen, and laundry facility.⁶⁹ However, they are costly to build and beyond the reach of the majority of minorities and immigrants.⁷⁰ Given the similarities between extended families that live in a single-family household and those that live together in a two-family home, and taking into account municipalities’ zoning of certain multigenerational homes as single-family, *Moore* requires that states permit two-family homes occupied by extended family members to be in single-family zones.

I am not a land use scholar, so I am hesitant to propose recommendations to remedy the policies that *Moore* would prohibit without their insight. My goal is to start a conversation between family law scholars (like myself) and land use scholars. These discussions might lead us to conclude that municipalities must allow developers to build two-family homes in single-family zones. Or, we might conclude that the constitutional infirmities of current zoning laws can instead be remedied by increasing the number of two-family zones, thereby eliminating the need for squeezing two-family homes into a few blocks. Under this approach, some zones would remain exclusively single-family but most would include two-family homes. This contrasts with the current rules in many suburbs that zone the bulk of residential blocks for single-family homes only. Finally, we might conclude that we can address the disadvantages created by two-family zoning and also accommodate preferences for single-family zoning by limiting the number of two-family homes permitted in these zones to 10 or 15 percent. This approach would allow these blocks to maintain their character while potentially increasing racial integration and allowing residents of two-family homes to enjoy the benefits of living on a block with mostly single-family homes.

CONCLUSION

This Article focuses on the disadvantages that single-family zoning places on extended family members who reside together in two-family homes. Admittedly, municipalities may not be able to feasibly zone two-family homes occupied by extended family members differently than those in which the residents of each unit are not related, as this would require constant policing. Not all two-family homes are owned or occupied by extended family members. Some families live in one unit and rent the second unit. Other two-family homes are not owner occupied but rather are investment properties that the owner rents to tenants. And although racial minorities are more likely to live with extended family members, the

69. *See id.*

70. *See* Michele Lerner, *Demand Rises for Properties That Can House More Than One Generation*, WASH. POST (Sept. 30, 2015), https://www.washingtonpost.com/realestate/demand-rising-for-properties-that-can-house-more-than-one-generation/2015/09/29/9d6f7042-50bd-11e5-8c19-0b6825aa4a3a_story.html?utm_term=.db99013a61ba [https://perma.cc/AJL9-JK6K].

majority do not.⁷¹ In these cases, *Moore* places no restrictions on a town's zoning of single- and two-family properties differently, even if such zoning disadvantages low-income families who are disproportionately African American and Latino. However, *Moore* does force us to grapple with the burdens that two-family zoning laws may place on all families. If *Moore* prohibits towns from excluding two-family homes occupied by extended family members from the most desirable areas but towns cannot feasibly create different zoning classifications based on who lives in a two-family home, municipalities might find that the only practical solution is to eliminate the distinction between single-family and two-family zoning altogether.

71. Most African Americans and Latinos do not own their own home. In 2016, 71.9 percent of whites owned their home as compared to 41.3 percent of African Americans, 47 percent of Hispanics, and 55.6 percent of Asian, Native Hawaiian, or Pacific Islanders. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CB17-05, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FOURTH QUARTER 2016 tbl.7 (2017), <http://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/2YLA-QW48>].