1979

Zoning Control of Abortion Clinics

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Recommended Citation

Note, Zoning Control of Abortion Clinics, 28 Clev. St. L. Rev. 507 (1979)

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ZONING CONTROL OF ABORTION CLINICS

I. INTRODUCTION

EVER SINCE THE UNITED STATES SUPREME COURT declared that the decision to have an abortion carries the status of a fundamental right, state and local governments have been attempting to reconcile the widely held perception of abortion as a social and moral evil with its constitutional protection. Before Roe v. Wade\(^1\) and Doe v. Bolton,\(^2\) the method of solving the dilemma was criminal prosecution for performing an abortion. The method now utilized is the regulation of abortion clinics by cities as an exercise of the zoning power. This note will address some of the issues involved when communities propose to use the zoning power to limit the exercise of the constitutionally protected abortion decision, focusing on abortion clinic regulations in Cleveland, Ohio, and comparing them to ordinances in three other cities.

II. PRELIMINARY PERSPECTIVES

At the outset, it is clear that the Supreme Court has sustained steadily broader interpretations of the permissible scope and legitimate objectives of zoning. The Court first upheld the constitutionality of zoning as a valid exercise of the police power in 1926 in Village of Euclid v. Ambler Realty Co.\(^3\) In 1954, in Berman v. Parker,\(^4\) the Court held that spiritual and aesthetic values, as well as physical and financial values, come within the concept of the public welfare and may be factors in zoning decisions. In 1974, the Court in Village of Belle Terre v. Boraas\(^5\) declared the protection of family ideals to be a proper zoning objective. "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Should a legislature determine that "family" or "aesthetic" values come in conflict with the presence of an abortion clinic in the community, then the zoning power would seem to offer the opportunity to regulate that use.

On the other hand, the decisions handed down since Roe and Doe have defined a very narrow scope of permissible government intervention in the abortion question. Roe established that the decision whether to terminate a pregnancy in the first trimester is a fundamental con-

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\(^1\) 410 U.S. 113 (1973).
\(^3\) 272 U.S. 365 (1926).
\(^6\) Id. at 9.
stitutional right and that the state may not enact legislation which either acts as a bar to, or unduly interferes with, the abortion decision or the physician-patient relationship. Regulations which infringe on a fundamental constitutional right are permissible only if warranted by a compelling state interest, and according to the Roe court, the state interest is not compelling until the second trimester when "the state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 7

Using the Roe analysis, the courts have declared invalid a number of state and local statutes which impact in one way or another on the first trimester abortion decision or the physician-patient relationship. Spousal and parental consent requirements and civil and criminal penalties for failure of the physician to exercise professional care to preserve the life of the fetus were declared unconstitutional in Planned Parenthood of Central Missouri v. Danforth. 8 Extensive abortion service regulations promulgated by the Chicago Board of Health which were applicable to any place or facility in which abortions were performed without regard to the trimester of pregnancy involved were likewise held to be an infringement of the right to privacy in the first trimester in Friendship Medical Center v. Chicago Board of Health. 9 An Indiana statute requiring that all abortions, including those during the first trimester of pregnancy, be performed in a hospital or licensed health facility with hospital back-up 10 and a Youngstown, Ohio, ordinance which effectively required any abortion clinic to be staffed in such a manner as to provide facilities equivalent to a hospital surgical ward 11 were held to be unconstitutional attempts to regulate first trimester abortions. 12

9 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975).
12 Anti-abortion laws have also been declared invalid on the ground that they infringed upon the first amendment rights to free speech and privacy where states have sought to prohibit advertising or the dissemination of information on abortion clinics. The advertising cases in general have held that states may not impose regulations on clinics that are not imposed on comparable facilities. See Bigelow v. Virginia, 421 U.S. 809 (1975) (invalidating a state law prohibiting advertising of abortion clinics); Mitchell Family Planning v. Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972) (holding invalid an ordinance prohibiting billboard advertising of abortion services as an unlawful restraint on freedom of speech). For a discussion of the advertising cases, see U.S. COMM'N ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING 23 (1975).
At the same time, a few cases have defined some legitimate state action during the first trimester. In *Bellotti v. Baird*, the Supreme Court repeated that a restriction on obtaining a lawful abortion is not unconstitutional unless it unduly interferes with the right to seek an abortion. "Not all distinction between abortion and other procedures is forbidden. The constitutionality of such distinction will depend upon its degree and the justification for it." Thus, recordkeeping and informed consent requirements were upheld in *Danforth*. Regulations to insure that first trimester abortions be performed by medically competent personnel were upheld in *Connecticut v. Menillo*. This decision was based on the theory that the lack of state interest in maternal health during the first trimester "is predicated upon the first trimester abortions being as safe for the woman as normal childbirth at term, and that predicate holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman." A Connecticut regulation exempting nontherapeutic abortions from the state medicaid program which otherwise generally subsidized medical expenses incident to pregnancy and childbirth was sustained in *Maher v. Roe*. The Court in *Maher* reasoned that *Roe*’s prohibition on interference with the abortion decision did not preclude the state from making a value judgment favoring childbirth over abortion.

14 Id. at 149-50.
16 423 U.S. 9 (1975). In *Menillo*, a Connecticut statute which made criminal an attempted abortion by "any person" was held to remain fully effective against performance of abortions by non-physicians, even though *Roe* and *Doe* would have nullified the statute if applied to physicians.
17 Id. at 11.

and implementing that value judgment by the state's method of allocating public funds.

III. THE ABORTION CLINIC ZONING CONTROVERSY IN CLEVELAND

The Cleveland, Ohio, abortion clinic ordinance is probably the least innocuous of the challenged zoning attempts and therefore the most appropriate test case for deciding the limits of the zoning power in this area. In December, 1973, the Cleveland City Council passed Ordinance No. 1861-A-73, now chapter 231 of the city health code, setting forth regulations for facilities offering abortion services. The regulations applicable to first trimester abortions include requirements relating to persons qualified to perform abortions, recordkeeping, counseling and informed consent provisions, necessary laboratory procedures, emergency procedures, availability of adequate oxygen, intravenous fluids, anesthetic and resuscitation equipment, and recovery facilities.\(^{19}\) The ordinance provides that licenses are to be granted upon inspection by and the approval of the Director of Public Health after payment of an annual $100.00 fee.\(^{20}\) These regulations seem to be consistent with the state's interest in assuring that first trimester abortions be performed by medically competent personnel under conditions to insure maximum safety, as described in Menillo.\(^{21}\)

The zoning implications of the Cleveland ordinance first appeared in 1977 in response to the efforts of West Side Women's Services, Inc. to open a low cost first trimester abortion service in a local retail business district. The proposed clinic, which would have been the first to open on the west side of Cleveland, aroused a great deal of public opposition.\(^{22}\) On July 17, 1977, the city council passed as emergency legislation an amendment to the health code which banned abortion clinics in local retail business districts.\(^{23}\) The effect of the ordinance was to establish medically necessary surgical procedures. The district court in McRae held that the denial of funds for other than life-endangering medically necessary abortions violated first and fourth amendment liberty interests. See also Hodgson v. Board of County Comm'rs, 614 F.2d 601 (8th Cir. 1980); Reproductive Health Servs. v. Freeman, 614 F.2d 585 (8th Cir. 1980). [Editor's note: The Supreme Court upheld the constitutionality of the Hyde Amendment in Harris v. McRae, ____ U.S.L.W. ____ (June 30, 1980)].

\(^{19}\) CLEVELAND, OHIO, CODIFIED ORDINANCES § 231.03 (1976).

\(^{20}\) Id. §§ 231.06-.08.

\(^{21}\) Connecticut v. Menillo, 428 U.S. 9 (1975); see notes 16-19 supra and accompanying text.

\(^{22}\) Councilman Robert Getz, who opposed the clinic and in whose ward it was to be located, was quoted: "I was only responding to the wishes of the majority of my constituency. This was not a personal vendetta. Councilman Keane and I were presented with a petition with at least 7,000 names on it from our wards opposing the clinic." Cleveland Press, Nov. 3, 1977, at B-3, col. 1.

\(^{23}\) CLEVELAND, OHIO, CODIFIED ORDINANCES § 231.09 (1978 Supp):

Notwithstanding any other provision of the Codified Ordinances, no license, required under the provisions of Section 231.06, shall be issued
abortion clinics (distinct from other medical clinics) as a prohibited-use classification in local retail business zones.  

West Side Women's Services, Inc., and Dr. Richard Derman, the physician who was to perform the abortions, brought suit against the city in federal district court, seeking declaratory and injunctive relief against the enforcement of the ordinance on the basis of due process and equal protection violations. The court, in West Side Women's Services, Inc. v. City of Cleveland, denied the plaintiffs' motion for a preliminary injunction, holding that the ordinance bore a rational relationship to legitimate state interests and that the primary requirement for granting injunctive relief—probability of success on the merits—was not met.

for an abortion service to be located in a Local Retail Business District as set forth in Section 343.01 of the Codified Ordinances, and no abortion service shall operate in a Local Retail Business District.

The zoning code defines local business district as: "A business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only." CLEVELAND, OHIO, CODIFIED ORDINANCES § 343.01(a) (1976).

The following uses are among those permitted in a local retail business district:

- Business offices: real estate, insurance and other similar offices, and the offices of the architectural, clerical, engineering, legal, dental, medical or other established recognized professions, but excluding morticians, undertakers and funeral directors, in which only such personnel are employed as are customarily required for the practice of such business or profession and not exceeding a total of five persons at any one time.

Id. § 343.01(b)(3).

The plaintiffs did not raise, nor did the court address, the significant procedural due process problems with the enactment of the ordinance, but rather relied exclusively on substantive grounds. The ordinance was not enacted as a zoning measure according to statutory requirements. The Cleveland City Charter specifies the procedures to be followed when the city council desires to pass a zoning regulation:

All ordinances or resolutions of Council or acts of any administrative official or agency of the City of Cleveland which ... concern zoning or other regulations affecting or controlling the use or development of land or otherwise come within the functions of the Planning Commission ... before adoption and before they shall become legal or binding upon the City, shall be submitted to the Planning Commission for report and recommendation. Any matter so referred to the Planning Commission shall be acted upon by the Planning Commission within thirty (30) days from the date of referral .... CLEVELAND, OHIO, CHARTER § 76-3 (1976).

The city charter section describing the powers and duties of the City Planning Commission specifies that "no general plan or portions thereof shall be adopted by the Commission until after a public hearing thereon." Id. § 76-2. The charter also gives the council the authority to pass zoning regulations: "The Council shall by ordinance provide regulations and restrictions governing ... the
IV. ZONING ABORTION CLINICS: THE ISSUES

A. Popular Sentiment Versus Minority Rights

Since it is evident that the Cleveland ordinance was an attempt to gauge and document the desires of the community, the question must be asked as to how much weight is to be given to such public sentiment. Is it overemphasizing the first amendment protection accorded to the abortion decision to say that the rights of women who want access to abortion clinics are paramount to those of the members of the community who are hostile to legal abortion?

The Massachusetts Supreme Court in *Framingham Clinic, Inc. v. Board of Selectmen* thought the first amendment protection warranted such a construction. Framingham Clinic leased premises to operate an abortion clinic in an industrial park area of Southborough, location and use of buildings, structures and land for trade, industry, residence and other purposes, and such other matters pertinent thereto as may be competent for this Charter to authorize." *Id.* § 76-5. Pursuant to this power, the zoning code requires that zoning amendments be submitted to the Planning Commission and that public hearings be held:

Council may . . . amend or change the maps, districts, setback building lines or regulations of this Zoning Code, provided that before such action is taken the matter shall first be submitted to the Planning Commission for its opinion and recommendations. The Commission shall be allowed a reasonable time, not less than thirty days, for consideration and report thereon, and a public hearing shall be held before the appropriate committee of Council. Ten days' notice of such public hearing and of the intention to amend or change the maps, districts, setback building lines or regulations shall be given by publication in the City Record.

*Cleveland, Ohio, Codified Ordinances* § 333.01 (1976).

There was no referral to the Planning Commission, no Planning Commission report, and no public hearing prior to the enactment of section 231.09. The city council circumvented the notice and hearing requirements by enacting section 231.09 as an emergency ordinance to take effect immediately under the procedures set forth in the city charter:

The Council may by a two-thirds vote of the members elected thereto, pass emergency measures to take effect at the time indicated therein. An emergency measure is an ordinance or resolution for the immediate preservation of the public peace, property, health, or safety, or providing for the usual daily operation of a Municipal department, in which the emergency is set forth and defined in a preamble thereto.

*Cleveland, Ohio, Charter* § 36 (1976).

While the council has the authority to enact emergency legislation without meeting the notice and hearing requirements of ordinary legislation, the power to enact zoning measures is specifically granted as defined in Cleveland City Charter sections 76-3 and 76-5 and Codified Ordinances section 333.01, which mandate public hearing and notice. If enacted as a zoning ordinance pursuant to such procedures, the substance of section 231.09 would logically be located in section 343.01, so that abortion clinics would have been listed along with funeral parlors as exceptions to the permissible uses in local retail business districts. Instead, section 231.09 is part of the health code and arguably ineffective as a zoning regulation.
Massachusetts. State law required that in order to obtain licensing the corporation show that its proposed use would not be in conflict with any applicable zoning ordinance or by-law. While preliminary steps in the approval process were underway, the town Planning Board held a public hearing to consider an amendment to the zoning by-laws which added abortion clinics to the list of prohibited uses in all districts.\(^{28}\) Based on the public hearing, the Planning Board issued a report to the Town Meeting that adoption of the by-law was "consistent with the desires of a substantial number of residents and a clear expression of how they wish to regulate the use of land, buildings and structures within the town."\(^{29}\) The court, in invalidating the ordinance, said that public sentiment cannot be considered when to act in accord with such sentiment inhibits the right to terminate a pregnancy: "The desires of members of the community to disfavor an abortion clinic ... cannot extenuate such a violation. The report of the Southborough Planning Board about public sentiment was thus an irrelevancy, and a dangerous one, for that way would be the extinction of many liberties which are indeed constitutionally guaranteed against invasion by a majority."\(^{30}\)

In *Fox Valley Reproductive Health Care Center, Inc. v. Arft*,\(^{31}\) a proposed abortion clinic in the Wisconsin town of Grand Chute elicited a similar negative public response. Upon newspaper reports that Fox Valley Reproductive Health Care intended to open a clinic, the town Board of Health held a public meeting to gather citizen testimony. The meeting resulted in one resolution opposing abortion and the establishment of abortion clinics and a second resolution authorizing the Town Council to draft an ordinance regulating operation of the proposed clinic. The ordinance subsequently passed set forth thirty-eight lengthy provisions regulating licensing, building plans, specifications, record-keeping, and staffing aspects of abortion clinics and also permitted such clinics to be located only in heavy industrial districts. The court implied that the zoning and building aspects of the ordinance would not be upheld when tried on the merits because "based on the chronology of events set forth ... plaintiff is reasonably likely to show that both of these alleged deficiencies are actually disguised attempts to improperly regulate or proscribe abortion procedures."\(^{32}\)

\(^{28}\) The amendment added to the zoning by-laws the words "Abortion Clinics" as the fifth of "Prohibited Uses—All Districts." The other prohibited uses for all districts were trailer camps, commercial racetracks, junk yards, and piggeries or fur farms. *Id.* at 608-09.

\(^{29}\) *Id.* at 608.

\(^{30}\) *Id.* at 611. In addition, the court used the "compelling state interest" test, stating that "[t]he regulation appears on its face to be an incursion into the basic right [of abortion] without acceptable justification." *Id.* at 610.

\(^{31}\) 446 F. Supp. 1072 (E.D. Wis. 1978) (granting plaintiff's motion for preliminary injunction).

\(^{32}\) *Id.* at 1075.
There is no doubt that there was vocal public sentiment against West Side Women’s Services’ proposed clinic when Cleveland amended its ordinance in July, 1977, and that the zoning regulation passed was a response thereto. The court in *West Side Women’s Services, Inc.* found no problem with the expression of public disapproval as a zoning regulation. Relying on *Maher v. Roe*, the court declared that there was a legitimate state interest in promoting live birth over abortion, that the state was not forbidden from making a pro-life value judgment, and that the City of Cleveland’s decision to deny abortion clinics the right to operate in local retail business districts while according other surgical clinics that right “appears to be consonant with such a value judgment.”

However, *Maher* did not state that such a value judgment might be exercised in any fashion or through the use of any governmental power, but rather “by the allocation of public funds.” The state might, in other words, affirmatively promote live birth through the expenditure of public funds while remaining neutral with regard to public funds for abortion. In language implying that the value judgment may not be exercised in a prohibitive manner, the *Maher* Court stated:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State’s power to encourage actions deemed to be in the public interest is necessarily far broader.

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33 The petition to Councilman Getz discussed in note 22 *supra* is one indicator of public sentiment. West Side Women’s Services had unsuccessfully attempted to open a clinic in suburban Lakewood before selecting the Cleveland site. Several western suburbs adopted stringent abortion clinic regulations in 1977, echoing the sentiments of the Parma Heights law director: “The feeling of City Council and the Mayor is that before an abortion clinic comes to Parma Heights, the U.S. Supreme Court will have to tell us twice.” Cleveland Plain Dealer, May 27, 1977, at B-5, col. 1. Parma Heights then passed an ordinance requiring all abortions to be performed in a hospital, and Parma Heights has no hospitals.

Rocky River, another western suburb, considered banning all medical clinics or alternatively creating a medical use district classification (requiring applicants to go through rezoning and public hearing procedures) and reserving to the public the right of referendum against the clinic. “These ordinances are a form of harassment,” according to Penny Steenblock of the National Association of Abortion Facilities; “if taken to the Supreme Court they’d be overruled. But it takes a lot of time and money to do that.” Cleveland Press, Apr. 19, 1977, at D-10, cols. 1, 3.

34 *West Side Women’s Services, Inc. v. City of Cleveland*, 450 F. Supp. 796 (N.D. Ohio), aff’d mem., 582 F.2d 1281 (6th Cir.), cert. denied, 439 U.S. 983 (1978); see notes 25-26 *supra* and accompanying text.

25 432 U.S. 464 (1977); see note 18 *supra* and accompanying text.

26 450 F. Supp. at 798.

27 432 U.S. at 474.

28 Id. at 475-76.
The enactment of a zoning prohibition as a means of implementing value judgment against abortions seems to be an attempt by the state to impose its will by force of law on a protected activity.

Village of Belle Terre v. Boraas approved the protection of family values as a permissible zoning objective, but the Court in Belle Terre did not say that such zoning was valid if the "value" was in opposition to a fundamental right. There being no fundamental right for several unrelated persons to maintain a common household, the Court found that legislating the community value in opposition to such living arrangements was within the zoning power. But when the preference for the nuclear family living pattern was expressed in the East Cleveland family ordinance, the Court in Moore v. City of East Cleveland found an impermissible exercise of the zoning power because it impacted on the constitutionally protected family privacy. Similarly, when public protests against a proposed abortion clinic in St. Paul, Minnesota, prompted the city council to study whether special zoning restrictions should be imposed, the United States court of appeals in Planned Parenthood of Minnesota v. Citizens for Community Action, after discussing the extent of constitutional protection afforded the abortion right, said "there is no judicial authority allowing a municipality, by imposing special restrictive zoning requirements on first trimester abortion clinics, to do indirectly that which it cannot do directly by medical regulation."

B. The Issue of Impact

The language in Planned Parenthood of Minnesota is interesting because it implies a near total prohibition on zoning as applied to abortion clinics. In Planned Parenthood of Minnesota, the town had not yet

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30 416 U.S. 1 (1974); see notes 5-6 supra and accompanying text.
40 431 U.S. 494 (1977). The East Cleveland, Ohio, single family zoning code defined "family" as no more than one married couple and their parents and permitted no more than one set of grandchildren to live with their grandparents. The Supreme Court held that the ordinance violated the due process clause of the fourteenth amendment in that the ordinance interfered with the strong constitutional protection of the sanctity of the family. Id. at 503-06. Belle Terre was distinguished because the ordinance at issue in that case affected only unrelated individuals while the East Cleveland ordinance regulated the "occupancy of its housing by slicing deeply into the family itself." Id. at 498. Because the impact on the constitutionally protected family was so direct, the Court abdicated its usual deference to the legislature and declared that the city's avowed purposes of preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burden on the schools did not justify this zoning measure. Id. at 499-500.
41 558 F.2d 861 (8th Cir. 1977).
42 Id. at 868.
43 This rule would undermine the argument of the City of Cleveland in West Side Women's Services, Inc., that the rational basis test rather than the compelling state interest test should be applied in judging the validity of the ordinance. The
enacted any zoning regulation; rather, the city council had imposed a six-month moratorium on the construction of separate abortion facilities pending a study of whether special zoning restrictions should be imposed based upon the determination of the effects of clinics on the integrity of existing land use controls and their relationship to the comprehensive plan. Drawing from Sendak v. Arnold, the court reasoned that municipalities may not impose special locational requirements on the construction of first trimester abortion clinics. Such locational requirements would constitute undue interference.

In West Side Women's Services, Inc., the City of Cleveland argued a different construction of the Sendak decision, emphasizing the impact of the ordinance rather than its substance. According to the city, the Indiana statute requiring hospital back-up was unconstitutional because it had the effect of preventing low cost first trimester abortions in freestanding clinics and thus operated as a substantial or undue interference with the abortion decision. Locational requirements which do not unduly or substantially interfere with the protected right, the city argued, must therefore be judged according to the rational basis test. On the basis of the city's argument, the court found no undue in-

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city argued that if the ordinance did not unduly interfere with the abortion decision, it must be sustained if it bore a rational relationship to a constitutionally permissible objective. Brief of Defendants-Appellees City of Cleveland at 13, West Side Women's Services, Inc. v. City of Cleveland, 582 F.2d 1281 (6th Cir. 1978).

44 The ordinance, adopted after public hearings, read in part:
[A] moratorium is hereby placed on the construction, reconstruction, adaption and modification of separate abortion facilities and other like facilities within the City of Saint Paul, and a moratorium on the issuance of permits for same. . . . [T]he Planning Commission is hereby directed to conduct a study of the effects of such facilities on the integrity of existing land use controls within the City, including proposed amendments to existing ordinances, the relationship of such facilities to the comprehensive plan, and any additional considerations the Planning Commission deems appropriate, and make recommendations thereon to the City Council within five months of the effective date of this resolution. . . . 558 F.2d at 864.

45 416 F. Supp. 22 (S.D. Ind.), aff'd mem., 429 U.S. 968 (1976); see note 10 supra and accompanying text. The reasoning is circuitous, however. Sendak involved provisions in an Indiana statute requiring that all abortions be performed in a hospital or licensed medical facility. A three-judge federal district court panel ruled that regulations as to the type of facility in which an abortion is to be performed can occur only at the end of the first trimester. The Planned Parenthood of Minnesota court interpreted Sendak as a ruling that states may not regulate where first trimester abortions are to be performed, and the Supreme Court's summary affirmance in Sendak, constituting a disposition on the merits, "supports Planned Parenthood's argument that municipalities can not impose moratoriums and special locational requirements on the construction of first trimester abortion clinics." 558 F.2d at 868.

terference by the ordinance because it only banned abortion clinics in certain areas and because women already had access to abortion facilities in other areas of the city. 47 The court distinguished both Planned Parenthood of Minnesota and Framingham Clinic 48 because the ordinances at issue in those cases would have had the effect of banning abortion clinics from the entire political subdivision. 49

C. The Equal Protection Problem

Even if a zoning regulation does not operate as a complete bar to obtaining an abortion at a free-standing clinic within the city, there remains the question of whether the separate-use classification meets equal protection standards. Cleveland's ordinance setting forth permissible uses in local retail business districts allows those uses "as are normally required for the daily local retail business needs of the residents of the locality only" 50 and includes medical offices employing five persons or less. Therefore, the abortion practitioner, by implication, is classified differently from other medical practitioners who operate either alone or in comparatively small medical clinics, and the abortion

47 In 1977, there were four free-standing first trimester abortion clinics in Cleveland and nine hospitals offering first and second trimester abortion services. Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, Exhibit "B," West Side Women's Services, Inc. v. City of Cleveland, 450 F. Supp. 796 (N.D. Ohio 1978). None of the clinics were located on the west side, and only two of the hospitals were located on the west side.

48 Framingham Clinic, Inc. v. Board of Selectmen, 367 N.E.2d 606 (Mass. 1976); see notes 27-28 supra and accompanying text.

49 450 F. Supp. at 798.

Although Planned Parenthood's clinic would have been the first free-standing facility in the St. Paul area and the district court in Minnesota stressed that the fact helped to give the moratorium ordinance the impact of undue interference, the whole question as to whether any special locational requirements would be valid was not related to the number of clinics in operation at that time. Special locational requirements aimed at curbing access to abortion were prohibited under state law. 558 F.2d at 868. The district court found violations of state zoning law because of the discriminatory and bad faith enactment of the ordinance calling for the moratorium and also because the zoning power, though broad, did not contemplate regulation of medical practices. Under Minnesota law, a zoning measure enacted outside the zoning power is null and void. Id.

The Framingham Clinic ordinance had declared abortion clinics a prohibited use, but the Massachusetts Supreme Court found the argument that there was no undue interference because abortions were available in nearby towns to be without merit; that a Southborough woman would have to travel to Boston, Brighton, Brookline, or Springfield to find a first trimester abortion clinic was enough evidence to show the undue interference of Southborough's ordinance. 367 N.E.2d at 612. The court declined to speculate whether the constitutional infringement would be so slight as to be unworthy of note if a first trimester abortion facility were available across the border from Southborough in nearby Framingham. Id.

50 CLEVELAND, OHIO, CODIFIED ORDINANCES § 343.01(a) (1976), set out at note
procedure itself is distinguished from other lawful forms of outpatient surgery.

There is some question as to whether a physician in private practice who occasionally performs an abortion would be barred from doing so if his office were located in a local retail business district. The ordinance defining "abortion service," which applies to both first and second trimester abortions, specifies:

"Abortion service" means an individual physician, group practice or physicians, clinic, hospital or other firm, agency, institution or organization by whom or under whose auspices and control abortions are performed, whether as a primary service or as an integral part of a broader practice or group of medical services, and his or their physical facilities used in the performance of an abortion.51

Depending on how one defines "integral," a weak but plausible argument could be made that all the regulations applicable to first trimester facilities, including the zoning restriction, would not apply to the private physician who occasionally performs an abortion in his office. If such a duly licensed private physician who may foreseeably perform an occasional abortion is in fact subject to the ordinance, he would be required to locate his office in a general retail or industrial district, even though he does not plan to regard himself as an abortion practitioner or his practice as an abortion service.

In Framingham Clinic, the court was struck by the blatant discrimination against abortion clinics. Abortion clinics were prohibited by the zoning by-law while clinics which offered other lawful medical services were not prohibited; private physicians who offered abortion services were similarly unaffected by the ordinance. Under the Massachusetts court's analysis, application of the Cleveland ordinance to the individual physician who might occasionally perform an abortion would violate equal protection under either interpretation of integral: "It may make the point more sharply, perhaps, to note that the legal services would be in substance the same, had the regulation taken the more obviously grotesque form of 'zoning out' of the town the private offices of any physician who proposed to perform lawful first trimester abortions there."52 The concurring justice, while noting the presumption of validity in favor of zoning amendments, concluded that even without the constitutional problems involved there was no rational basis for classifying an abortion clinic differently from any other medical clinic and that an ordinance attempting to exclude orthopedic clinics should fail under the same analysis.53

51 Id. at § 231.01(d) (emphasis added).
52 367 N.E.2d at 610.
53 Id. at 613 (Hennessey, C.J., concurring).
Planned Parenthood of Minnesota had likewise planned to operate its clinic in a zoning district where other medical offices, clinics, and laboratories were permitted uses. The court noted that before the moratorium ordinance was passed there was no dispute that the proposed clinic would be a proper use within the district. The city had indicated it would require adequate hospital back-up for abortion clinics in its zoning regulation. In the discussion concluding that Planned Parenthood would probably succeed on the merits, the court added parenthetically that one defect in the city's case was its failure to impose a similar requirement on the other medical facilities in the district which performed surgical procedures entailing a risk of serious complication. The court seemed to imply that the absence of such a requirement for all other clinics is evidence of discriminatory intent against abortion facilities.

In West Side Women's Services, Inc. the City of Cleveland argued that the five-employee limitation in the local retail business district professional office category weakened the abortion clinic's equal protection claims, for that limitation excluded a whole segment of medical offices of any nature as permissible uses in the district. It is more correct to say that the plaintiffs misstated the issue in complaining that all medical offices were permitted while abortion clinics were not. The five-employee limitation relates to traditional police power objectives such as traffic or noise control. It is equally applicable to all professional offices in local retail business districts, and while it would operate to exclude larger medical clinics, it does so for legitimate police power concerns and not to discriminate between types of medical practice. Thus, an abortion clinic employing more than five persons would be too large a business to legally operate within a local retail business district. What seems to be at fault with the Cleveland ordinance is that it treats abortion clinics differently from other medical clinics of identical characteristics within the purpose of local retail business district zoning objectives.

D. Preliminary Injunctions

Of the four abortion clinic zoning cases previously discussed, only Framingham Clinic reached a disposition on the merits of the claim.

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54 Planned Parenthood of Minn. v. Citizens for Community Action, 558 F.2d 861, 868 n.7 (8th Cir. 1977) (citing Hodgson v. Lawson, 542 F.2d 1350, 1358 (8th Cir. 1976)). In Hodgson, the Minnesota state regulations on first trimester abortion clinics were challenged as unconstitutional. The United States court of appeals reasoned that a state can impose the same regulations on first trimester abortion clinics as are imposed on clinics that perform surgical procedures requiring approximately the same degree of skill and care as first trimester abortions, but “where the state regulates abortions beyond its regulation of similar surgical procedures, that difference in treatment must be necessitated by the particular characteristics of the abortion procedure.” Id.

55 See 558 F.2d at 868 n.7.

56 Planned Parenthood of Minn. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977), discussed in e.g., notes 41-42 supra and accompanying text;
Because the Southborough ordinance banned first trimester clinics totally, the court reasoned that the facts placed the case well beyond the borderline of invalidity.\(^{57}\) In the other three cases, where the zoning prohibition was less than total, the Planned Parenthood and Fox Valley courts granted preliminary injunctions; the court in West Side Women's Services, Inc. did not. In analyzing the motions, each court used some combination of the following factors to be considered in granting a motion for preliminary injunction: the threat of irreparable harm to plaintiff, the balancing of that harm to the threat of injury to the defendant if the injunction were granted, the probability of success on the merits, and the public interest at stake.\(^{58}\)

In Fox Valley, the court concluded that preliminary injunctive relief was warranted on the basis of irreparable injury because the cost of complying with the town regulations would raise the fee for performing abortions to an amount which would be beyond the economic means of poor women.\(^{59}\) The clinic was located in an area zoned for commercial uses, and the ordinance specified that a clinic could be located only in a heavy industrial district. The corporation had leased and remodeled the building, incurring substantial expenditures. To bring the clinic in compliance with the provisions passed by the Town Council, the court determined, would mean that the clinic would have to raise the proposed abortion fee from $150.00 to perhaps $500.00; the threatened harm to the plaintiff outweighed any harm the injunction might inflict on the town.\(^{60}\) Further, the court determined that if the dispute were fully litigated, Fox Valley Reproductive Health Care Center was likely to suc-


\(^{57}\) 367 N.E.2d at 610.

\(^{58}\) The Wisconsin district court in Fox Valley, citing Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Prods., Inc., 545 F.2d 1096 (7th Cir. 1976), placed the burden on plaintiffs to show that they had no adequate remedy at law and would suffer irreparable harm if the injunction did not issue, that the threatened injury to plaintiffs outweighed harm to the defendants, that plaintiffs had a reasonable likelihood of success on the merits, and that granting of the injunction would do no disservice to the public interest. 446 F. Supp. at 1073. The Planned Parenthood court, citing Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973), required plaintiff to show substantial probability of success on the merits and irreparable harm if an injunction were not forthcoming. 558 F.2d at 866. West Side Women's Services, Inc. cited Virginia Petroleum Jobber Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958) as authority for requiring probability of success on the merits in order to obtain a preliminary injunction. 450 F. Supp. at 799.

\(^{59}\) 446 F. Supp. at 1074.

\(^{60}\) Id.
ceed on the merits because the regulations were a burdensome interference and the zoning requirement was an improper attempt to prescribe abortion procedures. The court further reasoned that since the ordinance was probably unconstitutional, the public interest was best served by obeying the Constitution. The injunction was granted.

In Planned Parenthood of Minnesota, irreparable injury to Planned Parenthood and its prospective clients was apparent to the court. Relying on the zoning classification in effect at the time, the corporation had purchased the land and the buildings for its new facility for $200,000.00, financing the entire amount. The subsequent moratorium ordinance thus forestalled the opening of the clinic and the revenue Planned Parenthood hoped to generate to discharge the debt. The court found further irreparable injury in the denial of the constitutional rights of Planned Parenthood and its patients and the damage to its goodwill. Finally, the court accepted the district court's finding that the ordinance, as the first attempt by the city council to restrict abortion operations, was directed primarily at Planned Parenthood and was discriminatorily motivated. This finding supported both the district court's determination of irreparable injury and the probability of success on the merits. The court further found probability of success on the merits in what it determined to be an impermissible use of the zoning power to regulate abortion clinics indirectly, something the city council could not do directly by medical regulation. The zoning measure was a disguised attempt to regulate medical practices and therefore impermissible as without the city's authority under state law.

In the Cleveland case, the district court reached the opposite result when faced with the motion for a preliminary injunction. First, the court did not address the question of irreparable injury, probably due to the fact of insufficient pleadings by the plaintiffs. Plaintiffs did not allege the amount they had expended in leasing and preparing the building for opening as an abortion clinic, nor had they applied for or paid a license fee or estimated a loss of revenue or goodwill caused by the ordinance, factors which persuaded the courts in the Fox Valley and Planned Parenthood of Minnesota cases. On the question of probability of success on the merits, the court started with the opposite assumption of

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61 Id. at 1075.
62 Id.
63 558 F.2d at 866.
64 Id. at 867.
65 Id.
66 Id. at 868.
67 Id.
68 See Complaint and Motion for Preliminary Injunction for Plaintiffs, West Side Women's Services, Inc. v. City of Cleveland, 450 F. Supp. 796 (N.D. Ohio 1978).
69 450 F. Supp. at 797.
the court in *Planned Parenthood of Minnesota* in holding that the exercise of a value judgment against abortion was a valid zoning objective. Since the ordinance did not operate as a total ban on abortion facilities, it was therefore subject only to the rational basis test. Further, the court, unlike the *Planned Parenthood of Minnesota* court, saw nothing suspect in the application of a zoning classification masquerading as a regulation of medical procedures. While the *Planned Parenthood of Minnesota* and *Fox Valley* courts found the evidence of discriminatory motivation to indicate probability of success on the merits, the same evidence brought no such reaction from the *West Side Women's Services, Inc.* court.

V. THE USE OF ZONING

It is helpful to look to the United States Supreme Court's decision in *Young v. American Mini Theatres, Inc.* for guidance in determining the extent of the power of local governments in applying zoning regulations to situations which may involve first amendment rights. *Young* involved the issue of protection to be accorded to sex-oriented businesses. Communities have traditionally sought to control sex-oriented businesses through obscenity statutes. This means of control is an ineffective and extremely litigious approach, due in part to the steadily narrowed and constantly changing definitions of obscenity, the susceptibility of local obscenity ordinances to constitutional attack, and the fact that each prosecution must be individually adjudicated. The city of Detroit turned to zoning as an alternative means of control in 1972 when the city council added adult motion picture theaters and adult bookstores to the list of regulated uses in the city's "anti-skid-row" ordinance. Under that law, "skid-row" uses such as pawnshops, pool halls, topless entertainment cabarets, adult bookstores, and adult theaters were subject to a conditional-use permit process. No permit would be granted to one of these uses within 500 feet of a residentially zoned district, and no such use would be permitted within 1,000 feet of any two other regulated uses. The purpose of the ordinance, stated in acceptable planning and zoning police power terms, is contained in its preamble:

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of

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70 Id. at 798-99.
71 Id. at 799.
these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood .... The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area ....

Operators of two adult theaters and the owner of an adult bookstore challenged the constitutionality of the ordinance in Nortown Theatre, Inc. v. Gribbs. The district court struck down the 500-foot requirement as a near total ban on sex-oriented businesses but upheld the 1,000-foot anti-clustering limitation using a compelling state interest analysis. The Sixth Circuit Court of Appeals reversed, holding that the zoning power could be used to restrict location of all theaters or bookstores but not to single out adult bookstores and theaters on the basis of content. The Supreme Court reversed the appellate decision, holding the 1,000-foot requirement a valid exercise of the zoning power. Straying from the concept of strict content neutrality, the Court reasoned that erotic speech may be entitled to a lesser degree of protection than social, political, or philosophical speech and that the state’s interest in protecting the quality of urban life justified a content classification on erotic materials which differed from other motion pictures or books. Concurring, Justice Powell skirted the content distinction issue and found the ordinance to be an “innovative land use regulation, implementing First

74 DETROIT, MICHIGAN, OFFICIAL ZONING ORDINANCE § 66.0000, reprinted in F. STROM, supra note 73, at 48.


78 The Court stated:
Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire’s immortal comment. Whether political oratorical or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen’s right to see “Specified Sexual Activities” exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Id. at 70-71.
Amendment concerns only incidentally and to a limited extent. Applying the test to government regulations which incidentally affect communicative conduct as announced in United States v. O'Brien, Justice Powell found that the purpose of the ordinance was not to suppress free speech but to prevent the secondary effects of these uses on neighborhoods and was therefore valid.

Thus, in Young the 1,000-foot limitation was held valid because it bore a rational relationship to the accepted zoning purpose of preventing neighborhood blight and had only a limited effect on first amendment rights. The 500-foot limitation was held invalid because it operated as a ban on free speech and was thus invalid as a prior restraint. The Young decision seems to allow a minimum amount of tampering with the exercise of a first amendment protected right through zoning if the purpose was not to hinder that right but to cure the adverse effects of its exercise upon the community; the Court would not allow a legislative determination that sex-oriented businesses per se were against public policy and, therefore, could be banned through the zoning power. Many commentators expressed fears that local communities would use the Young decision to justify their efforts to suppress sexually explicit material and thereby control constitutionally protected social and personal behavior under the pretext of zoning.

In applying the principles of the Young decision to the abortion clinic cases, it seems that to sustain these ordinances lends credence to the fears of Young's critics since the purposes of the ordinances were to exert zoning control over social and personal behavior. Two of the cases, Fox Valley and Framingham Clinic, specifically involved ordinances which expressed a public condemnation of abortion. While the Cleveland ordinance contained no such statement of public disapproval, the language of the West Side Women's Services, Inc. court that a legislative

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79 Id. at 73 (Powell, J., concurring).
81 427 U.S. at 82-84 & n.4 (Powell, J., concurring).
82 The evidence included the city council's determination that a concentration of adult theaters in an area led to deterioration and the spread of crime, an effect not attributable to theaters showing other types films, 427 U.S. at 71 n.34, and reports from sociologists and urban planners on the cycle of decay started in other cities by the influx of such theaters. Id. at 81. n.4.
83 "It seems that if Young is applied in the future as a zoning case, then the effect of the Berman-Belle Terre-Young line of cases will be to give cities nearly plenary power to zone out their troubles." Note, Constitutional Law—First Amendment-Content Neutrality, 28 CASE W. RES. L. REV. 456, 489 n.246 (1978). For other interpretations of the impact and meaning of the Young decision, see F. Strom, supra note 73; W. Toner, Regulating Sex Businesses (1977); Marcus, Zoning Obscenity or, The Moral Politics of Porn, 27 BUFFALO L. REV. 1 (1977-78); Teachout, Chains of Tradition, Instruments of Freedom: Contours of the Emerging Right to Community in Obscenity Law, 7 CAP. U. L. REV. 683 (1978); Developments in the Law—Zoning, 91 HARV. L. REV. 1427 (1978) [hereinafter cited as Developments].
value judgment favoring childbirth over abortion is a legitimate state interest means that it would find no problem in a city's expressing the public sentiment against such social or personal behavior in the form of a zoning control. The Fox Valley and Framingham Clinic courts found the legislative determination that abortion clinics were against public policy to be an intolerable use of the zoning power, as would the Young Court have found such a public policy determination against sex businesses. To the court in West Side Women's Services, Inc., underlying policy motivation is not intolerable at all as long as the zoning does not operate as a total ban on access to abortion. In other words, it is possible for the community to say, "We abhor legal abortion so we will not permit access to legal abortion services in our area." This is not, however, what the Young decision permits. Young allows a determination against the secondary effects of the exercise of the constitutionally protected right, if those secondary effects are legitimate police power objectives. The Young Court did not allow a community to declare that it abhorred sexually-explicit but legal material and therefore would regulate it through zoning. The Young Court distinguished Erznoznik v. City of Jacksonville, which invalidated an ordinance prohibiting adult films from being shown at outdoor theatres, because the justification for the Jacksonville law was the city's interest in protecting its citizens from exposure to "offensive" speech. If the purpose of the ordinance is to restrict the exercise of the first amendment right, be it freedom of expression or the privacy of the abortion decision, it is not a valid zoning objective.

What the Young decision accomplished was to allow communities greater leeway in applying zoning restrictions to first amendment related business uses if the restriction's impact on the use is minimal and if the purpose is to further a legitimate police power objective. In other words, if the impact is minimal, the balance tips back in favor of

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84 One court has stated, in dictum, that an unconstitutional legislative intent will not invalidate an ordinance with an otherwise valid stated purpose. See Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979). Plaintiffs claimed the abortion ordinance violated the first amendment establishment clause because one of the "whereas" clauses to the ordinance, stating its purpose, read:

[It] is the finding of Council that there is no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of the infant at which we can say the unborn child is not a human life, and that the changes occuring between implantation, a six-weeks embryo, a six-month fetus, and a one-week old child, or a mature adult are merely stages of development and maturation... .

Id. at 1189. The court stated that even if the council's finding amounted to a religious belief, as long as there was also a stated secular purpose for the ordinance the court would not look beyond that purpose to determine if the legislative intent was to further a religious motive. Id. (dictum).
the public welfare concern. Cleveland’s abortion clinic ordinance meets the minimal impact criterion more clearly than did the ordinances in the Framingham Clinic, Fox Valley, or Planned Parenthood cases, which served to ban such clinics either permanently or temporarily or to put such obstacles in their paths as to effectively make low cost first trimester abortions impossible to obtain in the area. Under Cleveland’s law, abortion clinics might still operate in semi-industrial or industrial districts, and therefore the four east side clinics would be unaffected by the zoning law change. If the question is degree of impact alone, the Cleveland ordinance survives the test. 

The question, however, is not impact alone. Rather, it is whether the minimal impact on the protected use is justified by the fact that the use creates a condition which is within the zoning power to control. The deterioration of the business and neighboring residential areas caused by the glut of pornographic bookstores and theaters in Detroit qualified as such a condition. None of the abortion clinic zoning ordinances were based on a proven causal relationship between the operation of a clinic and an undesirable community effect. The condition sought to be addressed by the Cleveland ordinance is the “community sense that natural childbirth is preferable to abortion and that it is harmful to have abortion services located in close proximity to residential neighborhoods.” The West Side Women’s Services, Inc. court accepted “community sense” as a value that could be implemented by zoning. The other courts did not.

VI. CONCLUSION

One commentator, broadly interpreting Belle Terre and Young, perceived a growing sense of community in recent Supreme Court constitutional decisions and applauded the Court for abdicating its doctrinaire libertarianism. The author stated that the Court had recognized a “right to community” more comprehensive than that found in traditional police power analysis and was permitting that right to be effectively preserved through zoning measures reflecting community standards.

On the other hand, Roe and Doe are recent Supreme Court decisions too, and they mandate that a community may not define the abortion decision as a community problem. In addition, Maher, although allowing a pro-birth legislative policy to determine the allocation of welfare

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66 See note 47 supra.

67 Plaintiffs in West Side Women’s Services, Inc., did not join any potential clients who testified that their access to abortion was limited by the ordinance. See Complaint and Motion for Preliminary Injunction, supra note 68. Perhaps such a showing would have altered the disposition of the impact issue.

68 Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction at 5, West Side Women’s Services, Inc. v. City of Cleveland, 450 F. Supp. 796 (N.D. Ohio 1978).

69 Teachout supra note 83.
funds, would not permit an anti-abortion stance to prohibit legal abortion. The essence of the abortion decision protection lies in the right to privacy, a right which even under the broadest interpretation of "community zoning" should be beyond the reach of police power. What is lacking is an explicit Supreme Court statement that community hostility toward the exercise of any constitutionally protected right is an insufficient justification for the exercise of the zoning power, no matter how minimal the degree of impact on the right. 0

The courts in Fox Valley, Framingham Clinic, and Planned Parenthood of Minnesota were able to avoid deciding the propriety of zoning regulations for abortion clinics by invalidating the ordinances solely on their impact. However, the court in West Side Women's Services, Inc. decided that the impact of the Cleveland ordinance was insufficient to warrant invalidation. faced directly with the issue, the court declared that an anti-abortion attitude may be expressed through zoning regulation.

The furtherance of community attitudes against abortion through zoning is one step removed from the community's interest in preserving the character of its neighborhoods, which was declared in Young to be a valid zoning objective. 91 Nonetheless, under the standards established in Moore v. City of East Cleveland, 92 anti-abortion zoning is an untenable intrusion into the protected individual right.

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0 The inference that such a statement should be forthcoming may be drawn from language in the recent cases. In Belle Terre, Justice Douglas noted that there was no evidence that the ordinance prohibiting more than two unrelated individuals from living in the same residence was prompted by "animosity to unmarried couples living together," implying that such animosity would not justify the zoning measure. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). In Young, the Court stated that government regulation of communication may not be "affected by sympathy or hostility for the point of view being expressed by the communicator." Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976). In Moore, Justice Brennan criticized the East Cleveland nuclear family ordinance as an attempt to impose "white suburbia's preference in patterns of family living," implying that a community hostility toward the extended family living patterns of minority groups was unjustified as a basis for the zoning ordinance. Moore v. City of East Cleveland, 431 U.S. 494, 508-09 (1977) (Brennan, J., concurring). See also Developments, supra note 83, at 1450-57.


92 431 U.S. 494 (1977), see note 40 supra.