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## Moore v. City of East Cleveland, Ohio: The Emergence of the Right of Family Choice in Zoning

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***Moore v. City of East Cleveland, Ohio:***  
**The Emergence of the Right of Family**  
**Choice in Zoning**

INTRODUCTION

One's conception or inception into a family unit related either by blood or adoption is generally not a product of one's own choosing. Rather, the creation of such status is often left to the discretion of others. Once an individual becomes integrated into the "family realm" however, his decision to bring another into a similar unit is protected by the fundamental right termed the "right of family choice."

But this family choice, not solely limited to procreation, arises in those instances in which the family invokes its very privilege to interact as a family.

Examples of the "right of family choice" include the right to live together as a family or apart, the right to educate the family in a preferred manner, be it public or private, the right to proselytize among the unit uniform religious beliefs or language, the right to pass these ideals from one generation to another and finally the very choice of procreation which itself determines the recipients of family traditions and goals.

*Moore v. City of East Cleveland, Ohio* exemplifies the Supreme Court's addition of yet another category of rights inuring to the family by virtue of the "right of family choice" doctrine. This newly created guarantee encompasses the right of a family, albeit extended rather than nuclear, to live, grow and mature in the same household.

FACTUAL BACKGROUND

As a result of violating a zoning ordinance of the City of East Cleveland, a 63 year old grandmother, Mrs. Inez Moore, was fined twenty-five dollars and sentenced to five days in jail.

Early in 1973, Mrs. Moore was given notice of non-compliance with a city ordinance limiting occupancy of a single family dwelling to individuals related by a particular degree of kinship and was instructed to remedy her alleged violation. However, Mrs. Moore refused to do so since compliance meant the exclusion from her home of the "illegal occupant", Mrs. Moore's then 10 year old grandson John Moore Jr. Mrs. Moore was then living with her son, Dale Moore Sr. and her grandsons, Dale Moore Jr. and his cousin John Moore Jr.<sup>1</sup>

Mrs. Moore's non-compliance resulted in the city filing criminal charges against her. She subsequently moved to dismiss the criminal complaint, claiming that by violating her fourteenth amendment rights, the statute was unconstitutional on its face.<sup>2</sup> Such motion was dismissed and conviction ensued. The Ohio Court of Appeals affirmed, followed by the Ohio Supreme Court's decision to deny her review.<sup>3</sup> The United States Supreme Court noted probable jurisdiction,<sup>4</sup> and on May 31, 1977,

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1. EAST CLEVELAND, OHIO, SECTION 1341.08 (1976) provides:

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

2. Section 1341.08 provides:

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

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

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

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

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual.

2. U.S. CONST. amend. XIV, § 1 read in part;

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The question of Mrs. Moore's failure to seek a variance from the city as bearing on her right to relief in the highest court was not discussed at length by Justice Powell who delivered the judgment of the Court. However, Chief Justice Burger's dissenting opinion, 97 S. Ct. 1947-1952, (1977), deals directly with the problem of exhaustion of administrative remedies. Neither this dissent nor the issue of exhaustion of remedies will be discussed in this casenote. However, for a discussion of this procedural aspect see Scriven, *Exhausting Administrative and Legislative Remedies in Zoning Cases*, 48 TUL. L. REV. 665-681 (1974).

4. 425 U.S. 949 (1976).

reversed the Ohio court decisions in *Moore v. City of East Cleveland, Ohio*.<sup>5</sup>

In its plurality decision,<sup>6</sup> the Supreme Court concluded that the city zoning ordinance was in violation of certain rights guaranteed to Mrs. Moore by virtue of the Fourteenth Amendment of the United States Constitution.<sup>7</sup> The Court's decision was not premised upon precedent regarding zoning issues however. Such an approach was in fact rejected by the Court at the outset<sup>8</sup> thereby characterizing *Moore* as something other than merely a zoning case.

Rather, the Supreme Court found support for its decision in case law concentrating on the right of choice in matters concerning marriage and family,<sup>9</sup> since this was the gravamen in *Moore*. The Court was not primarily concerned with the municipality's right to regulate land use, but with its right to regulate the family, for the *effect* of the zoning ordinance was the internal disruption of the composition of the Moore family.

It would not be difficult, initially, to perceive *Moore* as nothing more than a zoning case. Indeed, the zoning overtones of *Moore* seem to present a somewhat common factual situation which has, and in all probability will continue to be easily disposed of in the lower state and federal courts. An aggrieved property owner's objections to a municipality's attempt to regulate land use within its borders is perhaps as old as the first zoning ordinance itself.<sup>10</sup>

## I. ZONING

Zoning has been defined as the legislative division of a com-

5. 97 S. Ct. 1932 (1977).

6. Justice Powell, announcing the judgment of the Court, together with Justice Brennan, Justice Marshall and Justice Blackmun rendered East Cleveland's ordinance unconstitutional on the grounds that it infringed upon Mrs. Moore's fundamental right of choice in family living arrangements evolving from fourteenth amendment guarantees of "liberty." Justice Stevens, however, did not feel that the Court need search that far and found that the ordinance was irrational and an arbitrary taking of property without due process of law.

7. The decision of the Court was not predicated on any equal protection grounds guaranteed by the fourteenth amendment, although asserted by Mrs. Moore. See note 3 *supra*, 97 S. Ct. at 1934.

8. *Id.* at 1935.

9. *Id.*

10. RATHKOPF, 1 THE LAW OF ZONING AND PLANNING 1-6 (4th ed. 1975).

munity into areas within which are permitted only certain designated uses of land or structures.<sup>11</sup> Zoning is a device by which the state seeks to regulate individual land use for the well-being of *all* the land dwellers in the municipality.

The state derives such zoning authority from its police powers.<sup>12</sup> The ultimate and general purposes of zoning are those traditionally associated with the police power, i.e., public health, safety and morality as well as the general welfare, peace, comfort and convenience of the citizenry. Zoning seeks to promote these goals by confining certain classes of buildings and certain uses to defined areas.<sup>13</sup>

Use restrictions imposed by various zoning ordinances may be classified into three types, any or all of which may be implemented by the municipality.

First, (the ordinances) define the kind of structure that may be erected on vacant land. Second, they require that a single-family home be occupied only by a 'single housekeeping unit'. Third, they often require that the housekeeping unit be made up of persons related by blood, adoption, or marriage, with certain limited exceptions.<sup>14</sup>

When the individual landowner discovers that his property is restricted as to its use he may challenge the municipality's zoning ordinance on the ground that the manner in which his particular land is zoned represents a "taking",<sup>15</sup> either by decreased value or a denial of a desired use. Such an allegation, however, will generally be dismissed. Although the police power, as manifested through the power to zone, represents "public encroachment upon private interests,"<sup>16</sup> the good of the whole, as opposed to the detriment of the few, vindicates zoning from what might otherwise be an unconstitutional violation of personal property rights.

What the police power entails is relatively undefined. Limiting boundaries of this somewhat nebulous power, however, do exist. More specifically the police power, in particular the zoning power, must be exercised within the boundaries of reasonableness.<sup>17</sup>

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11. MCQUILLAN, 8 MUNICIPAL CORPORATIONS 21 (3d ed. rev. 1971).

12. Police power has been likened to a "residual sovereign power". Donaldson, *Regulation of Conduct in Relation to Land-The Need to Purge Natural Law Constraints From the Fourteenth Amendment*, 16 WM. & MARY L. REV. 182, 196 (1974) (hereinafter cited as *Donaldson*)

13. MCQUILLAN, *supra*, note 11, at 43.

14. 97 S. Ct. at 1944.

15. Taking in this context is defined as a deprivation of "life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V § 1.

16. *Donaldson*, *supra*, note 12, at 196.

17. *Id.* at 196, "Except for . . . familiar standards of reasonableness this Court has generally refrained from announcing any specific criteria."

Reasonableness, as translated into constitutional terms, is examined through a rational basis test. That is, in the absence of some fundamental right,<sup>18</sup> the state need only demonstrate that the challenged ordinance is rationally related to some legitimate state end.<sup>19</sup>

The legitimate state end uniformly asserted by the state in zoning cases is the preservation of the public welfare as achieved through the decreased congestion of the streets,<sup>20</sup> increased protection of the aesthetics of the environment,<sup>21</sup> the control of noise pollution,<sup>22</sup> the control of population density,<sup>23</sup> etc. If a zoning ordinance even *hypothetically* relates to and serves that end, its validity will be upheld,<sup>24</sup> for “. . . the law

18. Fundamental rights have been interpreted to include; the right to vote, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); the right to terminate pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973); the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right to exercise of religion, *Sherbert v. Verner*, 374 U.S. 398 (1963); the right of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right of association, *NAACP v. Alabama*, 357 U.S. 449 (1958).

One of the ways in which this right has been defined is whether such a right “is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .” 381 U.S. at 493.

When such a right is present, the State must come forth with a “compelling interest” as to justify such an abridgment. The State has met this test only once in *Korematsu v. United States*, 323 U.S. 214 (1944).

19. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1954), sets out this test which in effect amounts to little or no test whatsoever:

It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, . . . because they may be unwise, improvident, or out of harmony with a particular school of thought.

20. *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 912 (N.D. Cal. 1970).

21. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

22. *Kirsh Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 245 A.2d 513, 515 (1971).

23. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

24. Comment, *Constitutional Law-Fourteenth Amendment-Municipality Zoned Exclusively For Single Family Dwellings Promotes Valid Community Objectives and Does Not Interfere with Right to Travel-Village of Belle Terre v. Boraas*, 94 S. Ct. 1536 (1974), 2 FLA. ST. L. REV. 787, 793 (1974),

. . . the courts, however, will not substitute their judgment for that of the legislature when it is ‘fairly debatable’ whether the zoning ordinance is an unreasonable exercise of the police power. Historically, therefore, considerable deference has been accorded to legislative zoning determinations.

need not be in every respect logically consistent with its aims to be constitutional.”<sup>25</sup>

Since the courts generally apply only minimal standards of reasonableness to zoning ordinances, instances of similar cases involving this type of legislation reaching the United States Supreme Court under claim of constitutional invalidity are few.<sup>26</sup>

*Euclid v. Ambler Realty Co.*,<sup>27</sup> an early landmark zoning case did reach the Supreme Court, however, in 1926.

The petitioner therein claimed that the city’s zoning his property as residential rather than its “highest and best use” as industrial constituted a taking of property without the fourteenth amendment guarantees of due process. The Court rejected his claim with an opinion by Justice Sutherland which continues to be the yardstick in constitutional determinations of land use control. If the state should advance some form of preservation of the public welfare as justification for its zoning ordinances, a court will not question the validity of its motives or rationale.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.<sup>28</sup>

Some fifty years later in 1974, the Supreme Court reaffirmed this rationale in *Village of Belle Terre v. Boraas*,<sup>29</sup> the last zoning decision of the Court to precede *Moore*.<sup>30</sup> The petitioner’s claim therein, that a zoning ordinance prohibiting more than two unrelated individuals from occupying a single-family residence was violative of their fundamental rights of due process and equal protection, was summarily dismissed by the Court.<sup>31</sup>

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25. *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1954).

26. Only six zoning cases have been decided by the Supreme Court prior to *Moore*. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Washington ex re Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Goriech v. Fox*, 274 U.S. 603 (1927); *Zahn v. Board of Public Works*, 274 U.S. 325 (1977); *Cf. Berman v. Parker*, 348 U.S. 26 (1954) taking case; *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

27. 272 U.S. 365 (1926).

28. *Id.* at 395.

29. 416 U.S. 1 (1974).

30. *Belle Terre* will be discussed at further length elsewhere in this case-note.

31. 416 U.S. at 7.

The Court in *Belle Terre* applied a rational basis test, effectively ignoring the petitioner's assertion of fundamental rights of association and privacy. It concluded that the ordinance bore a rational relationship to some legitimate state end.<sup>32</sup>

The instant case therefore, came to a Court which for over a half-century had,<sup>33</sup> in nearly every instance,<sup>34</sup> upheld the constitutional validity of zoning ordinances by requiring little more than an educated guess at what permissible goals the legislature might have envisioned at the time of enacting the statute and a further hypothesis of how the ordinance might serve that imagined end.<sup>35</sup> Mrs. Moore faced a Court which, just three years prior, rejected a petitioner's claim that his fundamental rights of privacy and association were violated by a zoning ordinance which based permissible occupancy of a single-family dwelling on the *relationship* of the inhabitants within.<sup>36</sup>

However, careful analysis indicates that construing *Euclid* and *Belle Terre* as insurmountable barriers to favorable adjudication in *Moore* would be improper.

Although zoning is a predominant issue in these cases as it is in *Moore*, the case at bar additionally contains the critical family element, a factor not materially considered by the Supreme Court in its other zoning decisions.

In light of this fact, the *Moore* Court abandons *Euclid* and *Belle Terre* as controlling<sup>37</sup> and proceeds to explore and ulti-

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32. See text pg. 566 as to the permissible legislative end found by the Court.

33. This time span is measured from *Euclid* (1926) to *Belle Terre* (1974).

34. The only instance of the Court rejecting a zoning ordinance as unconstitutional was in *Nectow v. City of Cambridge*, see note 26 *supra*. The ordinance was found to be irrationally related to a legitimate state end after applying the *Euclid* test.

35. Although this type of approach was utilized by the Supreme Court, the lower federal court, finding *for* the petitioners used a sliding scale approach similar to that developed in the dissent by Justice Marshall in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). This test requires that as the right involved becomes closer to fundamental in nature, the State must specify the means and the goal, rather than hypothesizing the same.

36. The assertions of the petitioners in *Belle Terre* and that of Mrs. Moore were nearly identical in nature, undoubtedly stemming from the restrictive nature by which the respective cities had defined permissible single family occupancy. See note 1 *supra* and note 95 *infra*.

37. 97 S. Ct. at 1935, "But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only unrelated individuals."



mately rely upon those decisions dealing with what is termed the right of choice in family matters.

## II. THE FAMILY AND ZONING

*Moore* deals with an ordinance which refuses to allow the definition of *family* to encompass any relationship beyond that of the nuclear family. Whatever may be the popular notion of a family,<sup>38</sup> each zoning ordinance has consistently attempted itself to define this term. Such definitions vary widely since zoning ordinances are drafted locally rather than at the state level and often display salient discrepancies in statutory language. The typical ordinance limits certain geographical areas to residency by a single family, defining family as one related by blood, marriage or adoption. Other ordinances similarly control geographical areas by limiting residency to families, but define family in terms of a single housekeeping unit.<sup>39</sup>

These differing definitions of the "family" have traditionally caused the constitutional battles over zoning ordinances.<sup>40</sup>

Where the city chooses to define family in terms of a blood relationship, unrelated individuals, asserting violation of constitutional rights in various state and district courts have made attempts by the city in limiting occupancy to related individuals unsuccessful.<sup>41</sup>

In *City of Des Plaines v. Trottner*,<sup>42</sup> the Illinois Supreme

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38. Einbinder, *The Legal Family*, 13 J. FAMILY L. 781 (1974). Family is derived from the Latin word 'familia'. Originally it denoted a master-servant relationship. Gradually the master's wife was included, together with all persons related to him by blood or marriage.

39. *Id.* at 798.

40. 97 S. Ct. at 1944.

41. Justice Stevens concurring opinion in *Moore*, 97 S. Ct. 1943-47, citing these lower court decisions, emphasises the right normally associated with property—that of an owner to decide who may reside on her property, thus suggesting that the absence or presence of a blood relationship, or the *degree* of blood relationship need not be determined in finding in favor of Mrs. Moore. Instead Justice Stevens applies the *Euclid* rationale to *Moore* without any apparent difficulty, and concludes that under that test, the ordinance of East Cleveland must fail.

"The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins. Since this ordinance has not been shown to have any 'substantial relation to the public health, safety, morals or general welfare' of the City of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on her property—it must fall under the limited standard of review of zoning decisions which this Court preserved in *City of Euclid* and *Nectow*, *supra*. Under that standard, East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation." *Id.* at 1947.

42. 34 Ill. App. 2d 432, 216 N.E. 2d 116 (1966).

Court invalidated an ordinance prohibiting four unrelated men from occupying a single family structure. The city's limited definition of "family"<sup>43</sup> included only those related by blood, marriage or adoption. The *Trottner* court emphasized the stability of the single housekeeping unit established by the unrelated men and concluded that the household complied with the overall legislative intent and purpose of the ordinances in preventing transient occupancy. The court commented:

The General Assembly has not specifically authorized the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit. Until it has done so, we are of the opinion that we should not read the general authority that it has delegated extend so far.<sup>44</sup>

Another case invalidating ordinances requiring a blood relationship for single family occupancy is *Kirsh Holding Co. v. Borough of Manasquan*.<sup>45</sup> The Supreme Court of New Jersey found that the Borough's attempt to deal with unruly seaside resort vacationers by means of enforcing the blood relationship requirement deprived the owners of their property without affording fourteenth amendment guarantees.<sup>46</sup>

*Palo Alto Tenants Union v. Morgan*,<sup>47</sup> however, represents a case in which a restricted family definition was upheld. In *Morgan* the court placed great emphasis on traditional family values and found that a statute prohibiting "hippie" communes was valid. The *Morgan* opinion not only justifies such exclusionary zoning on family principles, but in a sense sets the

43. The ordinance required that family be construed as one or more persons related to each other by blood marriage or adoption.

44. See note 42 at 120.

45. 59 N.J. 241, 245 A.2d 513 (1971).

46. Types of group living which have not fared well under single-family ordinances include fraternities, *City of Schenectady v. Delta Chi Fraternity*, 5 App. Div. 2d 14, 168 N.Y.S. 2d 754 (1957) sororities, *Cassidy v. Triebel*, 337 Ill. App. 117, 85 N.E. 2d 461 (1948), a retirement home designed for over 20 people, *Kellogg v. Joint Council of Women's Auxiliaries Welfare Assn.*, 265 S.W. 2d 374 (Mo. 1954), and a commercial therapeutic home for emotionally disturbed children, *Browndale International, Ltd. v. Board of Adjustment*, 60 Wis. 2d 182, 208 N.W. 2d 121 (1973). These institutional uses are not only inconsistent with the single-housekeeping unit concept but include many more people than would normally inhabit a single-family dwelling.

For further consideration of the group homes, see, Wildgren, *Exclusionary Zoning and Its Effects on Group Homes In Areas Zoned For Single-Family Dwellings*, 24 U. OF KAN. L. REV. 677 (1976).

47. 321 F. Supp. 908 (N.D. Cal. 1970).

hypothetical stage for the actual factual situation found in *Moore*.

Plaintiff's are also correct in observing that a law which barred traditional families from R-1 neighborhoods might well be deemed highly suspect. But there is a long recognized value in traditional family relationships which does not attach to the 'voluntary family.' The traditional family is an institution reinforced by biological and legal ties which are difficult or impossible to sunder. It plays a role in educating and nourishing the young which, far from being 'voluntary', is often compulsory. Finally, it has been a means for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings. *A zoning law which avoided or totally excluded traditional families would indeed be suspect.*<sup>48</sup> (emphasis added)

*Morgan* seems to enunciate clearly the role of the family in the scheme of societal life and reinforces the effect which the zoning power can play in molding that certain lifestyle.

The notion of employing governmental mechanisms, however, in such a way as to promote family life, is not new. Governments sometimes try deliberately to shape family behavior in ways they believe to be in the best interests of both the families and society as a whole. "As social life becomes more complex and delicately balanced, the state becomes more concerned that families should supply it with recruits well qualified to fit into the delicate network of social roles which compose the society."<sup>49</sup>

If the state desires to promote the family as a tool to achieve social harmony and indoctrination of socially acceptable traits in the young, to whom should the actual task be delegated? The inescapable answer to this question leads one to conclude that the job should rest upon the shoulders of the child's elders for they themselves have undergone the same inculcation.

The ordinance involved in *Moore*, has, in effect, predetermined the identity of the child's elders, making a legal judgment as to the members of a family capable of handling the job of socially developing the child.<sup>50</sup> East Cleveland concluded that the nuclear family was superior to the extended family. Justice Powell strongly disapproved the city's choice, basing his dis-

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48. *Id.* at 911.

49. BLOOD, *THE FAMILY* 93 (1972).

50. For an interesting discussion concerning the relationship of the State and parents, see TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* (1971) pgs. 560-1. The author sees the scope of State power as depending on the nature of the origin of parental authority. If such authority is a "natural" right rather than a privilege, the state may not "arbitrarily take the child away from the care of the parents." It seems that such a 'natural right' is very much akin to what *Meyer* termed as the right to "bring up children." See text at pg. 558.

agreement on historical mandate and tradition:

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. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.<sup>51</sup>

East Cleveland's attempt at defining "family" in such a way as to preserve the nuclear family therefore had the effect of disrupting the extended family. East Cleveland is not unlike other governmental units employing this somewhat inconsistent approach. Most governing bodies supposedly possess the general ideal of promoting the family life. Unfortunately, at time these units, be they municipal, state or federal, lose sight of the overall goal when pursuing more specific ones. East Cleveland's ordinance is representative of such a municipality.

*Moore* is not the first, nor is it the last, example of this bifurcated approach. A classic example of a governmental agency attempting to subvert its own social instrument was found in *Skinner v. Oklahoma*.<sup>52</sup>

Justice Douglas invalidated forced sterilization of habitual criminals. In doing so, he noted: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Similarly in *Cleveland Board of Education v. La Fleur*,<sup>53</sup> the court invalidated obstacles preventing procreation among females engaged in the teaching profession. The *Moore* case, like *Skinner* and *La Fleur, supra*, presents an irony in that it represents a classic study in contradiction: a government interfering with its own governmental interests, i.e., preservation of the family.<sup>54</sup>

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51. 97 S. Ct. 1932, 1938-39 (1977).

52. 316 U.S. 535, 541 (1942).

53. 414 U.S. 632 (1974).

54. This contradiction can be better seen in the societal promotion of marriage itself. While this institution is officially sanctioned, what takes place as an interaction in the marriage relationship is a constant concern of the Court.

"Love and sexual gratification can and do exist outside of marriage and they

To better understand the implications of *Moore*, with respect to the family choice doctrine and its concomitant right of privacy, we must first analyze the cases developing this concept, as well as those relied upon by the *Moore* court. Each of the following cases present a factual situation where the activity involved and the choice of participation therein was found by the Supreme Court to be the exclusive domain of the family, barring governmental interference in this particular decision-making process.

### III. CASES PRINCIPALLY RELIED ON BY THE MOORE COURT: DEVELOPING THE CONCEPT OF FAMILY CHOICE

*Meyer v. Nebraska*<sup>55</sup> concerned a Nebraska state statute prohibiting the teaching of German in either a public or private school to persons who had not successfully passed the eighth grade. The statute was challenged on fourteenth amendment grounds. Whether the fourteenth amendment encompassed a right to educate and rear one's children as the parent chose was a question of first impression. Justice McReynolds held that such a fundamental right was implicit in the "liberty" concept of the Fourteenth Amendment.<sup>56</sup> He said:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupation of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, recognized at common law as essential to the orderly pursuit of happiness by free men. (emphasis added)<sup>57</sup>

In *Pierce v. Society of Sisters of Holy Names*,<sup>58</sup> Oregon, as Nebraska, attempted to broadly limit the *type* of education children of its state would receive rather than merely requiring that children be educated.<sup>59</sup> *Pierce* posed the question of the constitutional validity of a statute which required parents or guardians with children between the ages of eight and sixteen to send such minors to public schools only, thereby effectively

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can and do fail to exist in marriage, but this is not the point. The point is that the state has undertaken to sponsor one institution that has at its core the love-sex relationship. That relationship demands liberty in the practice of the sexual act." Willington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 294 (1973).

55. 262 U.S. 390 (1923).

56. See note 2, *supra*.

57. 262 U.S. 390, 399 (1923).

58. 268 U.S. 510 (1925).

59. *Meyer* recognizes this later exercise of the police power as valid, 262 U.S. at 400.

depriving such parents or guardians of any choice in the kind of education their children would receive. Justice McReynolds again held this type of statute violative of fourteenth amendment rights as interfering “. . . with the liberty of parents and guardians to direct the upbringing of children under their control.”<sup>60</sup>

Some twenty years after the *Meyer* and *Pierce* decisions, the Supreme Court in *Prince v. Commonwealth of Massachusetts*<sup>61</sup> dealt with an alleged violation of the state's child labor laws by an aunt, an avowed Jehovah's Witness, who had provided her niece with religious literature which, for a small donation, was to be distributed by both the child and her guardian on public streets throughout the state. A Massachusetts law prohibited children under a specified age from selling or exercising a trade in public streets and also prohibited any adult from furnishing any material to a minor with knowledge that such minor intended to sell the same. The petitioner claimed that this statute was not only violative of her first amendment guarantee of freedom of religion, as applied to the states by the fourteenth amendment, but was additionally violative of her “claim of parental right” as secured by the due process clause of the same amendment.<sup>62</sup>

The distribution of such religious materials was considered, by the aunt and her niece, as a type of preaching. Such preaching was claimed to be part of their religious customs and beliefs.

The Court affirmed the aunt's conviction on the basis that the ordinance was in the best interests of the state in preventing child labor abuse,<sup>63</sup> but recognized a parent or guardians' right to direct the upbringing of a child within the limits of public interest.<sup>64</sup>

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60. 268 U.S. 510, 534 (1925).

61. 321 U.S. 158 (1944).

62. *Id.* at 164.

63. *Id.* at 166, Justice Rutledge suggests that the parent is not to have total control of the child and states that “the family itself is not beyond regulation in the public interest.”

64. *Id.* at 166-67. Examples of what the state may compel in the public interest are cited from *Prince* below:

“Acting to guard the General interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters, supra*. And it is in recognition of this that these decisions have respected the *private realm of family life which the state cannot enter*. (emphasis added)<sup>65</sup>

A later decision of the Court, promulgated in the early 1970's presented a somewhat similar factual situation as those found in *Meyer, Prince* and *Pierce*, the nexus among all being the right of choice in family matters.

*Wisconsin v. Yoder*,<sup>66</sup> like *Pierce*, dealt directly with the parent's right to choose the type of education his or her child would receive. This Wisconsin statute provided for compulsory education at a high school level in either a public or private institution. Yoder, a follower of Amish customs as well as Amish beliefs of community exclusion from outside influences, chose to raise and educate his child in the Amish community after his child had reached eighth grade level in the Wisconsin state educational system.

The Supreme Court agreed with the petitioner's claim of parental right to rear children in a particular mode of religious belief and further held this area "of conduct protected . . . and thus beyond the power of the State to control, even under regulations of general applicability."<sup>67</sup>

The pre-1960 cases cited herein were to later gain major importance in the landmark decision of *Griswold v. Connecticut*,<sup>68</sup> which would in turn have enormous inferential impact on the expansion and application of the "family choice" doctrine relied on in *Moore*. Although all three of these early cases dealt with differing degrees of family choice, *Meyer, Prince* and *Pierce* would pave the way for the creation of a new fundamental right of privacy announced in *Griswold*.

*Griswold*<sup>69</sup> involved Connecticut's attempt to prohibit the use of contraceptive devices by making it a crime for any person to

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course of conduct on religion or conscience. (*But see* note 66, *infra*). Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."

65. *Id.* at 166.

66. 406 U.S. 205 (1972).

67. *Id.* at 220.

68. 381 U.S. 479 (1965).

69. The *Griswold* decision is of such magnitude that a complete analysis of this opinion is not possible in this casenote. *Griswold* will be discussed only in terms of its impact on the right of family choice as enveloping the right of privacy, though both at time appear to be totally intertwined. For a thorough

use "any drug, medicinal article or instrument for the purposes of preventing conception."<sup>70</sup>

The Connecticut law was "clearly" unconstitutional, but upon what grounds?<sup>71</sup>

The Court was faced with the problem of not only specifying a fundamental right to protect such an intimate relationship,<sup>72</sup> but of additionally finding a constitutional basis for creating a right of privacy, such right not being specifically enumerated in the constitution.

The right to rear and educate a child in the German language or in a private institution was likewise not explicitly mentioned in the constitution. Such rights, however, were found in both *Meyer* and *Pierce* to exist in the First Amendment's guarantee of freedom of speech as applied to the states by the fourteenth amendment.<sup>73</sup>

The Court successfully determined the existence of such rights by broadening the definition of speech to encompass more than mere forms of verbal expression, extending protection to those areas of activity which represent the necessary foundational framework for communication itself i.e., education. It developed the technique of creating ancillary implied rights indispensable for the protection and furtherance of specifically enumerated guarantees. This was the *procedural* precedent gleaned from *Meyer* and *Pierce* and ultimately utilized in *Griswold*.

Similarly, there is no explicit mention of freedom of association in the constitution, although this right was found to exist by virtue of the first amendment's guarantee of freedom of speech,

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discussion of this case *see*, Comment, *Constitutional Privacy*, 48 N.Y.U. L. REV. 670 (1973).

70. CONN. GEN. STAT. §§ 53-32 (rev. 1958).

71. For an interesting and informative comment on *Griswold* concerning the point of view of the attorney who prepared the brief and argued the case, *see* Pollack, *Thomas I. Emerson Lawyer and Scholar: Ipse Custodiet Custodes*, 83 YALE L.J. 221 (1973).

72. The phrase "right to privacy" was originally coined by Warrent and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

73. Even under the strictest incorporation theory, this amendment together with the seven following it are applied to the states via the fourteenth amendment, *Palko v. Connecticut*, 302 U.S. 319 (1937), *Adamson v. California*, 332 U.S. 46 (1947).



in the decision of *NAACP v. Alabama*.<sup>74</sup> That case did not deal with speech per se, but rather with a contempt order for failure to turn over to the state NAACP membership lists. The Court again, however, found that the need for “privacy in one’s association”<sup>75</sup> was implicit in the guarantee of freedom of speech if that right were to be exercised in its fullest sense. “Without those peripheral rights the specific rights would be less secure.”<sup>76</sup>

The concept of “privacy” both in one’s choice of expression and associates had therefore already been found to emanate from first amendment guarantees<sup>77</sup> when *Griswold* came before the Court. The notion itself was not new. Justice Douglas was also to find this conception of privacy emanating from third amendment<sup>78</sup> prohibitions of quartering soldiers “in any house”, from fourth amendment<sup>79</sup> prohibitions of unreasonable search and seizure and from fifth amendment<sup>80</sup> prohibitions of compelling a person to disclose his private thoughts which might lead to his own incrimination. The *Griswold* Court reasoned that these specific rights evolved from the basic desire of individuals to be free from unwarranted governmental intrusion in their everyday private lives.

The Court, utilizing the procedural technique of *Meyer* and *Pierce* and combining the elements of privacy found in the above mentioned specifically enumerated rights designed and fashioned a right to privacy in and of itself. The “zone of privacy created by several fundamental constitutional guarantees,”<sup>81</sup> originally parasitic in nature, was now, by virtue of *Griswold*,

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74. 357 U.S. 449 (1958).

75. *Id.* at 462.

76. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

77. See note 74, *supra*.

78. “No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III, § 1.

79. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV, § 1.

80. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V, § 1.

81. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

an independent fundamental right which could be utilized without the necessity of coming within the scope of activity of a specifically enumerated guarantee.<sup>82</sup>

Upon closer examination, however, it can be seen that the right of privacy still basically functions as a protectoral right. The motive perhaps for creating such a zone of privacy in *Griswold* may be better discerned if it is looked at with a view to what might be termed the ulterior motive of the Court, i.e., protection of the *family* relationship. "In constructing the zone of privacy, the Supreme Court has relied heavily on cases suggesting that family life is a uniquely private enclave to be scrupulously protected against governmental intrusion . . . the court's conclusion about the nature of constitutional privacy may be traced to the concern with protecting family life."<sup>83</sup>

Justice Douglas in *Griswold* was not alone in his concern for the family. Justice Goldberg, although approaching *Griswold* from a ninth amendment perspective, quotes Justice Harlan's dissenting opinion in *Poe v. Ullman*,<sup>84</sup> emphasizing the fundamental importance of protection of the family relationship:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right . . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.<sup>85</sup>

The *Griswold* Court seems to continually stress the significance of family life by cloaking the same with the protection of the newly created right of privacy. The right of privacy, therefore, may very well be given greater extension and applicability when dealing with the family as opposed to unrelated individuals. It seems this right is parasitic and protectoral in nature, rather than equal or ancillary, to the right of family choice.<sup>86</sup>

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82. See Justice Stewart's dissent, 97 S. Ct. at 1952-57.

83. Comment, *Constitutional Privacy*, 48 N.Y.U.L. REV. 670, 738 (1973).

84. 367 U.S. 497, 551, 552 (1961). *Poe v. Ullman* additionally concerned contraception but the merits were not decided after a finding of an absence of any justiciable controversy.

85. *Griswold v. Connecticut*, 381 U.S. at 479, 495.

86. This may explain the *Belle Terre* Courts decision summarily dismissing the petitioner's claim of violating his and other unrelated tenant's right to privacy. 416 U.S. 7 (1974).

Although this choice is not a specifically enumerated guarantee found in the constitution, its absence from that document is not conspicuous. The need to include such a concept of family choice possibly never arose due to the fact that the thought of a governmental authority denying such a right was inconceivable. In *Meyer, Pierce, and Griswold*, however, this possibility became close to a reality necessitating the creation of a right of privacy which "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and traditions."<sup>87</sup>

It is family life which illicitly *Griswold's* zone of privacy. It lies dormant until the family institution is challenged. There are many facets of the family protected by this zone of privacy other than the marital relationship. *Griswold* does not merely extend to marital privacy insulating "the personal activities of consenting adults, (but) it may be also used to shield from State interference a parent's 'natural right' to control his children."<sup>88</sup> It further applies to those individuals desiring total detachment from the family area.

*Eisenstadt v. Baird*<sup>89</sup> dealt with a similar issue of contraception as did *Griswold*. The distinction was that, unlike the Connecticut statute, the Massachusetts statute proscribed the sale or dispensing of contraceptives to *unmarried* persons only, in an attempt at what was "thought to be the precise accommodation necessary to escape the *Griswold* ruling."<sup>90</sup> If that were the case, then the Massachusetts legislature had too narrowly construed the impact of *Griswold*. The decision to conceive children resolves itself into the determination of whether or not another person will be brought into a family. It does not change because the parents of the child are unmarried. Their privacy in this choice is just as significant as that of a married couple, for the result of so choosing is the same—conception.

The Court in *Eisenstadt* recognized the zone of privacy to encompass this type of family choice.

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intru-*

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87. 97 S. Ct. at 1933.

88. Baskin, *State Intrusion Into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1382, 1384-85 (1974).

89. 405 U.S. 438 (1972).

90. *Id.* at 450.

*sion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.* (emphasis added)<sup>91</sup>

*Roe v. Wade*<sup>92</sup> was a landmark case dealing with the constitutionality of a Texas criminal abortion statute, making the proscribing, procuring or attempt to procure an abortion, except upon the medical advice by a licensed physician and for the purpose of saving the mother's life, illegal.

Although *Griswold* seems at first to be inimical to the problem posed in *Roe v. Wade*, it is not. Like *Eisenstadt*, *Roe* dealt with family choice and, once again, the zone of privacy. "Although the results are divided most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision . . ."<sup>93</sup>

The outcome of *Roe* was fairly predictable. In reviewing the decisions and precedents that lead to the decision in *Roe v. Wade*, it becomes quite clear that given the Court's attitudes towards the home, marriage and family during the last fifty years, the resolution of such a socially critical issue as posed by *Roe* was foreseeable. "The Court has tended to regard family behavior and beliefs as fundamental rights that cannot be breached except in the presence of a compelling public interest."<sup>94</sup>

The foregoing cases<sup>95</sup> have developed and shaped the right of family choice. They additionally demonstrate the Court's deep abiding concern with protecting the family unit from outside interference. In view of the Court's attitude in this respect and in light of the fact that the ordinance of East Cleveland had the practical effect of abrogating the choice of family living arrangements in Mrs. Moore's household, it may be somewhat easier to appreciate the *Moore* Court's reasoning in refusing to blindly treat its factual situation in the same manner as that found in *Euclid*.

Living arrangements, however, had been before the Court on

91. *Id.* at 453.

92. 410 U.S. 113 (1973).

93. *Id.* at 153.

94. GROSS, PRIVACY-ITS LEGAL PROTECTION 99 (1976).

95. Because other cases cited by Justice Powell were not discussed at length, this is not to suggest that they are in any manner less important in developing the concept of family choice.

a previous occasion in a zoning case which directly preceded *Moore*. *Belle Terre* did not involve blood related occupants however, and the right of family choice was not a factor in determining the outcome. Only in *Moore* does the right of family choice<sup>96</sup> invade the heretofore intact province of zoning. One may see the emergence of this right by closely examining *Belle Terre* for many of the same issues and arguments present in *Belle Terre* are also found in *Moore*. Constitutional rights to privacy and association were asserted in both, yet the results were diametrically opposed. The basic factual difference between the two cases, however, was the presence of a blood relationship. This factor alone is responsible for the differing outcomes.

The petitioners in *Belle Terre*, six unrelated college students, asserted that an ordinance of that community,<sup>97</sup> restricting the occupancy of a single family dwelling to only two unrelated individuals, while placing no limit on those who could permissibly occupy the same dwelling if blood related, violated their due process and equal protection guarantees under the fourteenth amendment by infringing upon their rights to privacy and association.

The court heavily emphasized *Berman v. Parker*<sup>98</sup> and *Euclid* stating that a zoning ordinance seeking to enhance the "social habitability" of a community and its aesthetic environment is well within the reasonable limits of the police power. Additionally, the court emphasized the preservation of *family* values as an allowable goal of the municipality.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to *family needs*. This goal is a permissible one within *Berman v. Parker*, supra. 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. (emphasis added)<sup>99</sup>

The *Belle Terre* court, therefore, applied the constitutional test utilized in *Euclid* rather than a compelling state interest, strict scrutiny test,<sup>100</sup> after summarily dismissing petitioner's

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96. See pg. 558, *supra*.

97. "The word 'family' as used in the ordinance means, 'one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.'" 416 U.S. at 2.

98. 348 U.S. 26 (1954).

99. 416 U.S. 1, 9 (1974).

100. See note 18, *supra*.

claim of infringement of the rights of privacy and association.<sup>101</sup> "The Court was unwilling to align appellants' choices of living arrangements with fundamental constitutional rights previously enumerated by the Supreme Court."<sup>102</sup>

While the majority decision of the *Belle Terre* Court did not characterize this type of association as one meriting the protection of a fundamental right, this narrow interpretation of the applicable scope of associational freedom<sup>103</sup> was found to be too constricting for Justice Marshall, who felt the associational rights of the students were being violated.

Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members. The selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.<sup>104</sup>

Marshall preferred the interpretation of the scope of this right found in *Moreno v. Department of Agriculture*,<sup>105</sup> a case relied upon by Marshall in his *Belle Terre* dissent.

The concurring opinion of Justice Douglas in *Moreno*, a case

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101. 416 U.S. 1, 7 (1974).

102. Comment, *Recent Developments*, 13 J. FAMILY L. 901 (1974).

103. See Smith, *Burning the House to Roast the Pig: Unrelated Individuals and Single Family Zoning's Blood Relation Criteria*, 58 CORNELL L. REV. 138, 146 (1972).

104. 416 U.S. 1, 15 (1974). Justice Marshall's dissent in *Belle Terre* presents somewhat of a contradiction in thought in light of his approach in *Moore*, "I am still persuaded that the choice of those who will form one's household implicates constitutionally protected rights," seemingly to imply his approach in *Moore* would be akin to that of Justice Stevens, basing constitutionality on the fundamental right of the *property owner*, rather than on the fundamental right of the family, *id.* at 18. See also, *supra* n. 41. Then later in *Belle Terre* at pg. 18-9 he asserts that the city, if it is to impose limits on unrelated persons should likewise do the same for related individuals.

The ordinance imposes no restrictions whatsoever on the number of persons who may live in a house, as long as they are related by marital or sanguinary bonds-presumably no matter how distant their relationship.

This language would lend itself to the same type of thought as that of Justice Stewart's dissent, questioning the treatment of the family on an elevated plain apart from unrelated individuals. Neither approach is taken by Justice Marshall in *Moore* who joins in the judgment and a concurring opinion which predicates constitutional invalidity of the ordinance on violation of "family choice" rights.

105. 413 U.S. 528 (1973).

dealing with the exclusion of unrelated individuals from eligibility in the government Food Stamp Program,<sup>106</sup> expanded the scope of associational activity protected by the fourteenth amendment to include living arrangements of non-related individuals.

As the examples indicate, these peripheral constitutional rights are exercised not necessarily in assemblies that congregate in halls or auditoriums but in discrete individual actions such as parents placing a child in the school of their choice. Taking a person into one's home because he is poor or *needs help* or brings happiness to the household is of the same dignity. (emphasis added)<sup>107</sup>

*Belle Terre*, therefore, when properly viewed, with respect to its emphasis on the non-blood relationship of the student petitioners is not the obstacle it may once have appeared to be for favorable adjudication in cases such as *Moore*. On the contrary, it actually paved the way for the *Moore* decision.

*Village of Belle Terre v. Boraas*, the case primarily relied upon by the appellee, actually supports the Court's decision. The Belle Terre ordinance barred only unrelated individuals from constituting a family in a single-family zone. The Village took special care in its belief to emphasize that its ordinance did not in any manner inhibit the choice of related individuals to constitute a family, whether in the 'nuclear' or 'extended' form. This was because the Village perceived that choice as one it was constitutionally powerless to inhibit.<sup>108</sup>

Why were the associational and privacy rights involved in *Belle Terre* almost totally ignored by that Court? The simple and rather obvious answer is that *Belle Terre* dealt with *unrelated* individuals.

The right of privacy, in the constitutional sense, rather than the right *to* privacy as a cause of action in tort, applies only to related individuals. Those seeking to invalidate statutes on the ground that it is an unlawful impairment of their constitutional right of privacy must "qualify" as an individual who may claim the right of family choice, for this is the only instance where the right of privacy will extend protection, as this is the only time its assertion will be recognized as valid, which *Belle Terre* well indicates.

It was this "qualifying process" that was at issue in *Moore*, for the state asserted that grandmothers had no fundamental right to choose to live with their grandsons, that this type of blood relationship was not of such a degree to come within the defini-

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106. Food Stamp Act of 1964, Section 3(e), 7 U.S.C. § 2012(e) (1971).

107. 413 U.S. at 527.

108. 97 S. Ct. 1942 (1977).

tion of "family" in the same sense as that found in prior cases dealing with family choice.

The judgment of the Court was accordingly therefore primarily concerned with finding a basis upon which to bring this choice into the *family realm*, thereby qualifying the extended family equally with that of the nuclear family.<sup>109</sup> Once the Court determined that the choice to live with one's uncles, aunts, nieces, nephews, grandchildren and grandparents was a facet of "family choice", it was foreseeable to conclude that case law dealing with the right of privacy would be used to protect this choice. This is true even though the right of privacy itself was never expressly mentioned in the judgment of the Court.

This qualifying process was also impliedly at issue in *Belle Terre*, but was never fully considered since the petitioners failed to assert any family relationship, however tenuous. Their attempt at invoking the right of privacy, therefore, was predictably subject to summary dismissal. One must first assert protection of the "family," before the right of privacy can be successfully maintained, as there appears to be no constitutional right to live with persons to whom one is not related.<sup>110</sup>

The tenants in *Palo Alto*, *supra*, absent a showing of ties through blood or adoption, were accorded no right to common residence, just as the homosexuals in *Baker v. Nelson*,<sup>111</sup> seeking a marriage license in an attempt to escape the state's sodomy law, were not.

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109. The extended family situation under question in *Moore* was somewhat posed in *City of White Plains v. Ferrailo*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). In that case, the city precluded occupancy of a single family residence by those individuals unrelated by blood, marriage or adoption. Twelve children resided in the Ferrailo household, though only two of the children were the offspring of the owners. The other ten children were "foster" children, three of which were unrelated to each other while the other seven were siblings. These twelve children however, had established an emotional attachment to one another similar to that of siblings. The court in Ferrailo refused to allow the city to break-up this family, due to the family ties that had been established among the group. (For a contrary result see, *Newark v. Johnson*, 70 N.J. Super. 381, 175 A.2d 500 (1961)).

110. For comments concerning this question see, Haber, *No Dogs, Cats or Voluntary Families Allowed-Village of Belle Terre v. Boraas*, 24 DE PAUL L. REV. 784 (1975). Hall, *An Extension of the States Police Power; The Protection of Family Values Through Zoning Legislation*, 21 LOYOLA L. REV. 243 (1975).

111. 291 Minn. 310, 191 N.W.2d 185 (1971) (en banc), *appeal dismissed*, 409 U.S. 810 (1972).



In light of the above, *Moore* might be better understood if analyzed with an eye to the creation of a new fundamental right rather than a constricting interpretation of the existing right of privacy.

#### IV. THE EXTENSION OF THE RIGHT OF FAMILY CHOICE: THE CREATION OF THE FUNDAMENTAL RIGHT OF FAMILY ASSOCIATION

It has already been noted<sup>112</sup> that when the United States Supreme Court deals with a fundamental right which is not explicitly enumerated in the constitution, a determination must be made as to the character of the right and its origin.

The associational right involved and explored herein is not that which was announced in *NAACP v. Alabama*, for that was of a political nature; nor is it the right asserted in the concurring opinion in *Moreno*, for that right was economic and social in nature. Neither does the associational right developed in *Moore* find its origin solely in the first amendment. It arises from all those amendments utilized in creating the zone of privacy, for that is where its foundation lies. To find the roots of this right one need only look to the case which first announced the zone of privacy.

The first instance of the development of family associational rights emanating from the broader right of family choice is found in *Griswold*. Justice Douglas examined the personal right of marital privacy from an associational view point, such being unusual as that type of activity had not before been expressly considered enveloped in the right of association.<sup>113</sup> Freedom of association has been constitutionally recognized because it is often indispensable to effectuation of explicit first amendment guarantees.<sup>114</sup> However, Justice Douglas emphasized that the type of associational right involved in the marriage (family) relationship is "older than the Bill of Rights" out of which it was supposedly created.

Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>115</sup>

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112. See text pg. 561.

113. The concept of a new family associational right discussed in this case-note is also the subject of Justice Stewart's dissent in *Moore*, 97 S. Ct. at 1952-57.

114. See, *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964).

115. 381 U.S. at 486.

All the cases mentioned by the *Moore* Court dealing with family choices have set the stage for the creation or perhaps labelling of the family associational right for they each deal with some form of *personal family association*, be it with parent (guardian) and child, husband and wife, mother and conceived or unconceived fetus. Justice Powell recognized this link between the cases, although each dealt with differing factual situations than that presented by Mrs. Moore. It was the family right to *interact as a family* that was the gravamen of *Moore*, and all cases cited in its support.

But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.<sup>116</sup>

Justice Brennan, in his concurring opinion in *Moore*, condemned the zoning practice of the City for choosing "a device that deeply intrudes into *family associational rights* that historically have been central, and today remain central, to a large proportion of our population".<sup>117</sup>

Justice Stewart, in his dissent, likewise acknowledged that the *Moore* Court had effectively broadened the definition of associational rights to include that of the family's.

To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect.<sup>118</sup>

However misunderstood the judgment in *Moore* may have been to Justice Stewart, he nevertheless conceded the attempted creation of a new fundamental right, stating that "the scope of the associational right, until now, at least, has been limited" to traditional protection of express first amendment rights.<sup>119</sup>

Although *Moore* is a plurality decision, the endeavor by the Court to bring forth this right of *family* association will heavily influence similar future cases.

It seems fitting that the creation of this particular associa-

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116. 97 S. Ct. 1932, 1936-37 (1977).

117. *Id.* at 1941-42.

118. *Id.* at 1954.

119. *Id.*

tional right should be attempted and, hopefully, applied in future decisions of the Court, considering the heretofore limited application of the right of privacy to only family choice situations. If such a right could be utilized by the courts in dealing with related individuals, who seemingly *are* treated differently than non-related persons, the zone of privacy could be extended to protect those individuals not coming within the ambit of the "right to family choice" doctrine, as this has previously been the key in successfully asserting the right of privacy. If the Court would recognize its "separate but equal, single but equal" policy regarding blood relations and non-related persons, vital rights of those in the latter category could be protected.

#### CONCLUSION

*Moore*, therefore, stands for the proposition that the state will not be allowed, by ordinance or otherwise, to cut "off any protection of family rights at the first convenient, if arbitrary boundary, the boundary of the nuclear family."<sup>120</sup> How far the notion of the "family" can be extended is still uncertain. *Moore* has made it clear, however, that as long as the bonds of kinship exist within a group of related individuals, any state action infringing upon such a relationship will be strictly scrutinized.

Perhaps, instead of beginning its inquiry at the blood relation level with respect to permissible occupants of a household, the state should focus its attention on the definition of a "family" which includes unrelated individuals who share the same degree of emotional ties as that of the "traditional" family. Due to the complexities of such a determination, however, the blood relationship continues to serve as the initial point in attempting to define the family. If this definitional yardstick seems unjust it is, nevertheless concededly practical. However, what is practical may not necessarily be that which is prudent.

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120. 97 S. Ct. 1932, 1937 (1977).