

with a securities transaction. A careful analysis of the statutory language of section 10(b), its legislative history, and the interface between state and federal regulation of corporate affairs with respect to issues of overall fairness reveals that the *Santa Fe* Court's narrow view of section 10(b) was analytically correct. This narrow view of the scope of section 10(b) was properly utilized in *Santa Fe* by the Court in its ruling that claims of unfairness and breach of fiduciary duty absent allegations of manipulation or deception are not cognizable under section 10(b).

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Constitutionally Protected Notions of Family: *Moore v. City of East Cleveland*¹—In 1973, Mrs. Inez Moore resided in her East Cleveland home with her son, Dale Moore, Sr., and two grandsons, Dale Moore, Jr. and John Moore, Jr. The two boys were first cousins, John being the son of Mrs. Moore's other son, John Moore, Sr.² East Cleveland had a zoning ordinance which limited residence in any single dwelling unit to a single family.³ This ordinance was unusual in that it defined the term "family" so as to include only a few categories of related individuals. Cohabitation by individuals related as first cousins was not one of these permitted categories, and consequently, the Moore household fell outside the ordinance's definition of a single family.⁴

Mrs. Moore was convicted of violating the zoning ordinance in the East Cleveland Municipal Court,⁵ and her subsequent appeals to the Court of Appeals of Ohio⁶ and the Supreme Court of Ohio⁷ were unsuccessful.

¹ 431 U.S. 494 (1977).

² *Id.* at 496-97.

³ CITY OF EAST CLEVELAND, HOUSING CODE § 1341.08 (1966). 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.

⁴ Section 1341.08 excludes many other relational combinations from the ambit of the term "family." For example, households consisting of two brothers or an aunt residing with her niece, cannot occupy a single dwelling unit.

⁵ 431 U.S. at 497. Upon Mrs. Moore's refusal to remove John Moore, Jr. from her household, the city filed a criminal complaint, charging her with violation of the zoning ordinance. Mrs. Moore stipulated to the facts underlying the complaint and was fined twenty-five dollars and sentenced to five days in prison. *Id.*

⁶ *City of East Cleveland v. Moore*, No. 33888 (Ct. App. Ohio July 18, 1975).

⁷ *Moore v. City of East Cleveland*, No. 75-896 (Ohio Nov. 28, 1975).

However, the United States Supreme Court, in a five to four decision with four justices concurring in a plurality opinion, reversed her conviction.⁸ Justice Powell, author of the plurality opinion, reasoned that an ordinance which restricts residence within a dwelling unit to nuclear family members impermissibly violates an extended family's interest in living together, and thus, violates the due process clause of the fourteenth amendment.⁹

This casenote will first attempt to explain Justice Powell's opinion in *Moore* by comparing and contrasting his analysis with the analysis in two major lines of substantive due process decisions: one involving family interests and the other involving privacy interests. It will be submitted that neither of these two lines of decision provides direct support for Justice Powell's opinion, and consequently, that *Moore* represents a significant expansion in the scope of substantive due process. In this light, this casenote will consider the ramifications of *Moore* on the further development of substantive due process interests by the Court. Finally, this casenote will conclude with a discussion of Justice Powell's standard of review in *Moore*, contrasting it with standards of review employed by the Court in earlier substantive due process cases.

I. POWELL'S OPINION IN *MOORE*

Justice Powell began his analysis in *Moore* by noting that the East Cleveland ordinance not only prescribed permissible living arrangements between unrelated individuals, but went further and regulated biologically related individuals as well. As such, Justice Powell reasoned, the ordinance

⁸ 431 U.S. at 506. Mr. Justice Powell announced the judgment of the Court in an opinion in which Justices Brennan, Marshall and Blackmun joined. Justice Brennan, joined by Justice Marshall, wrote a concurring opinion. Justice Stevens wrote an opinion concurring in the judgment.

Justice Stevens, in his concurring opinion, found it unnecessary to reach the substantive due process issues addressed by Justices Powell, Marshall, Brennan and Blackmun. He pointed out that the Court has upheld the validity of zoning ordinances regulating permissible property uses or limiting occupancy to single housekeeping units. Justice Stevens noted that ordinance provisions limiting occupancy solely to *related* individuals, however, often have been struck down as a deprivation of the home owner's property without due process of law. *Id.* at 514-19 (Stevens, J., concurring). He further observed that such provisions often seek to control community transience, and that the majority of reviewing courts have upheld this class of ordinance only where it is genuinely targeted at maintenance of community stability. *Id.* at 519. Since he viewed the present ordinance as neither aimed at restriction of transience nor reasonably related to any other asserted justification, he concluded that the provision impermissibly restricted the property owner's legitimate prerogatives, and hence deprived him of property without due process of law. *Id.* at 520-21. Justice Stevens cited the traditional standard set forth in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinances constitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"). 431 U.S. at 520-21.

Justices Stewart and White dissented on the ground that the standard of review applied was inappropriate. In his opinion, Justice White agreed that the interests of Mrs. Moore were entitled to some constitutional protection, but would have upheld the proscriptive ordinance because it is not without any purpose or utility. *Id.* at 550. In a separate dissenting opinion, Justice Stewart, joined by Justice Rehnquist, argued that the interest of Mrs. Moore in living with her grandson was not entitled to substantive protection. *Id.* at 537.

Chief Justice Burger also dissented, but on the ground that Mrs. Moore had failed to exhaust the available administrative remedies. *Id.* at 521.

⁹ *Id.* at 505-06.

regulated not merely abstract living arrangements, but rather, the very structure of family life.¹⁰ Pointing to a long line of decisions under the due process clause shielding the family from intrusive state regulation, Justice Powell concluded that the right of a family to reach its own choice concerning living arrangements was an interest meriting constitutional protection.¹¹ Since the East Cleveland ordinance sliced deeply into the family structure, Justice Powell determined that the usual judicial deference to the legislature was inappropriate. Accordingly, he felt constrained to "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged [governmental] regulation."¹² Inspection of the ordinance revealed that it had only a tenuous relationship to alleviation of the conditions to which it was addressed: overcrowding, parking and traffic congestion, and the fiscal burden on the school system.¹³ Justice Powell thus concluded that the Moores' interest in coresidence outweighed these governmental interests and that the ordinance violated the due process clause of the fourteenth amendment.¹⁴

In reaching his decision, Justice Powell first had to distinguish an earlier opinion involving a similar city ordinance, *Village of Belle Terre v. Boraas*.¹⁵ *Belle Terre* involved a group of college students coresiding in a village which consisted solely of single family residences. A zoning ordinance restricted occupancy to related individuals or no more than two unrelated individuals per dwelling unit.¹⁶ The *Belle Terre* Court held that the ordinance violated neither the due process clause nor the equal protection clause of the constitution.¹⁷ Justice Powell distinguished *Belle Terre* by noting that whereas the ordinance sustained in *Belle Terre* was directed solely against dwelling occupancy by more than two unrelated individuals, the East Cleveland ordinance restricted not only the classes of residency by unrelated individuals, but also the classes of blood relations who could permissibly occupy a dwelling unit.¹⁸ Thus, the ordinance directly interfered with a family's interest in structuring its own living arrangements.

Justice Powell's decision to accord protection under the due process clause of the fourteenth amendment to the family interests at issue in *Moore* is the essential and unique feature of that decision. Although the Court previously had accorded certain aspects of family life substantive protection under the due process clause,¹⁹ the Court never had explicitly confronted the particular question raised in *Moore*—whether an extended family enjoys a constitutionally protected right to reside together in the same dwelling. As Justice Powell's opinion pointed out, previous decisions

¹⁰ *Id.* at 498.

¹¹ *Id.* at 499-500.

¹² *Id.* at 499.

¹³ *Id.* at 499-500.

¹⁴ *Id.* at 505-06.

¹⁵ 416 U.S. 1 (1974).

¹⁶ *Id.* at 2. The ordinance defined family as "[o]ne or more persons related by blood, adoption or marriage, living . . . together as a single housekeeping unit A number of persons but not exceeding two (2) living . . . together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." *Id.*

¹⁷ *Id.* at 7-8.

¹⁸ 431 U.S. at 498-99.

¹⁹ See text at notes 27-61 *infra*.

²⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (individual's right to seek abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of parents to prevent conception by use of contraceptive devices).

under the due process clause dealt with matters of childbearing,²⁰ the rights of parents to custody of their children,²¹ or with parental authority in matters of child rearing and education.²² Analogizing from these earlier substantive due process decisions, all dealing with rights more traditionally associated with the family, Justice Powell concluded that extended families have a constitutionally protected right to live together,²³ and are deserving of substantive protection under the due process clause.

Moore is significant as the first major substantive due process decision to recognize protected interests outside the limits of either the nuclear family²⁴ or the individual.²⁵ This expansion of the due process clause may ultimately extend to other relationships not previously afforded constitutional protection. However, as in previous substantive due process cases, the *Moore* Court was sharply divided over the limits, and even the existence, of substantive due process rights.²⁶ Only four Justices in *Moore* recognized a right of blood relatives to live together. This failure to command a majority of the Court with respect to the invalidity of the ordinance on substantive due process grounds may signify that the Court is not yet ready to commit itself to a further expansion of substantive due process.

²¹ See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (presumption that unwed fathers are not suitable to oversee custody of their offspring violative of due process).

²² See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state may not prescribe education beyond eighth grade in contravention of religious beliefs of parents); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents have a right to provide private education for their children).

²³ 431 U.S. at 501.

²⁴ A nuclear family is limited to the parents and their dependent children. In contrast, an extended family may include the nuclear family grouping, non-dependent children and other blood relations. For examples of cases in which the Court recognized certain constitutionally protected rights in the context of the nuclear family see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (right of Amish parents to limit the secular education of their children) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to provide private education for their children).

²⁵ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (individual's right to seek abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (state may not deny an individual access to contraceptive devices).

²⁶ Substantive due process analysis was used widely by the Supreme Court in the late nineteenth and early twentieth centuries to analyze the substantive content of legislation to discover whether it was restrictive of constitutionally protected liberties. It was most commonly employed to strike down governmental attempts at social legislation, see, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), or business regulation, see, e.g., *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926). However, in these early days the Court occasionally utilized substantive due process analysis to secure personal liberties as against governmental interference. Thus, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court held invalid state attempts to prohibit the instruction of German in educational arrangements.

Substantive due process analysis should be distinguished from procedural due process analysis. In the latter case, judicial examination of legislation merely seeks to assure that the state has not occasioned a deprivation of life, liberty or property without affording appropriate procedural safeguards. In contrast, substantive due process analysis scrutinizes the merits of the governmental act and seeks to supersede the legislature in determining the proper balance between the state interest and the personal liberty.

The Court began a headlong retreat from use of substantive due process protection of economic interests in the landmark case of *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld the constitutional validity of the minimum wage law of the State of Washington. This began an era in which the Court accorded a presumption of validity to governmental action, unless there was no rational basis for the legislation.

Griswold v. Connecticut, 381 U.S. 479 (1965), marked a turning point, with a majority of the Court participating in what has proved to be the revivification of substantive due pro-

II. MOORE AND EARLIER SUSTANTIVE DUE PROCESS CASES

A. The "Family Rights" Decisions

Just as the future implications of *Moore* are uncertain, it is unclear whether past decisions provide strong support for Justice Powell's opinion in *Moore*. In concluding that the due process clause of the fourteenth amendment protects a family's interest in choosing its living arrangements, Justice Powell ostensibly relied upon earlier substantive due process cases. Indeed, the history of substantive due process includes a line of decisions, stemming from *Meyer v. Nebraska*,²⁷ which recognized "family" rights. Careful examination of these cases, however, reveals that Powell's opinion in *Moore* did not merely restate principles announced in these decisions, but rather, recognized principles only hinted at in the earlier cases.

Meyer was the first of these substantive due process decisions to accord parental rights a special constitutional status. *Meyer* overturned a statute that forbade any teaching in a language other than English in the first eight grades of public or private schools.²⁸ The *Meyer* Court noted that parents have a natural duty to provide education for their offspring and to make choices concerning the child's education, including his education in foreign languages.²⁹ It also found that the statute impermissibly interfered with the right of the teacher to pursue his livelihood.³⁰ Based on the combined deprivations of the teacher and the parents, the Court concluded that the statute as applied was "arbitrary and without reasonable relation to any end within the competency of the state,"³¹ and therefore constituted an impermissible intrusion upon the prerogatives of parental control and the interest of the teacher in his livelihood.³²

Although the *Meyer* Court's reasoning with respect to the protection afforded parental rights was inarticulate, this newly forged right was reaffirmed and given substance in *Pierce v. Society of Sisters*.³³ In *Pierce*, the Court considered the validity of an Oregon statute which prohibited the education of a child between the ages of eight and sixteen in any facility other than a public school.³⁴ The appellees were private schools which

cess in protecting certain personal rights and liberties. Under this modern approach the Court first seeks to ascertain whether governmental action has impinged upon an important liberty interest which is either explicit in the constitution or otherwise demonstrable. Having made that threshold determination, the Court then either weighs the nature and extent of the intrusion against the asserted liberty interests, see *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1965), or measures the asserted state justifications against a fixed standard, see *Roe v. Wade*, 410 U.S. 113, 152-56 (1973). Contemporary substantive due process analysis has heretofore been confined to protecting the rights of parents to supervise the upbringing of offspring, see *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1965), and guaranteeing the vaguely defined interests loosely gathered under the right to privacy, see *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

²⁷ 262 U.S. 390 (1923).

²⁸ 1919 Neb. Laws Ch. 249 (no longer in force). The defendant, a language teacher, had been convicted under the statute of teaching German to young children. 262 U.S. at 396-97.

²⁹ 262 U.S. at 400.

³⁰ *Id.* at 402.

³¹ *Id.* at 403.

³² *Id.* at 400.

³³ 268 U.S. 510 (1925).

³⁴ 1922 Or. Laws § 5259 (no longer in force).

would have been deprived of patronage by operation of the statute.³⁵ Initially, the *Pierce* Court noted that the statutory mandate of public education destroyed the appellees' business property without due process of law "through the unwarranted compulsion which appellants [sought to exercise] . . . over present and prospective patrons of their schools."³⁶ However, the Court also found a second due process violation in *Pierce* based upon the "doctrine" established in *Meyer*. As the Court stated,

the Act [at issue] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.³⁷

Although dealing with different factual situations, the Court in both *Meyer* and *Pierce*, in finding a substantive constitutional violation under the due process clause, considered the rights of parents to make decisions respecting the guidance of their offspring as well as the economic interest of the educator. In *Meyer*, the Court recognized parental rights when those rights were joined with another constitutionally cognizable interest: the teacher's right to teach and the parent's right to engage him.³⁸ Similarly, the *Pierce* Court afforded constitutional recognition to parental rights only in conjunction with the property rights asserted by the private schools.³⁹ Thus, in both *Meyer* and *Pierce*, the Court afforded substantive protection to parental decisions only when the parental interests were coupled with the traditional right to pursue one's livelihood.⁴⁰ Therefore, neither *Meyer* nor *Pierce* can be said to hold that a family has a constitutionally protected right to make certain decisions regarding its lifestyle. Although *Meyer* and *Pierce* hinted at the existence of such a right, *Moore* clearly solidifies these hints in an explicit statement.

In addition to *Meyer* and *Pierce*, Justice Powell purported to find support for his opinion in two other cases which merely hinted at the existence of a family's right to make certain lifestyle decisions. In *Prince v. Massachusetts*,⁴¹ the Court was confronted with a claimed violation of parental and religious liberties engendered by a Massachusetts statute regulating child labor.⁴² Prince, a Jehovah's Witness, had assumed guardianship of her

³⁵ 268 U.S. at 531-34.

³⁶ *Id.* at 535.

³⁷ *Id.* at 534-35.

³⁸ 262 U.S. at 400.

³⁹ 268 U.S. at 534-35.

⁴⁰ The decisions in *Meyer* and *Pierce* were delivered during the era of protection of economic interests under the due process clause, best characterized by *Lochner v. New York*, 198 U.S. 45 (1905). See note 26 *supra*. The Court's recognition of economic interests, however, was not its only consideration. The acknowledged importance of education and the family's traditional role in directing the child's education also may have induced the Court in *Meyer* and *Pierce* to protect the family's interest in making certain decisions about its lifestyle. The *Meyer* Court stated, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." 262 U.S. at 400. Similarly, the *Pierce* Court noted that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535.

⁴¹ 321 U.S. 158 (1944).

⁴² MASS. GEN. LAWS ANN. ch. 149, §§ 80-81 (West 1971).

niece, also a Jehovah's Witness.⁴³ Prince was convicted of violating a child labor statute because she permitted her niece to sell copies of a religious publication.⁴⁴ The Supreme Court sustained Prince's conviction, but also noted the importance of the parental interests involved:

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. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.⁴⁵

However, in affirming Prince's conviction, the Court held that her interest in the religious proselytizing activities of the child must yield to the state's overriding interest as *parens patriae* in the protection of the minor citizen's welfare and safety.⁴⁶

As in *Meyer* and *Pierce*, the *Prince* Court examined the substantive due process aspect of parental rights only in conjunction with other constitutionally protected interests, in this instance the first amendment right to religious freedom.⁴⁷ Thus, although there were no protectable due process property rights in *Prince*, as there were in *Meyer* and *Pierce*, the Court seemingly recognized parental rights only because a first amendment right was also at stake.⁴⁸

The final case in the area of parent-child protection cited by Justice Powell in *Moore, Wisconsin v. Yoder*,⁴⁹ dealt with a parent's right to resist the effects of a state compulsory education law. In *Yoder*, Amish parents were convicted of violating Wisconsin's compulsory school attendance law⁵⁰ by withdrawing their children, aged fourteen and fifteen, from public school after they finished eighth grade.⁵¹ The Amish religion holds as a tenet that formal public education beyond eighth grade exposes Amish children to undesirable worldly influences and endangers the salvation of both parent

⁴³ 321 U.S. at 161-62. The fact that the relationship in *Prince* was one of guardian-ward rather than parent-child is irrelevant. The Court consistently phrased the interests at issue as if the relationship were one of parent-child when speaking of the due process claim; for example: "One [liberty] is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith." *Id.* at 164.

⁴⁴ *Id.* at 159-60. Of course, distribution of religious material, absent an interest of the state as substantial as that in *Prince*, normally comes within the ambit of first amendment protection. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940).

⁴⁵ 321 U.S. at 166. The defendant relied upon both the first amendment claim of freedom of religion, and a substantive due process claim based upon *Meyer*. *Id.* at 164. The Court appeared to say that the merits of the substantive due process claim were dependent upon the first amendment: "The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter." *Id.* at 164 n.8.

If this is the proper explanation of *Prince*, then it appears consistent with the conclusion that *Meyer* and *Pierce* do not encompass constitutional protection of the family's interests absent other constitutionally protected interests. See text and note 39 *supra*.

⁴⁶ 321 U.S. at 166. The overriding state interest noted by the Court was regulation of child labor and protection of the child from perceived evils of the "street." *Id.* at 168-69.

⁴⁷ *Id.*

⁴⁸ *Id.* at 164 n.8.

⁴⁹ 406 U.S. 205 (1972).

⁵⁰ WIS. STAT. ANN. § 118.15 (West 1973).

⁵¹ Each defendant was fined a sum of five dollars. 406 U.S. at 208.

and child.⁵² The Amish community was concerned that the extensive exposure to secular mores in public high school education would encourage impressionable children to stray from the fold.⁵³ The defendants contended that the provision in the law requiring compulsory education until age sixteen⁵⁴ ran afoul of the first amendment, as well as the parental prerogatives explicated in the line of cases extending from *Meyer*.⁵⁵

In distinguishing *Yoder* from *Prince*, the Supreme Court noted that the Old Order Amish community was an inextricable synthesis of lifestyle and religion, which would be affected severely by the state-mandated secular change.⁵⁶ The Court also considered the informal vocational education which the Amish provided for a period of years beyond the eighth grade, balancing it against the marginal benefits of requiring the children to attend at most two more years of formal education.⁵⁷ Reasoning that this period was essential for the successful integration of Amish children into the Amish agrarian existence,⁵⁸ the Court found that this interlude satisfied both the child labor laws and the compulsory education acts by keeping children under certain ages in school and out of the labor market.⁵⁹ Therefore, the Amish system of child rearing outweighed the state concerns and merited an exemption from the Wisconsin statute.⁶⁰

The factual setting of *Yoder* leaves in doubt the precise basis of the Court's judgment. The *Yoder* Court balanced first amendment rights, educational choices and parental considerations concerning child rearing against the state interests underlying compulsory education.⁶¹ Careful reading of *Yoder*, however, suggests that the decision was rooted primarily in the religious considerations, and that parental rights were tangential to the Court's holding.⁶² Thus, the parental rights acquired significance in *Yoder* only because first amendment interests were present as well.

The common thread of *Meyer*, *Pierce*, *Prince*, and *Yoder* is the judicial deference accorded to parental decisions concerning the care, upbringing and nurture of children when weighing state interests against such decisions. However, the Court in these cases accorded deference to parental decision only because of the simultaneous presence of other constitutionally protected interests: the first amendment in *Prince* and *Yoder*, and economic

⁵² *Id.* at 209.

⁵³ *Id.* at 218.

⁵⁴ Wis. STAT. ANN. § 118.15(1)(a) (West 1973).

⁵⁵ 406 U.S. at 231-34.

⁵⁶ *Id.* at 216-19.

⁵⁷ *Id.* at 224-25.

⁵⁸ *Id.* at 211-12.

⁵⁹ *Id.* at 228.

⁶⁰ *Id.* at 234-36.

⁶¹ *Id.* at 214. Justice Douglas, dissenting in part in *Yoder*, suggested that the majority's inclusion of parental rights into the decisional mix was misplaced. *Id.* at 241. He argued that consideration of only the parental choice of religion incorrectly presumed that the children would concur in their parents' religious preferences. Douglas urged that "[w]here the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views." *Id.* at 242.

⁶² The Court stated in *Yoder*, "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Id.* at 215. This seemingly confirms that the Court will not vindicate parental rights alone. Rather, before parents can mount a successful challenge under the due process clause to state interference with parental rights, a nexus must be sketched to independent, important constitutional interests—in this case, religion.

rights in *Meyer* and *Pierce*. Accordingly, the decisions in the *Meyer* family of cases balanced not only the parental decisions being challenged, but all the constitutional interests involved, against the state justifications asserted. In contrast, Justice Powell's opinion in *Moore* recognized a constitutionally protected right of a family to live together even without other, supporting constitutional interests.⁶³

Justice Powell significantly expanded *Meyer* and its progeny in yet another way. The holdings in the cases from *Meyer* through *Yoder* applied only to *parental* rights concerning child raising and did not consider the family's right to decide whether to live in an extended family or nuclear family setting. Thus, even though the *Prince* Court spoke broadly of a "private realm of family life which the state may not enter,"⁶⁴ it did so only in the context of a parent or guardian controlling a child's upbringing. The substantive due process protection afforded by Justice Powell's opinion in *Moore* went beyond this limited context. His opinion did not deal with Mrs. Moore's right to guide the upbringing of her grandchildren, the functional equivalent of the rights recognized in *Meyer*, *Pierce*, *Prince* and *Yoder*. That right was not directly at issue⁶⁵ and, in any event, such a right could have been exercised regardless of whether the extended family lived together. Rather, the rights at issue in *Moore* were the right of a family to reside together, the right to provide the most beneficial milieu for familial life, and the right to provide care and aid to all family members in need.⁶⁶

B. *The Privacy Decisions*

The other major area, apart from that of "family rights," in which the Court recently has utilized the mechanism of substantive due process, is the privacy area. Increasingly, constitutionally protected notions of privacy have bulwarked sensitive areas of daily life from state interference. The landmark decision of *Griswold v. Connecticut*⁶⁷ marks the genesis of this protection.

⁶³ 431 U.S. at 505-06. It is possible that the right not to be deprived of property without procedural due process and the first amendment right to associate constitute unarticulated conjoined interests supporting the right of the family to live together. See note 8 *supra*, for Justice Stevens' explanation of the procedural due process issue. However, Justice Powell's opinion failed to mention these interests.

⁶⁴ 321 U.S. at 166.

⁶⁵ The closest Justice Powell came to equating the situation in *Moore*, where the issue was the state's interference with a family's living arrangements, with the situation in *Meyer*, where the issue was the state's interference with childraising, occurred in the following remark: "Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of children." 431 U.S. at 505. Note that even in this context, the family's right to occupy the same dwelling is antecedent to the parental role. Further, the "parental" role in *Moore* may not have been stressed because of the confusing make-up and changing composition of the *Moore* household.

⁶⁶ Justice Powell noted that many circumstances required extended families to live together, "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Id.* at 505.

⁶⁷ 381 U.S. 479 (1965).

The *Moore* opinion may, in part, be premised upon the conceptions of privacy introduced in *Griswold* and developed by *Stanley v. Georgia*⁶⁸ and other cases creating a zone of privacy surrounding family living arrangements which the state may not lightly enter. Justice Powell cited these cases as having delineated areas of protection parallel to the rights recognized in *Moore*.⁶⁹ Examination of these decisions, however, indicates the extent to which the *Moore* decision actually extended these cases.

The earliest of the privacy decisions, *Griswold*, involved a Connecticut criminal statute which prohibited third parties from distributing contraceptive information to married individuals.⁷⁰ Four separate majority opinions were written condemning the statute. The common theme underlying the opinions was the existence of a peripheral zone of privacy, loosely derived from the explicit guarantees of the Bill of Rights. The existence of this zone of privacy suffices to protect "sensitive area[s] of privacy—that of the marital relation and the marital home" from intrusive state action.⁷¹ Thus, two themes emerged in *Griswold*, the privacy of the marital home and the privacy of the marital relation.⁷² Although the theme of the privacy of the physical home, safeguarded from unlawful governmental trespass, was not the principal theme in *Griswold*, the Court noted in passing that the spectre of the "police . . . search[ing] the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives,"⁷³ was constitutionally offensive.

The Court further developed the privacy of the home theme in *Stanley v. Georgia*,⁷⁴ which held that a state statute prohibiting possession of obscene materials in one's own home violated the fourteenth amendment. The decision in *Stanley* was grounded on the premise that certain forms of unprotected activities remain shielded from state examination so long as the activity takes place within the confines of a private residence. Although the state may permissibly regulate public displays or perusal of obscene material, legitimate expectations of privacy protect the individual from state regulation of the private use of obscene material within the home.⁷⁵ Thus, *Stanley* recognized that special considerations of privacy attach to a person's residence—the constitutional equivalent of the old adage "a man's home is his castle." This view of *Stanley* has been confirmed by subsequent decisions of the Court in which activities protected from governmental intrusion when conducted within the home became vulnerable to governmental prosecution when carried beyond the shelter of the domiciliary threshold.⁷⁶ Therefore, the privacy right is at least partially grounded on the notion of the physical sanctity of the home.

⁶⁸ 394 U.S. 557 (1969).

⁶⁹ 431 U.S. at 499.

⁷⁰ 381 U.S. at 480.

⁷¹ *Id.* at 495. (Goldberg, J., concurring).

⁷² See Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 687-97 (1973) for a detailed discussion of these themes and their relation to the constitutional concept of privacy developed by the Court. See also Note, *Right of Privacy*, 26 STAN. L. REV. 1161 (1974).

⁷³ 381 U.S. at 485.

⁷⁴ 394 U.S. 557 (1969).

⁷⁵ See *id.* at 565.

⁷⁶ See, e.g., *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

Although Justice Powell's opinion in *Moore* revolved in part about the concept of the sanctity of Mrs. Moore's home, his opinion did not explicitly rest upon protection of the physical privacy of the home as did *Stanley*.⁷⁷ *Stanley* recognized the physical sanctity of the home without regard to the activities taking place within its walls. In contrast to *Stanley*, Justice Powell's opinion in *Moore*, rather than relying solely on protection of the physical locus, emphasized a protectable interest of family life, the essence of life within the home.⁷⁸ The constitutional violation in *Moore*, then, was the state intrusion upon the protected "realm of family life"⁷⁹ coincidentally situated in the home, not upon the physical locus of the home. Therefore, in *Moore*, Justice Powell expanded the concept of privacy recognized in *Stanley*, transforming it from one centered on the physical situs of the home to one based on an abstract notion of the sanctity of the family itself.

Justice Powell's theme of family life finds some support in Justice Harlan's dissent in *Poe v. Ullman*.⁸⁰ *Poe* involved a challenge to the same statute at issue in *Griswold*. Justice Harlan, rejecting the plurality's dismissal for lack of justiciability, addressed the merits. He noted that protection of family life within the home flowed inevitably from the fourth and fourteenth amendments' physical protection of the home.⁸¹ Justice Harlan further reasoned that the conduct sought to be proscribed by the statute, contraceptive usage by married couples, is contained within the concept of family life, and therefore protected under the fourteenth amendment.⁸² Although Justice Harlan's dissent in *Poe* provided a basis for the family life interests protected in *Moore*, his opinion was not directed at the same issues as those in *Moore*. Thus, even Justice Harlan's dissent in *Poe* does not fully support Justice Powell's recognition of certain family interests in *Moore*.

Similarly, Justice Powell's citation of *Eisenstadt v. Baird*⁸³ is curious since the case seems unrelated to Justice Powell's concept of *Moore*. In *Eisenstadt*, a case decided shortly after the cases recognizing the concept of privacy based on the physical sanctity of the home, the Court embraced a broader concept of privacy based on an individual's integrity.⁸⁴ *Eisenstadt* challenged a Massachusetts statute prohibiting the display or distribution of contraceptive devices except by pharmacists or physicians.⁸⁵ The statute

⁷⁷ It may well be that the spectre of the city housing inspector marching into the Moore living room in order to ascertain a violation of the statute formed an implied basis for Justice Powell's extension of constitutional protection to family living arrangements. However, his opinion did not explicitly mention this aspect. Therefore, it is unlikely that the physical intrusion of an inspection played more than a tangential role in the decision. As he noted: "here we have not an intrusion into the home so much as on the life which characteristically has its place in the home" 431 U.S. at 503 n.12 (quoting *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

⁷⁸ 431 U.S. at 503-05.

⁷⁹ *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. at 166).

⁸⁰ 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

⁸¹ *Id.* at 551.

⁸² *Id.* at 551-54.

⁸³ 405 U.S. 438 (1972).

⁸⁴ *Id.* at 453. The *Eisenstadt* Court used an equal protection analysis rather than a substantive due process analysis in finding a constitutional violation. However, the protection afforded in *Eisenstadt* is based upon privacy constructs and the protection of the individual from state violation of privacy. See Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 693-97 (1973).

⁸⁵ MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1970).

denied unmarried individuals access to contraceptives. The Court, in striking down the statute, noted that privacy encompasses freedom from "unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁸⁶ Thus, *Eisenstadt's* formulation of protectable privacy interests made it clear that privacy rights need not depend upon any particular relationship but that privacy can be individual in nature.⁸⁷

Although Justice Powell cited *Eisenstadt* as support for his opinion in *Moore*, the notion of privacy stemming from the integrity of the individual did not seem to be reflected in his opinion. The plurality in *Moore* might have analyzed the interest invaded as inhering within a single person—the right of Moore to reside with her grandson—rather than as interests harbored within family groupings.⁸⁸ But Justice Powell's opinion essentially ignored Moore's personal interest in living with her grandchildren.⁸⁹ Similarly, the plurality ignored any individual right the grandchild might possess in continued household residence. Instead, the interests of both grandmother and grandchild were analyzed together within the familial relationship. The constitutional protection accorded Mrs. Moore derived from that afforded the Moore family. Thus, it is the preservation of the family grouping itself that triggered the constitutional protection found in *Moore*, and not the right of a particular individual to reside with family members. Therefore, the theme of individual protection, developed in *Eisenstadt*, is inapplicable to *Moore*.

Since neither the *Meyer* theme of parent-child protection nor the *Griswold* and *Stanley* themes shielding home or individual from intrusive governmental action were precisely applicable to *Moore*, the Powell decision established new themes in order to explicate the protectable interest in the matter at hand.

C. New Directions in Moore

Inasmuch as the prior decisions of the Court under the due process clause did not address the precise issue in *Moore*, Justice Powell's grant of constitutional protection to the family opens up a new area of substantive due process. His idea that the family unit is partially immune from obtrusive state acts, while conceptually related to the rationale of *Meyer* and its progeny is, in fact, very different.

Having established the existence of the constitutionally protected right of a family to live together, Justice Powell faced the further question of the

⁸⁶ 405 U.S. at 453.

⁸⁷ It is clear that *Eisenstadt* presents a more expansive view of privacy than *Griswold*. There is language in *Griswold* to the effect that Connecticut could permissibly have regulated access to contraceptive devices by unmarried people. The *Griswold* Court appeared to give more weight to the marital relationship than did the *Eisenstadt* Court.

⁸⁸ Justice Powell's opinion in *Moore* talked in terms of family rights rather than individual rights; for instance, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." 431 U.S. at 499.

⁸⁹ Necessarily, due to the nature of the criminal offense, Mrs. Moore's tolerance of the illegal residence of her grandson, the Court addressed the interests of Mrs. Moore alone. However, as pointed out previously, the bulk of the plurality opinion discussed vindication of family rights. See text at notes 19-23 *supra*.

limits of that right. His opinion makes it clear that the activities protected within the home do not cease at nuclear family borders: "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."⁹⁰ However, the decision leaves for future resolution the question how attenuated an extended family relationship can be and still fall within the purview of the protectable interests recognized by Justice Powell's decision in *Moore*.⁹¹ Furthermore, nothing in Justice Powell's opinion in *Moore* prevents the recognition of the sanctity of the extended family in other contexts. At a minimum, extended family decisions involving educational and religious choices would appear to be accorded substantial protection from intrusive regulation.⁹²

III. THE STANDARD OF REVIEW

The establishment of the family's right to make certain decisions regarding living arrangements was only the first step in Justice Powell's analysis of *Moore*. Since even constitutionally protected rights at times must yield to state interests, Justice Powell had to review East Cleveland's interests in prohibiting extended families from living together to see if these interests outweighed the Moores' interest in residing together.

⁹⁰ 431 U.S. at 504. The Court refused to accept the argument that relationships beyond those of husband-wife, parent-child, or brother-sister are appropriate subjects for extensive governmental regulation consistent with the due process clause. While the city attempted to distinguish *Moore* from *Meyer* and *Pierce* by arguing that these decisions at most indicated a right to live together extending only to the borders of the nuclear family, Justice Powell's opinion rejected this contention, stating, "[t]o be sure, [*Meyer* and *Pierce*] did not expressly consider the family relationship presented here But . . . we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 500-01.

⁹¹ In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) [*OFFER*], the Court was confronted with a case seeking to extend the horizons of *Moore*. *OFFER* challenged §§ 383(2) and 400 of the New York Social Services Law authorizing the removal of foster children from foster homes without a formal proceeding. Although the Court found that foster families have a limited interest, under the due process clause of the fourteenth amendment, in keeping the foster family together, this interest was constrained by the contract between foster parent and state. Moreover, any of the foster family's rights must give way to the superior interest of the natural parents. *Id.* at 846-47.

The opinion of the Court in *OFFER* fleshed out the definition of "family" for purposes of substantive due process determinations. The Court noted that, "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.* at 843. However, a biological nexus is not always necessary before the Court will recognize a family unit. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (guardian-ward relationship). The distinguishing factors dividing family groupings from those with a mere social, political or economic relationship "stems from the emotional attachments that derive from the intimacy of daily association . . ." *OFFER*, 431 U.S. at 844. It thus appears that neither *Moore* nor *OFFER* totally forecloses groupings of unrelated individuals from successful defense against state intrusion under the fourteenth amendment.

⁹² Cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state may not proscribe religious and private school education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state may not prohibit education of children in foreign languages).

Justice Powell implied that uncles, aunts, cousins and grandparents are within the class of extended family members. 431 U.S. at 504. He further implied that as relationships become more remote the family interest diminishes: "the choice of relatives in this degree of kinship to live together may not lightly be denied by the State." *Id.* at 505-06 (emphasis added).

The City of East Cleveland argued in *Moore* that the proper standard of review was the standard for testing city ordinances absent substantive due process considerations. That test, set forth in *Euclid v. Ambler Realty Co.*,⁹³ requires an ordinance to be upheld as constitutional unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."⁹⁴ Justice Powell refused to apply such a lenient standard, however, reasoning that "when a city undertakes such intrusive regulation of the family, . . . the usual judicial deference to the legislature is inappropriate."⁹⁵ Instead, Justice Powell indicated that the "Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."⁹⁶ Although finding the proffered governmental interests legitimate, Justice Powell concluded that the challenged ordinance served these interests only marginally,⁹⁷ and therefore struck down the ordinance as unconstitutional. Justice Powell, however, failed to clearly explicate what standard of review he employed, and he provided no coherent indication of what weight should be accorded to the competing interests at stake.

The standard of review in recent due process cases has focused on the interest underlying the challenged regulation and the nexus between the interest and the challenged regulation.⁹⁸ Where the interest at issue is afforded only a low level of constitutional protection, the state need only demonstrate that its legislation was intended to serve legitimate state ends and that *some* conceivable nexus exists between these interests and the legislation.⁹⁹ However, where the interests at issue are accorded more constitutional protection, the state has to demonstrate a correspondingly stronger interest and a greater nexus between the state interests and the means chosen to effectuate these interests.¹⁰⁰

Justice Powell's opinion in *Moore* does not follow this traditional analysis. He failed to state explicitly how much weight he accorded to the family interests at stake in *Moore*, although it is clear that he gave *some* substantive weight to these interests. If no substantive weight were afforded to the Moores' interest, a showing of some rational relation of the regulation to permissible state interests would have sufficed to sustain the ordinance under traditional due process analysis. However, Justice Powell required more than simply a "rational relation" between East Cleveland's interests and the ordinance in *Moore*. The opinion stated that although the underly-

⁹³ 272 U.S. 365 (1926). The *Euclid* standard is essentially a rational relation test in which the burden is on the challenger not only to prove the constitutional violation but also to show the arbitrary nature of the governmental action.

⁹⁴ *Id.* at 395.

⁹⁵ 431 U.S. at 499.

⁹⁶ *Id.*

⁹⁷ *Id.* at 499-500.

⁹⁸ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down a statute prohibiting advertisement or display of contraceptive devices and restricting distribution of such devices except by licensed pharmacist).

⁹⁹ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937).

¹⁰⁰ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977); *Roe v. Wade*, 410 U.S. 113, 154 (1973). Cf. *Maher v. Roe*, 432 U.S. 464 (1977) (Connecticut regulation prohibiting funding of non-medically related abortions not an undue burden on right to abortion, thereby requiring only a low degree of judicial scrutiny).

ing objectives of the ordinance—preventing overpopulation, alleviating traffic congestion and monetary burdens upon the education system—were legitimate prophylactic goals, the East Cleveland ordinance had but a tenuous relation to these goals.¹⁰¹ Thus, Justice Powell implied that the Moore family's interests are sufficiently weighty that East Cleveland must demonstrate more than a rational relationship between its ordinance and its own interests before it can permissibly intrude upon those family interests. Nevertheless, how much substantive weight should be afforded to these family interests remains unclear. The failure of the Powell opinion adequately to address this issue deprives the *Moore* decision of much of its potential precedential value. This is particularly unfortunate inasmuch as the federal courts are increasingly confronted with challenges to governmental regulation of the family under the due process clause.

Prior to the decision in *Moore*, two federal district court decisions had enunciated a "fundamental right of family integrity" meriting application of the strict scrutiny means-ends test based upon the issues before the courts.¹⁰² Although the judicial approach employed in *Moore* is not irreconcilable with the usage of a strict scrutiny test in analyzing state action substantially disruptive of family unity, *Moore* does not give guidance to the lower courts as to the substantive weight to be accorded to family interests in particular situations.

CONCLUSION

The *Moore* decision represents a synthesis and extension of both the family themes of *Meyer* and its progeny, and privacy decisions commencing with *Griswold*. *Moore* has explicitly set forth a new theme meriting substantive constitutional protection under the due process clause—the integrity of the family unit and its right to make certain decisions about its lifestyle. Thus, future state intrusions into this area will be scrutinized carefully by the Court. Unfortunately, the failure of the *Moore* decision to specify the quantum of weight to be accorded the family interests or to delineate boundaries of its protection of family interests means that the precise dimensions of protected family interests must await future decisions.

The explicit recognition of familial rights assures that the *Moore* decision will have ramifications in areas where state intrusions into the family have traditionally been acceptable. Recognition of a fundamental right of

¹⁰¹ 431 U.S. at 500.

¹⁰² See *Alsager v. District Court*, 406 F. Supp. 10, 21-22 (S.D. Iowa 1975). In *Alsager* the court applied strict judicial scrutiny in striking down the Iowa parental termination statute. See also *Roe v. Conn.*, 417 F. Supp. 769, 777 (M.D. Ala. 1976) (applying strict scrutiny in striking an Alabama summary seizure statute). Impingement of fundamental rights under substantive due process analysis requires application of a strict scrutiny standard of review akin to that used in equal protection analysis. Strict scrutiny review requires that once the challenger has demonstrated infringement of a protected right, the state must demonstrate the existence of a compelling or overriding state interest in order to justify the invasion. Even if the state can demonstrate the existence of such an interest, it must further show the non-availability of alternative means less intrusive of the challenger's constitutionally protected interest. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973). For the distinction between the use of strict scrutiny analysis in equal protection and substantive due process analyses, see generally *Eby, The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

family integrity is likely to have its greatest impact in the areas of custody proceedings, neglect and dependency determination, parental termination and state ordered medical treatment. In these areas the state interest in the protection of the welfare of the child under its exercise of traditional police powers has long been recognized. In the past these statutes have been held immune from substantive attack under the due process clause and have been vulnerable only to challenge for violations of the procedural due process guarantees. Recognition of a right of family integrity could require greater state justification than traditionally required before intrusion into the family is permissible.

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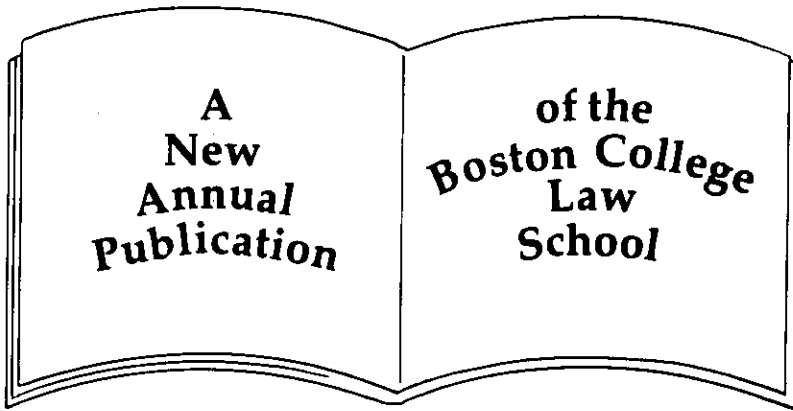
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