



Supreme Court of the United States

Warren v. City of Madison, Wisconsin

By Alexis Ixtlahuac

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 06-110890

Warren Plaintiff-Appellee,

versus

City of Madison, Wisconsin Defendant-Appellant

Appeal from the United States District Court
For the Western District of Wisconsin

Argued: November 3, 2011

Decided: December 1, 2011

Before SOUZA, Chief Judge, ROGERS, ALVAREZ, STANTON, HULL, LINDQUIST, GREY,
PIMENTEL, ADAMS, Associate Judges

OPINIONS:

Majority: Antony Souza, *Chief Judge*. Joined by: Alvarez, Stanton, Lindquist,
Pimentel

Dissent: Roger Hull, Circuit Judge. Joined by: Rogers, Grey, Adams

Facts of the Case

A.

Warren lives in her Madison, Wisconsin, home with her daughter and two grandsons (the grandsons are first cousins). The City of Madison has a housing ordinance that limits occupancy of a dwelling unit to members of a single family, but defines "family" in such a way that the appellant's household does not qualify. The Code defines the term "family" as follows:

“‘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 house-keeping unit in a single dwelling unit, but limited to the following:

Husband or wife of the nominal head of the household.

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.

Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

Notwithstanding the provisions of subsection (a) 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. Nor may the family contain more than one spouse and the dependent children of the dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household. 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.

A family may consist of one individual.

Thus, the "family" could include the head of the household and spouse and any of their parents. Unmarried children with no children are permitted but if these children had a family themselves (either a spouse or children), only one such family could live within the original household. The appellant, Mrs. Warren lived with her son, her son's child, and a second grandson from a different son.

Appellant was convicted of a criminal violation when she refused to comply with the household member guidelines outlined by the ordinance. Her conviction was upheld on appeal to the District Court of the Western District of Wisconsin. The District Court rejected Warren's claim that the Madison ordinance violates her Fourteenth Amendment right to Due Process and Equal Protection under the law. The City of Madison contends that the ordinance should be sustained under *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which upheld an ordinance imposing limits on the types of groups that could occupy a single dwelling unit.

B.

The Sixth Circuit District Court of Appeals, in a 5-4 decision, decided to reverse the decision of the US District Court of Western Wisconsin. The Circuit Court held that this intrusive regulation of the family was so arbitrary and unfair that it violated Warren's right to due process. This decision was

based primarily upon a different interpretation of the *Belle Terre vs. Boraas* precedent. The judges also developed a different application of the Fourteenth Amendment's Due Process Clause (DPC). However, both the interpretation of the *Boraas* precedent and the application of the DPC are controversial aspects of Constitutional Law. Therefore, a more detailed introduction of these Constitutional elements is required.

Applicable Case Law

14th Amendment Due Process Clause:

The 14th Amendment of the United States contains several important provisions including the Due Process Clause.

This clause states: "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."

Thus, Mrs. Warren claims that the city ordinance violates her right to family living. The majority of the Sixth Circuit Court of Appeals agrees, and it discusses the range of choices in family style that fall under the category of liberties protected by the Due Process Clause. (For more information on the DPC and the substantive due process claim made in this case please see Section III part A. of this brief).

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

This case was the first significant case regarding the relatively new practice of zoning and served to substantially bolster zoning ordinances in towns across the United States. Ambler Realty owned 68 acres of land in the village of Euclid, a suburb of Cleveland. The village, in an attempt to prevent industrial Cleveland from growing into and subsuming Euclid and prevent the growth of industry developed a zoning ordinance. The property in question was divided into three use classes, as well as various height and area classes, thereby hindering Ambler Realty from developing the land for industry. Ambler Realty sued the village, arguing that the zoning ordinance had substantially reduced the value of the land by limiting its use, amounting to a deprivation of Ambler's liberty and property without due process.

The Court held that the zoning ordinance was not an unreasonable extension of the village's police power and did not have the character of arbitrary fiat. Thus the ordinance was valid under the Constitution. The Court noted that the challenger in a due process case would have to show that the law in question is discriminatory and has no rational basis. The Court found

that Euclid's zoning ordinance in fact did have a rational basis. Both sides in this case use *Euclid* to demonstrate that, "based on a limited standard of review, before a zoning ordinance can be declared unconstitutional, it must be shown to be clearly arbitrary and unreasonable as having no substantial relation to the public health, safety, morals, or general welfare."

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974):

In this case, the United States Supreme Court upheld the constitutionality of a zoning ordinance in the village of Belle Terre that limited the number of unrelated individuals that may inhabit a dwelling.

The ordinance defined single family as: "one or more persons related by blood, adoption, or marriage, living and cooking together as a single house-keeping unit" or a maximum of two people who were not related by blood or marriage. Bruce Boraas leased a house zoned for a single family to serve as the home for a group of students. The Village of Belle Terre then brought an order of eviction claiming that the students did not constitute a family and thus were excluded from living in the area zoned for single-families. Boraas argued that the ordinance violated his Fourteenth Amendment rights. The ordinance, according to Boraas, was simply enacted because the city did not approve of unmarried couples living in the same dwelling. Boraas further claimed that, "the ordinance is antithetical to the nation's...ideology and self-perception as an open, egalitarian, and integrated society."

The majority opinion, drafted by Justice William O. Douglas, declared that since the ordinance established no form of racial discrimination or infringed upon a fundamental right, the Court could utilize the rational basis test under the Due Process Clause of the Fourteenth Amendment. The Court found, "no evidence to support" any animosity towards unmarried couples, and it cited the fact that the ordinance permitted families to host whomever they wanted within their domicile. Furthermore, under the rational basis test, the Court determined that the city had a rational, legitimate reason in establishing quiet neighborhoods by prohibiting large numbers of unrelated individuals from cohabiting the same dwelling.

Griswold v. Connecticut, 381 U.S. 479, 501 (1965):

This case involved a Connecticut law that prohibited the use of "any drug, medicinal article or instrument for the purpose of preventing conception." The majority invalidated the law on the grounds that it violated the "right to marital privacy".

Although the Bill of Rights does not explicitly mention "privacy" Justice Douglas' opinion for the majority argued that the right was to be found in the "emanations" of other constitutional protections. In other words, other rights that are specifically enumerated in the Constitution suggest a right to privacy because without a right to privacy these other rights would be severely limited. As the majority states in this case: "Appropriate limits on substantive due process come not from drawing arbitrary lines" but from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society."

Cleveland Board of Education v. LaFleur 414 U.S. 632 (1974):

In 1948 a National Education Association survey showed 43% of schools as having no maternity leave, and the rest having compulsory maternity leave. The compulsory maternity leave rules were discriminatory, as they implied that women were incapable of making their own decisions about work, health care, and their professional competency. Most of these compulsory maternity leave rules required teachers to take leave 4-6 months before childbirth until well after the child was born. Virtually all maternity leaves were unpaid. Essentially, women who were visibly pregnant were not allowed to work. The stated rationale of these compulsory maternity leave laws were: that pregnant women could not meet the physical or mental demands of the job, that pregnancy interrupted the continuity of instruction for students, and that pregnant women might get hurt on the job. In this case the court found that this reasoning was faulty.

The Supreme Court ruled that the mandatory maternity leave rules were unconstitutional under the Due Process Clauses in the 5th and 14th amendments. Essentially, the rules were found to be too arbitrary and having no relation to individual medical conditions and with no way to make exceptions for good reason. In regards to this cast the Court stated: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."

Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

On April 9, 1919, Nebraska enacted a statute called "An act relating to the teaching of foreign languages in the state of Nebraska," commonly known as the Siman Act. It imposed restrictions on both the use of a foreign language as a medium of instruction and on foreign languages as a subject of study. With respect to the use of a foreign language while teaching, it provided that "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language." With respect to foreign-language education, it prohibited instruction of children who had yet to successfully complete the eighth grade. On May 25, 1920, Robert T. Meyer, while an instructor in Zion Parochial School, a one-room schoolhouse in Hampton, Nebraska, taught the subject of reading in the German language to 10-year-old Raymond Parpart, a fourth-grader. The Hamilton County Attorney entered the classroom and discovered Parpart reading from the Bible in German. He charged Meyer with violating the Siman Act.

In the majority opinion, the Court stated that the "liberty" protected by the Due Process clause "[w]ithout doubt...denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations 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, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Furthermore: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."

This is one of the first cases in which the Court engages in what is known as Substantive Due Process with regards to civil liberties. In *City of Madison vs. Warren*, the majority opinion uses this decision to show how Substantive Due Process (discussed in further detail in Section III) may protect

the private realm of family life.

Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925):

On November 7, 1922, the voters of Oregon passed an initiative amending Oregon Law Section 5259, the Compulsory Education Act. The citizens' initiative was primarily aimed at eliminating parochial schools, including Catholic schools. The Compulsory Education Act, prior to amendment, had required all Oregon children between eight and sixteen years of age to attend public school. The Sisters of the Holy Names and Hill Military Academy separately sued Walter Pierce, the governor of Oregon, along with Isaac H. Van Winkle, the state attorney general, and Stanley Myers, district attorney of Multnomah County (of which Portland is the county seat, and where both the Sisters and the Academy were located). The Society of Sisters alleged that: "the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession."

The Court decided in favor of the Society of Sisters and argued that children were not "the mere creature[s] of the state" and that, by its very nature, the traditional understanding of the term *liberty* prevented the state from forcing students to accept instruction only from public schools. Furthermore, the responsibility of choosing a school belonged to the child's parents or guardians. The ability to make such a choice was a "liberty" protected by the Fourteenth Amendment. The justices in this current case use *Pierce* to argue both for and against the "private realm" of family life.

Prince v. Massachusetts 321 U.S. 158(1944):

In 1943, a Jehovah's Witness woman named Sarah Prince was convicted for violating child labor laws. She was the guardian of a nine-year old girl, Betty M. Simmons, whom she had brought into a downtown area to preach on the streets. The preaching involved distributing literature in exchange for voluntary contributions. Prince argued that the state's child labor laws violated the two's First Amendment right to exercise their religion. Furthermore, Prince argued that Betty was denied equal protection under the law for the labor laws discriminated against Betty serving as a minister of her religion simply because of her age.

In their decision, the Court held that the government has broad authority to regulate the actions and treatment of children. Parental authority is not absolute and can be permissibly restricted if doing so is in the interests of a child's welfare. While children share many of the rights of adults, they face different potential harms from similar activities. In the majority opinion the Court stated: "The family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither the rights of religion nor the rights of parenthood are beyond limitation. The right to practice religion freely does not include the right to expose the community or the child to communicable disease or the latter to ill-health or death..." Thus this case established that the family is not beyond regulation by the government.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958):

In 1956, Alabama sought to prevent the NAACP from conducting further business in the state. After the circuit court issued a restraining order, the state issued a subpoena for various records, including the NAACP's membership lists. The text of the United States Constitution does not specifically mention a "right to association". However, in this famous case *NAACP vs. Alabama* the Supreme Court held that the freedom of association is an essential part of the First Amendment's protection of the Freedom of Speech because in many cases citizens can only engage in effective speech when they are allowed to join with others to advance beliefs and ideas. Thus, this right is an inseparable part of the Due Process Clause of the Fourteenth Amendment.

As the justices in the minority argue in this case "Freedom of association has been constitutionally recognized because it is often indispensable to effectuation of explicit First Amendment guarantees. But the scope of the associational right, until now, at least, has been limited to the constitutional need that created it; obviously not every "association" is for First Amendment purposes or serves to promote the ideological freedom that the First Amendment was designed to protect." Therefore, the minority argue insist that the "association" in *City of Madison v. Warren* is not for any purpose relating to the promotion of speech, assembly, the press, or religion.

DISCUSSION

Substantive Due Process

Substantive Due Process (SDP) is a legal theory that is applicable under the 5th and 14th Constitutional Amendments. For the sake of this case, we will focus on SDP as applied under the 14th Amendment. SDP is a theory of law that allows courts to enforce limits on executive powers and authority. The Court now recognizes three types of rights under SDP: the rights derived from the first eight amendments in the Bill of Rights, the right to participate in the political process, and the rights of "discrete and insular minorities".

If public regulations or legislation seek to limit the actions of its citizens in a way that infringes upon a fundamental right, the government must pass strict scrutiny review. Strict scrutiny requires that the government proves that the law or act is narrowly tailored and serves a compelling government interest. At the conference we will talk more about what "fundamental right," "narrowly tailored" and "compelling government interest" mean. For this case, it is important to understand that the judges are not only debating about whether or not defining the composition of your family unit is a fundamental right, but also whether the government has a compelling interest to limit this definition.

SDP is to be distinguished from PDP, or procedural due process. PDP protects citizens from coercive government practices by ensuring that adjudication processes under laws are fair and impartial. In contrast, SDP protects citizens against legislation and policy that exceed the limits of government authority, regardless of how fair those regulations may be enforced.

B. Role of the State in Family Decisions

This case reaches beyond fundamental decisions or choices, such as the right to choose to have children, in order to discuss the nature of the actual composition of the family unit. As such, it raises the important Constitutional question: "Can the state determine configurations of family living, or are these matters that should be left to private determination?" As is evidenced by the sparse precedent cases presented in Section II, this issue had rarely been touched on in previous cases. Some other example of government intervention in family living include *Reynolds vs. US* (1878), which made polygamy illegal, and *Loving vs. Virginia* (1967), which legalized interracial marriage. In this case, the government asserts that it had a legitimate and compelling interest in limiting the definition of the family to reduce overcrowding, traffic, and to ensure that this public policy benefitted those families who needed it most. However, in this case the majority argues that "family living" is such a fundamental part of American history and culture that it deserves protection under the Fourteenth Amendment.

Case Opinions

ANTHONY SOUZA, *Chief Judge:*

I

Madison's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. However, the ordinance contains an unusual and complicated section that limits a "family" to only a few categories of related individuals. Because her family fits none of those categories, Warren stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.

II

The city of Madison argues that the Court's decision in *Village of Belle Terre v. Boraas* requires us to support the housing ordinance. Belle Terre, like Madison, imposed limits on the types of groups that could occupy a single dwelling unit. When we applied the constitutional standard announced in the Court's leading land-use case, *Euclid v. Ambler Realty Co* we sustained the Belle Terre ordinance on the ground that it served a rational, permissible state objective.

But one overriding factor sets this case apart from *Belle Terre*. The ordinance in *Belle Terre* affected only unrelated individuals. Thus, it allowed all who were related by, "blood, adoption, or marriage" to live together. When we sustained the Belle Terre ordinance we were careful to note that it promoted, "family needs" and "family values." The City of Madison, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family. This ordinance explicitly selects certain categories of relatives who may live together and declares that others may not. In particular, it criminalizes a grandmother's choice to live with her grandson.

When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* are applicable. Furthermore, the usual judicial deference to the legislature is inappropriate because, as stated in *Cleveland Board of Education v. LaFleur*, "this Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Many

cases, tracing their lineage to *Meyer v. Nebraska* and *Pierce v. Society of Sisters* have acknowledged a "private realm of family life which the state cannot enter" (*Griswold vs. Connecticut*). Of course, the family is not beyond regulation (*Prince v. Massachusetts*), but when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the validity of the governmental interests and the extent to which the regulation serves these interests. In other words, the court must apply strict scrutiny.

When we apply strict scrutiny we must come to the conclusion that this ordinance is not permissible. Madison seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on its' school system. Although these are legitimate goals, the ordinance is not narrowly tailored to serve these interests. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household.

III

Madison wishes to distinguish this case from *Meyer*, *Pierce*, and *Griswold*. According to the city, *Meyer* does not "give grandmothers any fundamental rights with respect to grandsons," and suggests that any constitutional right to live together as a family extends only to the nuclear family - essentially a couple and their dependent children. To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing or with traditional parental authority in matters of child rearing and education. But unless we ignore the basic reasons why certain rights associated with the family have been protected 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.

Understanding those reasons requires careful attention to this Court's function under the Due Process Clause. Mr. Justice Harlan described it eloquently: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. Although this Court's history counsels caution and restraint it does not require what the city urges here: cutting off any protection of family rights at the first convenient, arbitrary boundary - the nuclear family.

Appropriate limits on SDP come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society" (*Griswold v. Connecticut*). Our precedent establishes that the Constitution protects the sanctity

of the family and deems it a fundamental right precisely because the institution of the family is deeply rooted in this nation's history and tradition. Through the family that we pass down many of our most cherished moral and cultural values.

Our tradition by no means limits respect for the family to 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 is 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 wisdom of civilization that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and share a common home. Decisions concerning child rearing, which *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. Especially in times of economic adversity the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. *Pierce* struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution, "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." By the same token the Constitution prevents Madison from standardizing its children - and its adults - by forcing all to live in certain narrowly defined family patterns.

Reversed.

ROGER HULL, Circuit Judge. Joined by Judges ROGERS, GRAY, and ADAMS, dissenting:

I

In *Village of Belle Terre v. Boraas*, the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single-housekeeping unit; it forbade occupancy by any group of three or more persons who were not related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the Fourteenth Amendment or infringe any other rights or freedoms protected by the Constitution.

The present case brings before us a similar ordinance. The Madison ordinance limits the occupancy of any dwelling unit to a single family, but it defines "family" to include only certain combinations of blood relatives. The question presented, as we view it, is whether the decision in *Belle Terre* is applicable, or whether the Constitution requires a different result because Madison's definition of "family" is more restrictive than that used in the *Belle Terre* case.

In January 2008, a city housing inspector cited Mrs. Warren for occupation of the premises by more than one family. She received a notice of violation directing her to correct the situation, which she did not do. Sixteen months passed, during which the city repeatedly complained about the violation. Mrs. Moore did not request relief from the Board of Building Code Appeals, although the Code gives the Board the explicit power to grant a variance "where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance" Finally, in May 2009, a municipal court found Mrs. Moore guilty of violating the single-family occupancy ordinance. The court overruled her motion to dismiss the charge, rejecting her claim that the ordinance's definition of "family" is invalid on its face under the United States Constitution. The Wisconsin Court of Appeals affirmed on the authority of *Village of Belle Terre v. Boraas*, and the Wisconsin Supreme Court dismissed Mrs. Warren's appeal.

In our view, Warren's claim that the ordinance in question invades constitutionally protected rights of association and privacy is in large part answered by the *Belle Terre* decision. The argument was made there that a municipality could not zone its land exclusively for single-family occupancy because to do so would interfere with protected rights of privacy or association. We rejected this contention, and held that the ordinance at issue "involve[d] no 'fundamental' right guaranteed by the Constitution, such as the right of association (*NAACP v. Alabama*) or any rights of privacy (*Griswold v. Connecticut*).

II

The *Belle Terre* decision thus disposes of the appellant's contentions more general notions about the "privacy of the home." Warren's argument that every person has a constitutional right to share his residence with whomever he pleases, and that such choices are "beyond the province of legitimate governmental intrusion," reflects the same, unpersuasive argument made by Boraas in *Belle Terre*.

To be sure, the ordinance involved in *Belle Terre* did not prevent blood relatives from occupying the same dwelling, and the Court's decision in that case does not, therefore, disregard the appellant's arguments based specifically on the ties of kinship present in this case. Nonetheless, we hold, for the following reasons, that the existence of those ties does not elevate either the appellant's claim of associational freedom or her claim of privacy to a level invoking constitutional protection.

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. Freedom of association has been constitutionally recognized because it is often indispensable to First Amendment guarantees involving freedom of speech and expression. (*NAACP v. Alabama*) But the scope of the associational right, until now, at least, has been limited to the constitutional need that created it. Obviously not every "association" is for First Amendment purposes or serves to promote the ideological freedom that the First Amendment was designed to protect.

The "association" in this case is not for any purpose relating to the promotion of speech, assembly, the press, or religion. And wherever the outer boundaries of constitutional protection of freedom of association may eventually turn out to be, they surely do not extend to those who assert no interest other than the gratification, convenience, and economy of sharing the same residence.

The appellant is considerably more justified in asserting that the Madison ordinance intrudes upon "the private realm of family life which the state cannot enter" (*Prince v. Massachusetts*). Several decisions of the Court have identified specific aspects of what might broadly be termed "private family life" that are constitutionally protected against state interference (*Griswold v. Connecticut*, *Pierce v. Society of Sisters*, *Meyer v. Nebraska*).

Although the appellant's desire to share a single-dwelling unit also involves "private family life" in a sense, that desire cannot be equated with any of the interests protected in the cases just cited. The ordinance about which the appellant complains did not impede her choice to have or not to have children, and it did not dictate to her how her own children were to be nurtured and reared. The ordinance clearly does not prevent parents from living together or living with their dependent offspring.

But even though the Court's previous cases are not directly relevant, the appellant contends that the importance of the "extended family" in American society requires us to hold that her decision to share her residence with her grandsons may not be interfered with by the State. This decision, like the decisions involved in bearing and raising children, is said to be an aspect of "family life" entitled to substantive protection under the Constitution. When the Court has found that the Fourteenth Amendment placed a substantive limitation on a state's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed, "implicit in the concept of ordered liberty.'" The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

III

Viewed in the light of these principles, I do not think Madison's definition of "family" offends the Constitution. The city has undisputed power to ordain single-family residential occupancy (*Village of Belle Terre v. Boraas, supra*; *Euclid v. Ambler Realty Co.*). And that power plainly carries with it the power to say what a "family" is. Here the city has defined "family" to include not only father, mother, and dependent children, but several other close relatives as well. The ordinance's definition of family is rationally designed to carry out the legitimate governmental purposes identified in the *Belle Terre* opinion: "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."

Obviously, Madison might have as easily, and perhaps as effectively, determined a different definition of "family." But a line could hardly be drawn that would not sooner or later become the target of a challenge like the appellant's. If "family" included all of the householder's grandchildren

there would doubtless be the hard case of an orphaned niece or nephew. If, as the appellant suggests, a "family" must include all blood relatives, what of longtime friends? The point is that any definition would produce hardships in some cases without materially advancing the legislative purpose. That this ordinance creates some hardship is no reason to hold it as unconstitutional - unless we are to use our power to interpret the United States Constitution as a sort of generalized authority to correct even the minimal inequity wherever it surfaces. It is not for us to rewrite the ordinance, or substitute our judgment for the discretion of the prosecutor who elected to initiate this litigation.

Furthermore, the city of Madison recognized the difficult problems its ordinances were bound to create in particular cases, and therefore established variance provisions that established a procedure for the Board to receive complaints and to resolve at least some of them. Section 1311.01 of the Code establishes a Board of Building Code Appeals. Section 1311.02 then provides, in the pertinent part:

"The Board of Building Code Appeals shall determine all matters properly presented to it and where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance for which it is designated as such Board shall have the power to grant variances in harmony with the general intent of such ordinance and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City."

The appellant did not request a variance under this section, although she could have done so. While it is impossible to know whether such a request would have been granted, her situation appears to present precisely the kind of "practical difficulties" and "unnecessary hardships" that the variance provisions were designed to accommodate.

In assessing her claim that the ordinance is "arbitrary" and "irrational," I think the existence of the variance provisions is particularly persuasive evidence to the contrary. The variance procedure, a traditional part of American land-use law, bends the straight lines of Madison's ordinances, shaping their contours to respond more flexibly to the hard cases that are the inevitable byproduct of legislative line-drawing.

For these reasons, I think the Wisconsin courts did not err in rejecting the appellant's constitutional claims. I therefore, dissent.