Child Exclusion Policies in Housing

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INTRODUCTION

One of the most intractable problems of the twentieth century will prove to be population growth.¹ Evidence indicates that the current size of the population of the United States is a serious problem, having created the potential for severe shortages of natural resources and have effected reductions in privacy.² At the same time, contrary to an apparently popular belief,³ the number of Americans is increasing at a substantial pace, with approximately 1,400,000 more births than deaths each year in the United States.⁴ However, it is not at all appar-


² A national sample survey of adults in 1971 found that the majority (57 percent) believed that the size of the U.S. population at that time was “about right.” Approximately one out of five (22 percent) felt the size of the population “should be smaller,” a proportion substantially greater than that feeling it “should be larger” (8 percent). Wolman, Findings of the Commission’s National Public Opinion Survey, in Aspects of Population Growth Policy 469, 494 (Vol. VI of the Research Reports of the U.S. Commission on Population Growth and the American Future, edited by R. Parke & C. Westoff 1972).


ent that the traditional approach of family planning — providing birth control methods and permitting individuals to determine their family size as they see fit — will be sufficient to bring population numbers into line with the carrying capacity of the environment. Indeed, the evidence indicates that "individuals will employ [birth control] methods only when they have, in their judgment, good reasons for doing so... It follows that a successful birth control policy will have to strengthen and create family limitation incentives, rather than concentrating solely on problems of birth control availability and legitimation."5

If population growth is to be controlled in the United States, it will be necessary to promote incentives reducing the motivation to have children. Formal fertility control policies have been proposed,6 but their adoption in the foreseeable future seems unlikely. One possible solution is the fostering of environmental conditions that may not be overtly designed and developed for a fertility control purpose but that nevertheless have a tendency to reduce the number of births. One such condition — the policies of apartments and condominiums of excluding children — is the subject of this article.7

Little precise information is available on the extent to which parents are unable to rent housing because of child exclusion policies. One survey of newspaper advertisements in the Los Angeles metropolitan area indicated that 60 to 80 percent of apartments for rent are not available to persons with children.8 However, an analysis of the listings of a large com-

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5 Blake & Gupta, Reproductive Motivation versus Contraceptive Technology: Is Recent American Experience an Exception?, 1 POPULATION & DEV. REV. 229, 246 (1975).
7 Another condition widely assumed to lower fertility is female employment. Research has found that employed women have fewer children than women not employed, but recent evidence indicates that the causal connection runs just one way: from family size to employment. In other words, the number of children women have affects the probability they will be employed, but their employment status does not affect their childbearing. Smith-Lovin & Tickamyer, Nonrecursive Models of Labor Force Participation, Fertility Behavior and Sex Role Attitudes, 43 AM. SOC. REV. 541, 564 (1978); Ware, Fertility and Work-force Participation: The Experience of Melbourne Wives, 30 POPULATION STUD. 413 (1976). See also Terry, Rival Explanations in the Work-Fertility Relationship, 29 POPULATION STUD. 191 (1975).
8 Brief of Amicus Curiae Fair Housing for Children Coalition at 3-9, Marina Point,
mmercial rental agency in Los Angeles over a two-year period suggests that child exclusion policies are found in only about 40 percent of the rental units in the area. Another study conducted of apartment rental advertisements in newspapers published in the Chicago metropolitan area found that 21 percent of the advertisers would not rent to persons with children under fourteen years of age even though a state statute banned such discrimination. It is not possible to know how prevalent such policies would be in the absence of the statute.

While the prevalence of child exclusion policies is uncertain and undoubtedly varies considerably from one geographic area to another, it appears that such policies are sufficiently frequent to be a visible irritant to parents wanting to rent an apartment or purchase a condominium. If child exclusion policies were not a significant problem, it is unlikely that several states would have enacted legislation prohibiting them and that the Fair Housing for Children Coalition would have been organized. Given the prevalence of child exclusion policies, let us examine both the justifications for them and the relevant statutory and case law, paying particular attention to the question of the constitutionality of the policies where legislation has not suppressed them.

I. Justification for Child Exclusion Policies

Combating the social pressure to bear children—a phenomenon labeled "pronatalism"—should be a major focus of those concerned with population policy. To halt population


Id.


That the Coalition is concerned with a relatively prevalent practice is further suggested by the fact that it received an award for its activities from the Los Angeles Human Relations Commission. FAIR HOUSING FOR CHILDREN COALITION NEWSLETTER 1 (May/June 1978).

The address of the Coalition is Post Office Box 5877, Santa Monica, California 90405.

growth immediately in the United States, the family size of women now entering their childbearing years must be lowered to an average of approximately one child each. The attainment of this average will be facilitated by increasing the incidence of voluntary childlessness. Although there has been a marked increase during the past decade in the proportion of women in their childbearing years expecting to have no children, the potential exists for a substantially higher proportion to make that commitment. Child exclusion policies can help this potential be realized.

Child exclusion policies in apartments and condominiums will promote voluntary childlessness in two ways. First, the existence of such policies is an incentive to decide against childbearing because, if prevalent, the policies constitute a visible inconvenience to parents. Second, the policies will permit those wanting to remain childless to live in proximity to other adults who have the same commitment, providing reinforcement for the commitment.


The one-child family is required for immediate population stabilization because of the disproportionately large number of persons of childbearing age in the population at this time—the result of the baby boom after World War II. Such persons have a comparatively low death rate and thus will provide far more births than deaths even if each couple simply reproduces itself by having two children. See Bureau of the Census, U.S. Dep't of Commerce, Projections of the Population of the United States: 1977 to 2050, CURRENT POPULATION REP. (Series P-25, No. 704, 1977).

14 The proportion of all wives in their childbearing years expecting to have no children increased from 3.1 percent in 1967 to 5.7 percent in 1977. The increase was not uniform across all groups, however. Among black wives, the increase was minimal (from 4.0 to 4.4 percent). Among white wives, on the other hand, the expected incidence of childlessness almost doubled (from 3.0 to 5.8 percent). Bureau of the Census, U.S. Dep't of Commerce, Fertility of American Women: June 1977, CURRENT POPULATION REP. 24 (Series P-20, No. 325, 1978); Bureau of the Census, U.S. Dep't of Commerce, Previous and Prospective Fertility: 1967, CURRENT POPULATION REP. 17-19 (Series P-20, No. 211, 1971).


15 See Curry & Scriven, The Relationship Between Apartment Living and Fertility for Blacks, Mexican-Americans, and Other Americans in Racine, Wisconsin, 15 DEMOGRAPHY 477 (1978).

16 Research on voluntary childlessness supports this conclusion. For example, a
Aside from its implications for population control, voluntary childlessness should be protected and promoted because individuals choosing this lifestyle may possess a higher level of creativity than the average person. Research has found that two key characteristics of creative individuals are independence and introversion. Both of these traits appear to be more common among persons choosing to remain childless than among the general population.

Study of twenty-seven unmarried female undergraduate college students who stated that they wanted to remain childless and who were matched on a series of characteristics with twenty-seven of their counterparts who wanted to have children found that group support was important in maintaining the commitment to voluntary childlessness. Houseknecht, *Reference Group Support for Voluntary Childlessness: Evidence for Conformity*, 39 J. MARR. & FAM. 285 (1977). This study, however, focused on individuals who had articulated a desire to avoid parenthood relatively early in life, not those who came to the decision through a series of postponements of childbearing. A study of fifty-one currently-married women who were childless by choice found that postponement was the more frequent route to a commitment to voluntary childlessness, with approximately two-thirds of the sample falling in this category. The data from the study indicated that group support for the decision not to have children was of somewhat greater importance for the postponers than for the early articulators. Houseknecht, *Timing of the Decision to Remain Voluntarily Childless: Evidence for Continuous Socialization*, PSYCH. WOMEN Q. (forthcoming in 1979). It thus appears that the decision of the individual to be childless must have group support which must be continuous over time, rather than exist at just one critical point in the life cycle.

Furthermore, in a study of the membership of the National Organization for Non-Parents (an organization discussed infra at notes 19-21), two out of three members under 35 years of age intending to have no children reported experiencing pressures to have children, with the media, friends, and coworkers (but not parents) most often named as the leading sources of the pressure. Barnett & MacDonald, *A Study of the Membership of the National Organization for Non-Parents*, 23 SOC. BIOLOGY 297 (1976). These sources are continuous in nature, suggesting that reinforcement for the decision not to have children must also be continuous. See generally G. Homans, *The Human Group* 120 (1950).

 estudio de los partes de los universitarios no casados de 27 estudiantes que quisieron no tener hijos y que fueron seleccionados de acuerdo a una serie de características con otros 27 que querían tener hijos. En ambos grupos se encontró que el apoyo social en el grupo era importante para mantener la voluntad de no tener hijos. Houseknecht, *Reference Group Support for Voluntary Childlessness: Evidence for Conformity*, 39 J. MARR. & FAM. 285 (1977). Este estudio, sin embargo, se centró en individuos que habían expresado un deseo de evitar la paternidad relativamente temprano en la vida, no a los que se fueron al compromiso a través de una serie de posposiciones de la paternidad. Un estudio de 51 mujeres casadas actualmente que eran por ciento no tener hijos por voluntariamente encontró que el posponerse fue el más común camino a el compromiso voluntario de no tener hijos, con aproximadamente dos tercios de la muestra cayendo en este grupo. Los datos de este estudio indicaron que el apoyo social para la decisión de no tener hijos era de importancia mayor para los postergadores que para los articuladores tempranos. Houseknecht, *Timing of the Decision to Remain Voluntarily Childless: Evidence for Continuous Socialization*, PSYCH. WOMEN Q. (forthcoming in 1979). Así, parece que la decisión de que el individuo sea no tener hijos debe tener el apoyo social el cual debe ser continuo en el tiempo, en lugar de existir solo en un punto crítico en el ciclo de vida.


Además, hay evidencia que, en al menos algunas ocupaciones que requieren un relativamente alto nivel de creatividad, los hijos son más productivos que aquellos con hijos. En un estudio de investigadores químicos casados que tenían la Ph.D. y trabajaban en
While there are at least two national organizations directly concerned with the childfree lifestyle — the National Organization for Non-Parents and the Coalition for Optional Parenthood Education — neither organization has taken a position on child exclusion policies. Their reluctance to support child exclusion policies stems from an explicit commitment to the goal of maximizing individual freedom and from an implicit commitment to its corollary — the assumption that individuals are rational and will act in the best interests of society. While this assumption may well be acceptable in many areas, it does not appear to be useful in population policy and the control of population size. For instance, population policymakers assumed for many years that a reduction in death rates among universities or in government laboratories, those without children were found to have a substantially greater output of research articles than those with children. The differential in favor of the childless existed among both male and female chemists. Hargens, McCann & Reskin, *Productivity and Reproductivity: Fertility and Professional Achievement among Research Scientists*, 57 Soc. Forces 154 (1978).

Studies of the membership of the organization appear in Barnett, *supra* note 18; Barnett & MacDonald, *supra* note 16. The national office of the organization is located at 3 North Liberty Street, Baltimore, Maryland 21201.

The reasons for this occurrence are set out in a letter from Carole Goldman, the Executive Director of the National Organization for Non-Parents and Chairwoman of the Coalition for Optional Parenthood Education, to Larry D. Barnett (Sept. 12, 1978).

There exists a wide range of opinions among N.O.N. members themselves and among other organizations [on this issue]. On the one hand, some feel that individuals have a right to pursue their own lifestyle choice, which includes the right to live in an environment that is childfree. Others question whether or not such an arrangement might represent discrimination based on parental status. The National Organization for Non-Parents, in its policy statement regarding human rights, states, "The National Organization for Non-Parents supports the right of every individual to be free of social, economic or political discrimination based on parental status, sex, age, race, religion, national origin, physical or developmental handicap, marital status, or sexual orientation." Would all adult housing discriminate against individuals based on parental status? This is the question that remains unresolved and, therefore, the organization has not taken a stand on this issue.

In regard to COPE, the Coalition for Optional Parenthood Education, its policy statements also reflect our endorsement of the individual's choice as to whether to lead a childfree lifestyle or to become a parent. In regard to all adult housing, . . . COPE is concerned that our government and our society in general does not discriminate in attitude or policy against parents or non-parents.
children would lead parents to realize they needed fewer children to have a given number survive to adulthood; therefore, it was assumed that a reduction in child mortality would be followed by a lowered fertility rate, resulting in no greater excess of births over deaths. However, recent demographic research has consistently found that fertility reductions are substantially less than child mortality reductions and that, as a consequence, a lowered child mortality rate generates additional population growth. Another illustration is that, when individuals do reduce their childbearing intentions in response to programs of population education, they do so only within the socially-accepted norm of two, three, or four children and they possess only a weak commitment to a reduced level of childbearing.

The population problem is unlikely to be solved, then, by reliance on a presumed rationality of the individual in childbearing decisions and his or her concern with the interests of society. Steps must be taken to promote conditions that will motivate individuals to lower their fertility. Policies overtly and directly aimed at this goal — such as a tax on childbearing — will probably be politically unacceptable in the foreseeable future, and therefore indirect measures will be necessary to control fertility. Child exclusion policies have the potential for being one such influential measure, since approximately thirty-five percent of all occupied housing space is composed of rental units. To the extent that such policies become more common, the rate of voluntary childlessness will increase, contributing to a reduction in fertility. Let us turn, accordingly, to an examination of the legal status of the policies in the United States today.

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The effect of child exclusion policies in condominiums is likely to be minimal, because condominiums satisfy only a small fraction of housing demand. In 1977, only five percent of all owner-occupied housing units were in structures with two or more units and only two percent were in structures with three or more units. Id. at 794.
II. STATUTORY LAW

Six states expressly prohibit child exclusion policies: Arizona, Delaware, Illinois, Massachusetts, New Jersey, and New York. Other states have statutes that deal with discrimination on the basis of age. For example, Michigan prohibits a person from discriminating or refusing to engage in a real estate transaction "on the basis of . . . age" or from advertising in a manner that indicates an intent to discriminate on this basis. The predecessor to this Michigan law was interpreted by the state Attorney General to prohibit a landlord from refusing to rent to a tenant with children. Since the wording of the current law is essentially unchanged, the same prohibition probably applies to it. New Hampshire prohibits discrimination "because of age," but there is not any indication whether the ban will apply to the refusal to sell or rent to individuals who have children. Montana prohibits discrimination using the same statutory language as New Hampshire but adds that the prohibition does not apply "when the distinction is based on reasonable grounds." The District of Columbia prohibits age discrimination in real estate transactions except in the case of condominiums where the occupancy of "some or all of the units" has been restricted on the basis of age. Finally, the state of Washington has invalidated discrimination due to age and other characteristics (for example, race and sex) because "such discrimination threatens not only the rights and proper

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27 ILL. REV. STAT. ch. 80, § 37 (1973).
32 The law does not apply to certain rental housing if there are a small number of apartments or buildings or if the housing is intended primarily for senior citizens. Id. § 3.548(503).
33 MICH. ATT'TY GEN. 4953 (1976).
privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. However, no mention is made of age in the statutory sections dealing with real estate transactions, suggesting that age discrimination in housing is permissible.

III. CONSTITUTIONAL ISSUES

Three provisions of the Constitution are presently applicable to child exclusion policies: the due process clauses of the fourteenth and fifth amendments and the equal protection clause of the fourteenth amendment. These Constitutional guarantees, however, are only restrictions on governmental action; they do not protect the individual against the conduct of another who is acting as a private party. Thus the initial question is whether governmental action can be found in child exclusion policies.

A. The State Action Question

In the area of housing, governmental action has not been found in lawsuits against private landlords whose buildings were constructed with money provided by a mortgage insured by the federal government or whose buildings, occupied by low-income families, were the beneficiaries of interest-reduction payments from the federal government and partial

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34 WASH. REV. CODE § 49.60.010 (1976).
35 WASH. REV. CODE §§ 49.60.030(1)(c), 49.60.222 (1976 & Supp. 1977).
36 The due process clause of the fourteenth amendment was applied in the case of Moore v. City of East Cleveland, 431 U.S. 494 (1977). Moore involved a city ordinance that limited occupancy of a dwelling unit to members of a single family. For a further discussion of Moore, see text accompanying notes 49-57 infra.
However, financial benefits from government to private landlords combined with substantial regulations imposed by government have been sufficient to generate a finding of government action, especially when the housing was built on land obtained by an urban renewal agency having the power of eminent domain. Use of the judiciary for eviction has been held by a number of courts to be insufficient by itself to warrant a finding of state action, but there is precedent to support the contrary argument. The U.S. Supreme Court, without even discussing the issue of governmental action, has reached the merits of a fourteenth amendment challenge to the constitutionality of a state statute prescribing the conditions and procedures for obtaining a court order of eviction of a tenant; the Court seems implicitly to have found that governmental action existed in the use of the judiciary. The Court, in *Shelley v. Kraemer*, held that judicial enforcement of real property covenants results in state action. Furthermore, the Court has concluded that, while the mere existence of a statute authorizing a procedure to be undertaken by private parties without the involvement of the judicial system is not an adequate basis for governmental action, such

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action will occur when the judiciary orders private parties to act and a person is deprived of property to which he has a claim.\textsuperscript{50} Court-ordered eviction would seem sufficient to meet the criterion laid down by the Supreme Court in these decisions. Since cases exist where occupants of multiple-dwelling buildings have been subjected to or threatened with eviction through court proceedings because they had children,\textsuperscript{51} let us examine the constitutional issues in child exclusion policies.

B. The Constitutional Questions

1. Right to Structure Family Living Arrangements

A recent Supreme Court case, Moore v. City of East Cleveland, Ohio,\textsuperscript{52} has a marked bearing on the constitutionality of child exclusion policies. In Moore, a city ordinance limited occupancy of a dwelling unit to members of a single family, but the term "family" was defined in such a manner as to exclude the appellant grandmother and her two grandsons, who were first cousins. The appellant, who was fined twenty-five dollars and sentenced to five days in jail for violating the ordinance, challenged the legislation as violative of the liberty protected by the due process clause of the fourteenth amendment. The Supreme Court agreed, saying that the ordinance deprived the appellant of freedom of choice in the realm of family life and that the extended family, as well as the nuclear family of husband, wife, and children, must be given protection.

The protection extended by the Court to the family interest in residing together was apparently the strictest available under the Constitution. The four-member plurality and the

\textsuperscript{50} Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 n.10 (1978).


\textsuperscript{52} A case in California involves a child exclusion policy on the part of a privately-owned apartment that is situated on land owned by and leased from Los Angeles County and that is part of a small boat harbor project having both publicly- and privately-owned facilities. Brief for Appellants at 41-49, Marina Point, Ltd. v. Wolfson, Cir. No. A14120 (Super. Ct. App. Dep't, Los Angeles County, Cal., filed Aug. 28, 1978). Such an arrangement may constitute governmental action. See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). However, the highest court hearing the case rendered its decision on statutory, not constitutional, grounds. 47 U.S.L.W. 2437 (1979).

\textsuperscript{51} 431 U.S. 494 (1977).
concurring opinions appear to have applied the most stringent test of constitutionality to the ordinance: the government is required to demonstrate that a compelling interest is served by its action and that the means used are so circumscribed as to achieve only that interest. The ordinance failed the second part of the test — it did not promote the governmental interests at stake. The ordinance failed to achieve the city's objectives, which were the prevention of overcrowded housing, the alleviation of traffic congestion and parking shortages, and the elimination of unnecessary financial burdens on the school system. As the Court stated:

Although these are legitimate goals, the ordinance before us serves them marginally, at best. 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. We need not labor the point. [The ordinance] has but a tenuous relation to alleviation of the conditions mentioned by the city.

The Court was able to avoid the question of whether the interests of the city were sufficient to justify the ordinance. Al-

53 "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 419 U.S. 113, 155 (1973).

There is no explicit statement in Moore by the four-member plurality or two-member concurring opinions that this test is employed in the decision. However, the plurality opinion rejects the use of the less stringent, reasonable relationship test (discussed in the text at note 55 infra) and states that the case implicates the test applied in Roe v. Wade, 431 U.S. at 498-99. The two-member concurring opinion argues that the city ordinance imposes "burdens on fundamental rights." Id. at 513.

The compelling governmental interest test will also be applied where governmental action has created a "suspect" class; see text accompanying notes 72-74 infra for further discussion on this point.

54 431 U.S. at 500 (plurality opinion).
though these interests may have been "legitimate," there was no decision regarding whether the interests were "compelling."

*Moore* invoked the compelling governmental interest test because there was a substantial, direct interference with the constitutional right to freedom in family living arrangements. However, *Moore* involved an ordinance with city-wide application, and it was arguably this feature that created the substantial interference; the ordinance was not limited to a specific geographic area or to a specific type of housing accommodation. It is therefore questionable whether the compelling interest test should be applied to a practice, or even an ordinance, having only limited application.

*Riley v. Stoves*, an Arizona decision rendered prior to *Moore*, used the less stringent of the two tests of constitutionality under due process and equal protection. Under that test, governmental action is upheld if it is reasonably related to a legitimate goal. In *Riley*, the developer of a large tract of land for mobile homes reserved a portion for persons who were at least twenty-one years of age. Finding governmental action in the judicial enforcement of the restriction, the court held that the policy was not a denial of equal protection because it reasonably advanced the legitimate purpose of reducing noise and other disturbances in a residential area. It is uncertain, of course, whether *Moore* might have changed the decision; the court might have distinguished *Moore* on the grounds that the policy was not applicable to an entire city but only to a small portion of it, that as a result of this fact there was no substantial interference with freedom of the individual to select family

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431 U.S. at 496.

57 Cf. Molino v. Mayor & Council of Borough of Glassboro, 281 A.2d 401 (N.J. Super. Ct. Law Div. 1971) (city-wide zoning ordinance that required at least 70% of the units in apartment complexes to be one-bedroom held to violate the equal protection clause).


50 526 P.2d at 733.

In a variation of the rational relationship test, the court said that, since the state did not develop the restriction but only enforced it, the test of constitutionality would be whether the restriction reasonably promoted a legitimate private, not governmental, objective. *Id.* at 752.
living arrangements, and that the compelling interest test was therefore inapplicable.\textsuperscript{61}

2. The Right of Procreation

In \textit{Franklin v. White Egret Condominiums, Inc.},\textsuperscript{62} a Florida case involving the exclusion of children, the reasoning in \textit{Moore} was extended. At issue was a condominium policy prohibiting the purchase of an apartment to be occupied by children under twelve years of age. Finding governmental action in the condominium’s use of the courts to enforce its policy, it was held that the policy must be evaluated under the compelling governmental interest test because it seriously infringed at least one fundamental constitutional right: the right of privacy insofar as it protects decisions regarding procreation.\textsuperscript{63} No offsetting compelling interest was found to be advanced by the policy in this case; a possible reduction in noise was not considered a compelling interest.\textsuperscript{64}

The argument of the court that child exclusion policies seriously infringe on childbearing decisions is difficult to accept under Supreme Court precedents. A statute prohibiting an abortion except to save the life of the pregnant woman has been held to have a direct and substantial impact on the right of privacy,\textsuperscript{65} while the action of a state in providing funds for childbirth services but not abortions for indigent women has been held not to do so.\textsuperscript{66} Moreover, a state regulation imposing a maximum on welfare assistance for recipients of Aid to Families with Dependent Children, even though the maximum grant was less than the state-calculated need of families with a large number of members, has been held not to be a serious

\textsuperscript{61} In \textit{Ritchey v. Villa Nueva Condominium Ass’n}, 146 Cal. Rptr. 695 (Ct. App. 1978), a California court could have made this distinction. The court faced a condominium policy that excluded persons under 18 years of age but avoided mentioning \textit{Moore}, which had been decided a year earlier. The court upheld the policy as reasonable but did not expressly base its decision on constitutional grounds.


\textsuperscript{63} \textit{Id.} at 1089-90. Other rights mentioned were marriage, interstate travel, directing the upbringing and enjoying the companionship of one’s children, and family living arrangements.

\textsuperscript{64} \textit{Id.} at 1090.


infringement on childbearing decisions. Similar reasoning had led to the conclusion that denial of welfare assistance to women pregnant with their first child does not seriously interfere with procreation. In short, the limitation or denial of welfare assistance for an abortion or for supporting children does not implicate the constitutional right of privacy in a direct and substantial manner. Child exclusion policies in housing would appear to be of a similar nature. If indigents suffer no serious infringement on their right of privacy because they are unable to obtain certain finances for an abortion or for supporting their children, individuals who are unable to obtain certain housing because they have children will also not experience a direct and substantial infringement of a fundamental constitutional right. Lack of access to necessary or desired finances and lack of access to necessary or desired housing are equally distant from the constitutionally-protected activity of procreation. Consequently, if the only constitutional right implicated by child exclusion policies is that right protecting procreation, the compelling governmental interest test is inappropriate.

The Court of Appeals for the Second Circuit has utilized this line of reasoning in a decision rendered prior to Moore. In Bynes v. Toll, a state university barred children from the housing it made available to married students. In response to a challenge on the ground that the distinction between married students on the basis of whether they had children created a classification denying equal protection, the court rejected the use of the compelling governmental interest test. It cited three reasons for its decision: a Supreme Court case holding that there is no constitutionally-guaranteed right to housing of a particular type or quality; the principle that housing for students falls within an area traditionally committed to the discretion of school authorities; and the view that there was no direct, substantial interference with the right of privacy. On the last point the court said:

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69 512 F.2d 262 (2d Cir. 1975).
70 Id. at 255 (citing Lindsey v. Normet, 405 U.S. 56 (1972)).
The University here is not interfering with the marital privacy of the plaintiffs or their unquestioned natural right to bring up their children. They are totally free to procreate and educate their offspring — the only question is whether the University is constitutionally mandated to provide them campus housing to perform their protected prerogatives. Finding dangers to children from fire, construction, and traffic on campus, the court upheld the ban.

If child exclusion policies do not seriously interfere with procreation, as has been contended here, the reasonable relationship test should be used, at least where the policies have not been adopted by government and given the force of law applicable to an entire political jurisdiction. Challenges to the creation of communities with housing confined to the older age groups have been reviewed under the less stringent test and, using that test, rebuffed. These decisions have been given support by a Supreme Court case holding that old age is not a "suspect" class and that challenges to classifications involving old age therefore do not require the use of the compelling governmental interest test.

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

This reasoning can be applied equally well to children and their parents. Indeed, the Supreme Court has already stated, though arguably in dictum, that family size is not a suspect criterion for a classification, permitting distinctions between

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11 512 F.2d at 255. See also Lamont Bldg. Co. v. Court, 70 N.E.2d 447, 448 (Ohio 1946) (apartment lease excluding children held not to prohibit childbearing).


adults with one or more children and those without any children to be subjected to the reasonable relationship test. Moreover, our society encourages childbearing and gives preferential treatment to parents. There has been no history of invidious discrimination against those having children, and there is accordingly no justification for finding a suspect class in individuals who have been refused housing accommodations by a particular apartment or condominium because they have children.

CONCLUSION

Child exclusion policies can be justified under the federal constitution. They do not directly and substantially infringe on the fundamental right of privacy protecting freedom of procreation, and they create no suspect class. Moreover, as long as the policies are not incorporated into law and made applicable to all housing in a political jurisdiction, there is no substantial interference with the freedom of the individual to choose family living arrangements. Consequently, the action of apartment and condominium owners in excluding children should not be subjected to the compelling interest test. Protection of the childfree lifestyle, with a concomitant increase in individual freedom and creativity, and promotion of population control are legitimate objectives, if not compelling interests,

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75 See note 12 and accompanying text supra.

76 For example, for purposes of the federal income tax, a taxpayer is entitled to a tax credit for expenses for child care and household services where the expenses are incurred to enable the taxpayer to work; the tax credit is 20 percent of such expenses up to a maximum of $2000 for one dependent child under 15 years of age and a maximum of $4000 for two or more dependent children. I.R.C. § 44A. In addition, a taxpayer can currently deduct $750 for each dependent child from his income in determining taxable income. I.R.C. §§ 151(e), 152(a). Under the Revenue Act of 1978, this amount will increase to $1000 for taxable years starting on or after January 1, 1979. Pub. L. 95-600, §§ 102(a), 102(d), 92 Stat. 2771. The reason given for this increase is that inflation has devalued the $750 exemption, S. Rep. No. 95-1263, 95th Cong., 2d Sess. 46 (1978). Ironically, excessive child bearing has been a major cause of the inflation. L. Brown, The Twenty-Ninth Day 161-91 (1978). Congress has not recognized that its action subsidizes an important cause of inflation and constitutes part of a vicious circle.

An example in another area is public education, which is funded by all taxpayers but which most directly benefits parents with children in the public schools. These parents do not have to pay the full cost of the services provided. In 1978, the average expenditure in public primary and secondary schools in the United States was estimated to be $1,740. Bureau of the Census, supra note 24, at 158.
clearly advanced by these exclusionary policies. As a result, the policies are constitutionally supportable.

However, the question still remains as to whether child exclusion policies are desirable from the perspective of population policy. The answer is affirmative if one assumes (1) that there is a serious problem of overpopulation in the United States, (2) that formal policies explicitly designed to curtail fertility are unlikely to be adopted by the federal government in the foreseeable future, and (3) that there are no other indirect means to reduce the birth rate that are equally effective and that carry fewer undesirable side-effects. It is the third assumption of which the writer is uncertain. Nevertheless, child exclusion policies in housing at least raise the issue of the indirect means to control the birth rate. Such indirect means are not consistent with the traditional family planning perspective but nonetheless might be promoted in the United States. The issue is in need of the attention of population policymakers.

The likelihood that the issue will be discussed in the future was enhanced by the action of the board of directors of Zero Population Growth at its meeting in October 1978. Zero Population Growth came into existence in late 1968 in order to emphasize the environmental and resource problems of population numbers in the United States, but it shifted its focus in the early 1970's to promoting the availability of family planning methods and information. Accepting the assumption that the human species will act rationally and have the number of children that is in the best interests of society at large, Zero Population Growth urged and placed its principal emphasis on promoting the availability of contraception, sterilization, and abortion.

The observations made by the writer in the material following this point are in large part the result of his personal involvement as a participant in the organization. See autobiographical note preceding note 1.


ZERO POPULATION GROWTH, supra note 78. The organization went even further and advocated policies that may well increase fertility. Zero Population Growth called for the "[a]vailability of child care centers outside the home with public subsidies for low-income women" and for child care expenses of working parents to be "treated as an unreimbursed business expense in allowing for tax deductions, including child care provided by paid relatives." Id. at 5. These policies may permit women to bear
In 1978, the board of directors voted to return the organization to its original emphasis on the actual control of population size. However, it is not clear that the board recognized the type of population policy it may be forced to advocate. Zero Population Growth reached its zenith in membership and public influence during 1970 and 1971. Although there is evidence that its message regarding the domestic population problem did indeed reduce family size preferences,\textsuperscript{80} family size expectations have remained at roughly the same level since the early 1970’s, at least for those under 30 years of age.\textsuperscript{81} That level — namely, the two-child family — is substantially above what is recommended by the organization.\textsuperscript{82} Educational efforts and publicity regarding population were the primary concerns of Zero Population Growth during its most influential period. Will such activities again reduce fertility plans and do so to a significant extent? The answer is probably negative. The reduction occurring in the early 1970’s took place within the two-to-four

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\textsuperscript{80} Kruegel, supra note 1.

\textsuperscript{81} The average number of births expected by currently-married women during their lifetimes is shown below. The figures are lifetime births expected per 1,000 currently-married women of all races:

<table>
<thead>
<tr>
<th>Age of woman</th>
<th>Year</th>
<th>18-24</th>
<th>25-29</th>
<th>30-34</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td></td>
<td>2,166</td>
<td>2,215</td>
<td>2,424</td>
</tr>
<tr>
<td>1977</td>
<td></td>
<td>2,137</td>
<td>2,197</td>
<td>2,468</td>
</tr>
<tr>
<td>1976</td>
<td></td>
<td>2,141</td>
<td>2,202</td>
<td>2,536</td>
</tr>
<tr>
<td>1975</td>
<td>$</td>
<td>2,173</td>
<td>2,260</td>
<td>2,610</td>
</tr>
<tr>
<td>1974</td>
<td></td>
<td>2,165</td>
<td>2,335</td>
<td>2,724</td>
</tr>
<tr>
<td>1973</td>
<td></td>
<td>2,262</td>
<td>2,387</td>
<td>2,804</td>
</tr>
<tr>
<td>1972</td>
<td></td>
<td>2,255</td>
<td>2,452</td>
<td>2,915</td>
</tr>
<tr>
<td>1971</td>
<td></td>
<td>2,375</td>
<td>2,619</td>
<td>2,989</td>
</tr>
<tr>
<td>1967</td>
<td></td>
<td>2,852</td>
<td>3,037</td>
<td>3,288</td>
</tr>
</tbody>
</table>


\textsuperscript{82} The organization advocates that by 1985 women entering their childbearing years have an average of 1.6 children each during their lifetimes. \textit{Zero Population Growth, supra} note 78, at 3.
child range that our society defines as socially desirable and "normal," and the reduction was therefore one that was comparatively simple to achieve. However, a drop below the two-child level as advocated by the organization will probably require relatively severe external restraints. Education and other attempts to achieve an average family size in the one-child range by strictly voluntary means are unlikely to be successful. Since a policy manifestly designed to limit fertility is not likely to be adopted in the foreseeable future, Zero Population Growth may thus be forced to turn to conditions that effectively but indirectly restrict fertility. As that occurs, the issue of indirect influences that are difficult to reconcile with the perspective of the family planning movement in this country can be expected to receive attention in the field of population policy.

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83 See Blake, supra note 23.
85 See note 1 supra for the reason this effort will probably be unsuccessful; Falbo, Reasons for Having an Only Child, 1 J. POPULATION 181 (1978).
86 In a survey of a randomly-selected sample of members of Zero Population Growth conducted in November 1976, substantial support was found for two relatively stringent fertility control measures. The first measure was a requirement that non-indigent parents pay at least a portion of the cost of educating their children in the public schools. One-third of the members favored such a charge for the first child, a slight majority favored it for the second child, and four out of five favored it for the third and fourth children. There was less, though still strong, support for a tax surcharge, i.e., a special tax, on the income of parents who have more than a particular number of children. The majority of the membership opposed a surcharge for the first two children, but four out of five favored it for the third and fourth children. It is important to note that the members responded in terms of whether they supported or opposed the adoption of the two measures at the present time, not at some point in the future. Barnett, Zero Population Growth, Inc.: Membership Characteristics and Population Policy Attitudes 9, 12-15 (unpublished manuscript).

A tuition charge in the public schools would be an indirect fertility control measure if adopted today because it would not be enacted with the express goal of curtailing fertility; rather, it would be used to attain other objectives, for example, tax limitation. A tax surcharge for excessive childbearing would, by definition, be a direct fertility control measure, but since such a measure is not politically acceptable at this time, the membership must fall back on indirect fertility control incentives such as tuition charges in the schools. Such charges are not consistent with the assumption of the family planning perspective that individuals are rational with regard to childbearing and will voluntary act in the best interests of society.