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Constitutional Law - Zoning - Local Zoning Ordinance Excluding More than Two Unrelated Persons from Occupancy of Single Family Homes Held Not Violative of Fourteenth Amendment Equal Protection or Due Process of Law

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MAY 1974]

RECENT DEVELOPMENT

CONSTITUTIONAL LAW — ZONING — LOCAL ZONING ORDINANCE EXCLUDING MORE THAN TWO UNRELATED PERSONS FROM OCCU- PANCY OF SINGLE FAMILY HOMES HELD NOT VIOLATIVE OF FOUR- TEENTH AMENDMENT EQUAL PROTECTION OR DUE PROCESS OF LAW.

Village of Belle Terre v. Boraas (U.S. 1974)

Plaintiffs, the two owners of a Belle Terre, New York, residence¹ and their three unrelated student tenants,² brought an action under the Civil Rights Act of 1871³ challenging the constitutionality of the village zoning ordinance on the grounds that it denied them equal protection of the laws; restrained their right of freedom of association; intruded upon their right of privacy; and contravened their right to travel.⁴ The ordinance effectively prohibited groups of more than two unrelated persons — as distinguished from groups consisting of any number of persons related by blood, marriage, or legal adoption — from occupying a single-family residence within the township.⁵ The United States District Court for the Eastern District of New York upheld the ordinance as a lawful exercise of police power intended to protect and maintain the traditional family patterns of the area.⁶ The United States Court of Appeals for the Second

1. Belle Terre is a village of about two hundred and twenty homes, inhabited by seven hundred people, on Long Island's north shore. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974).

2. Originally there were six unrelated individuals that resided in the house, but only three joined in the suit. *Id.* at 3.

3. 42 U.S.C. § 1983 (1970). This section authorizes a private federal remedy for deprivation of constitutional rights. It provides in pertinent part:

Every person who, under color of any statute, ordinance . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

4. Brief for Appellees at 6-8.

5. Only "families" were permitted to occupy single-family residences. The applicable section of the zoning ordinance defined "family" as:

One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

Building Zone Ordinance of the Village of Belle Terre, Art. I, § D-1.35a (June 8, 1970) [hereinafter referred to as "the ordinance"]. See 416 U.S. at 2.

6. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 146 (E.D.N.Y. 1972). Although the district court rejected defendants' arguments that the ordinance furthered familiar zoning objectives, such as safety, adequate light and air, prevention of overpopulation, reduction of traffic congestion, and facilitation of providing adequate public facilities, it stated that single-family zoning nevertheless was within the area of valid general health and welfare objectives. *Id.*

Circuit, employing a "sliding scale" equal protection test⁷ to determine the validity of the ordinance, reversed and held that maintenance of traditional family patterns was not within the ambit of local zoning powers.⁸

The United States Supreme Court, addressing a zoning ordinance for the first time in 46 years,⁹ reversed, *holding* that the ordinance 1) was not aimed at transients; 2) involved no procedural disparities; 3) involved no deprivation of any fundamental right; and 4) was a valid land use regulation addressed to family needs. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The United States Supreme Court first upheld the validity of a local zoning ordinance in *Village of Euclid v. Ambler Realty Co.*,¹⁰ finding it to be a legitimate exercise of the police power.¹¹ The Court stated that in order for an ordinance to be declared unconstitutional, it must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."¹² Since *Euclid*, courts have tended to presume zoning ordinances valid¹³ in the face of attacks upon these ordinances on three distinct legal theories: for lack of specific legislative authorization,¹⁴ as being beyond the police power justification as not reasonably related to the public welfare;¹⁵ and as being invalid under the equal protection clause.¹⁶ Traditionally, equal protection analysis has consisted of a "two-tier" approach. First, under the "minimum scrutiny" or "rational relationship" test, the ordinance will be upheld if the plaintiff is unable to demonstrate that there is no rational relationship between the ends sought and the classification utilized in the ordinance.¹⁷

7. For a brief discussion of this equal protection standard, see note 55 *infra*.

8. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 818 (2d Cir. 1973).

9. The Court last addressed a zoning question in *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

10. 272 U.S. 365 (1926). A local landowner challenged the constitutionality of a village zoning ordinance which excluded from residential districts apartment houses, retail stores, and other like establishments, on the grounds that such regulation deprived him of liberty and property without due process of law. *Id.* at 373.

11. *Id.* at 395.

12. *Id.* (citations omitted). Two terms later the Court declared a local zoning ordinance arbitrary and unreasonable as applied to a particular parcel of land. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

13. See 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 2.14, at 67 (1968) [hereinafter cited as ANDERSON], where numerous cases are cited to support this presumptive validity. *Id.* at n.20.

14. See, e.g., *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966), where an ordinance was held invalid for its lack of specific legislative authorization. See note 29 and accompanying text *infra*.

15. For a comprehensive statement of this theory, which was the basis of the challenge in *Euclid*, see 8A E. McQUILLIN, *MUNICIPAL CORPORATIONS* § 25.279, at 278-79 (3d ed. 1965).

16. See notes 20 & 25 *infra*.

17. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). See also *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing cases), where Chief Justice Warren articulated the minimal scrutiny test, stating:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26 (emphasis added) (citations omitted). See generally Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

However, if the classification is deemed to be inherently "suspect" or if it restricts the exercise of a "fundamental right," the second tier of the test requires that the state demonstrate a compelling interest in the establishment and maintenance of such a classification.¹⁸

In response to these challenges, the courts, while upholding zoning ordinances designed to preserve the single-family, residential character of neighborhoods,¹⁹ have refused to permit those that are racially discriminatory²⁰ and, in recent years, those that are considered exclusionary.²¹ In this latter category, for example, minimum lot²² and floor space restric-

18. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (fundamental right of interstate travel infringed); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (classification based on race invalid); *Harper v. Virginia Bd. of Election*, 383 U.S. 663, 670 (1966) (fundamental right to vote infringed). See generally *Developments in the Law - Equal Protection*, 82 HARV. L. REV. 1065 (1969).

19. See, e.g., *Palo Alto Tenants' Union v. Morgan*, 321 F. Supp. 908, 912 (N.D. Cal. 1970), *aff'd per curiam*, 487 F.2d 883 (9th Cir. 1973). See 8 E. McQUILLIN, *supra* note 15, § 25.24, at 64, where the author states that a fundamental purpose of zoning is to preserve the character of the neighborhood. See also ANDERSON, *supra* note 13, § 7.25, at 540.

20. See *Buchanan v. Warley*, 245 U.S. 60 (1917), where the Court, before its decision in *Euclid*, struck down a city ordinance based on a racial classification. Recent lower federal court decisions have closely scrutinized municipal land ordinances that bear overtones or have the effect of racial exclusion. See *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), wherein the court found certain municipal actions, including a moratorium on new subdivisions and the rezoning of a proposed low-income housing site as open space and park area, racially discriminatory. See also *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970). In that case, the court suggested in a dictum that a city-wide referendum which nullified a rezoning ordinance permitting construction of low- and moderate-income housing would violate the equal protection clause if, as a result of the referendum, the zoning scheme discriminated against low-income residents. *Id.* at 295. *Accord*, *Norwalk CORE v. Norwalk Redevel. Agency*, 395 F.2d 920 (2d Cir. 1968).

The decision by the Supreme Court in *James v. Valtierra*, 402 U.S. 137 (1971) (low-income housing referendum law upheld), however, cast doubt on the validity of these decisions, especially since it was handed down only two years after the Court's contrary decision in *Hunter v. Erickson*, 393 U.S. 385 (1969) (referendum law racially discriminatory on its face struck down). Apparently the Supreme Court will not utilize the compelling state interest test if a municipality's exclusionary tactics, such as ordinances dependent on wealth classifications, cannot be shown to have had a racially discriminatory motive or purpose, regardless of the resulting racially exclusionary effect. *But see* Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971); Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971). See *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974), a recent decision that found a refusal to permit a proposed low-income housing project to tie into a city's existing water and sewer systems racially discriminatory.

21. The term "exclusionary zoning" refers to zoning which has as an objective economic segregation which effectively blocks the influx of low- and middle-income families into the area. See generally Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

22. See *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed*, 344 U.S. 802 (1952) (3-acre minimum sustained). In recent years, courts have begun to strike down minimum lot requirements as violative of substantive due process because they are not related to the protection of the general welfare. See, e.g., *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970) (2- and 3-acre requirements held unconstitutional); and *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965) (4-acre requirement held unconstitutional). For a discussion of this line of cases, see Commentaries, *The Pennsylvania Supreme Court and Exclusionary Zoning: From Hillbar to Girsh - A Decade of Change*, 16 VILL. L. REV. 507 (1971). *But see* *Steel Hill Dev.*,

tions,²³ and bans against multi-family dwellings²⁴ have been declared unconstitutional as not having been reasonably related to the general welfare of the community.²⁵

As to "blood-related" ordinances similar to the one in *Belle Terre*,²⁶ lower courts have been generally unreceptive to them due to their exclusionary nature.²⁷ In *City of Des Plaines v. Trottner*,²⁸ the Supreme Court of Illinois, in examining this type of ordinance, never reached defendants' due process and equal protection arguments, but intimated in dicta that

Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), noted in 58 CORNELL L. REV. 1035 (1973) (3- and 6-acre minimum lot requirements upheld under general welfare provision of state enabling statute). See generally Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969).

23. See *Medinger Appeal*, 377 Pa. 217, 104 A.2d 118 (1954) (minimum floor-space requirements invalid as an unreasonable use of police power). But see *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953) (upholding an ordinance which set large floor space minimums).

24. See *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970) (failure of township's zoning plan to provide for apartments held unconstitutional); *Township of Willistown v. Chesterdale Farms, Inc.*, 7 Pa. Comm. Ct. 453, 300 A.2d 107 (1973) (equally divided court found that a local zoning plan must provide for "fair share" of multi-family dwellings). See generally Comment, *Zoning: Closing The Economic Gap*, 43 TEMP. L.Q. 347 (1970); Note, *In Re Appeal of Girsh: A Pig In the Parlor Instead of the Barnyard?*, 32 U. PITT. L. REV. 83 (1970); Comment, *supra* note 22. See also notes 96-98 and accompanying text *infra*.

25. In addition to these due process challenges, constitutional arguments for strict judicial scrutiny of exclusionary zoning ordinances under the equal protection clause have been advanced under varying theories. For example, it has been suggested that housing is a fundamental right. See *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 295-96 (9th Cir. 1970) (dictum). See also Aloï, Goldberg & White, *Racial And Economic Segregation By Zoning: Death Knell For Home Rule?*, 1 U. TOL. L. REV. 65, 80 (1969). Other such theories are that wealth is a suspect classification and that the ordinances prohibit the right to travel. See generally Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Davidoff & Gold, *Exclusionary Zoning*, 1 YALE REV. L. & SOC. ACTION, Winter, 1970, at 56; Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339 (1970); Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774 (1971); and Note, *Low-Income Housing In The Suburbs: The Problem of Exclusionary Zoning*, 24 U. FLA. L. REV. 58 (1971). Several of these arguments were raised in the instant case. See notes 45-54 and accompanying text *infra*.

Recent decisions by the Supreme Court outside the zoning area, however, have raised serious questions as to the validity of the above-mentioned theories and the willingness of the Court to expand the parameters of the equal protection clause. It is doubtful that the Court would render different decisions if faced with the same challenges in the zoning context. See note 20 *supra*. See also *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 18-40 (1973), for a recent discussion of fundamental rights and a rejection of the argument that wealth is a suspect classification; *Jefferson v. Hackney*, 406 U.S. 535 (1972), and *Dandridge v. Williams*, 397 U.S. 471 (1970), in which allocations of welfare benefits were held not subject to strict scrutiny; *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972), wherein the Court refused to declare that access to a particular quality of housing is a fundamental right.

26. See note 5 *supra*.

27. See Note, "Burning The House to Roast the Pig": *Unrelated Individuals and Single Family Zoning's Blood Relation Criterion*, 58 CORNELL L. REV. 138, 161 (1972), for a discussion of how single-family zoning ordinances limit access of unrelated persons to suburbia. The author suggests that the exclusionary effects of blood-related zoning have a detrimental impact, not only on the unrelated tenants, but also on regional housing needs. *Id.* at 152.

28. 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

the asserted justifications for blood-related zoning ordinances would not satisfy even a rational relationship test.²⁹

The Supreme Court of New Jersey, in *Kirsch Holding Co. v. Borough of Manasquan*,³⁰ struck down as sweepingly excessive ordinances designed to prohibit renting of season seashore resorts to unrelated individuals and noted that the zoning ordinances were not intended to prevent anti-social conduct in dwelling situations.³¹ The court pointed out that under the ordinance, "two unrelated families of spouses and children cannot share an adequate cottage or house for the summer, nor could a small unrelated group of widows, widowers, older spinsters or bachelors — or even of judges."³²

Reaching a contrary result in *Palo Alto Tenants' Union v. Morgan*,³³ a federal district court in California sustained the validity of the city's definition of "family"³⁴ against a constitutional challenge by members of a commune.³⁵ Using the "two-tier" equal protection analysis, the court found no infringement upon any fundamental right,³⁶ and upheld the ordinance on the ground that it furthered traditional zoning objectives, such as: 1) control of population density; 2) alleviation of noise and traffic

29. *Id.* at 437-38, 216 N.E.2d at 119. Defendants' constitutional arguments were relevant in determining whether the legislature had authorized such a classification. The court found no such authorization and held that the ordinance was beyond the scope of the general welfare provision of the state enabling act. *Id.* at 438, 216 N.E.2d at 120.

30. 59 N.J. 241, 281 A.2d 513 (1971).

31. *Id.* at 253-54, 281 A.2d at 520. The court noted that relevant nuisance ordinances and criminal statutes could effectively deal with such conduct. *Id.*

32. *Id.* at 248, 281 A.2d at 517. See also *Gabe Collins Realty, Inc. v. City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970), where a New Jersey lower court struck down an ordinance almost identical to the one in *Belle Terre*. The ordinance defined "family" as "one or more persons related by blood, marriage or adoption or not more than two unrelated persons occupying a dwelling unit as a single non-profit housekeeping unit." *Id.* at 342, 271 A.2d at 430. The court held that the ordinance was an unreasonable restriction on the lessor's property right and the right of unrelated people in reasonable numbers to have recourse to common housekeeping facilities and stated:

[E]ven in the light of the legitimate concern of the municipality with the undesirable concomitants of group rentals experienced in Margate City, and of the presumption of validity of municipal ordinances, we are satisfied that the remedy here adopted constitutes a sweepingly excessive restriction of property rights as against the problem sought to be dealt with . . .

Id. at 349, 271 A.2d at 434. Thus, the court found the legislative classification to be neither reasonable nor rationally related to the public health, safety, morals, or general welfare.

33. 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd per curiam*, 487 F.2d 883 (9th Cir. 1973). For a discussion of single family ordinances, see Note, *supra* note 27; Comment, *All In The "Family": Legal Problems of Communes*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393 (1972).

34. The ordinance defined "family" as: "one person living alone or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons as a single housekeeping unit." 321 F. Supp. at 909.

35. Plaintiffs, as in *Belle Terre*, attacked the ordinance on the grounds that it infringed their rights to privacy and freedom of association and, more generally, that it violated their rights of equal protection and due process of law. *Id.* at 910.

36. As to plaintiffs' argument asserting an infringement upon freedom of association, the court stated that, though the right to form groups was constitutionally protected, the right to insist that they live together was not. 321 F. Supp. at 911-12.

problems; 3) maintenance of rent structures of the neighborhood that might otherwise increase upon an influx of unrelated individuals with separate incomes; and 4) preservation of traditional family patterns.³⁷ Thus, unlike the courts in *Trottner* and *Kirsch* which found that the ordinances involved were excessively broad and unreasonable, and would not accomplish the purportedly legitimate government interests, the *Palo Alto* court, under the minimal scrutiny test, was willing to find the ordinance constitutionally valid.³⁸

In light of this evolved body of law in which courts had begun to scrutinize the methods utilized in furtherance of these zoning objectives, Justice Douglas' holding in *Belle Terre* is a long step backward in that it represents a strong reaffirmation of the traditional "Euclidean" deference allotted municipal zoning ordinances.³⁹ This was accomplished by the adoption of a broad interpretation of the scope of the police power and of legitimate municipal interests. Specifically, the Court held that the town of Belle Terre had a legitimate interest in preserving the serenity of its residential community.⁴⁰

Before commencing his analysis, Justice Douglas, writing for the majority of the Court, restated the doctrine, christened in *Euclid*, that local zoning ordinances are presumptively valid.⁴¹ For instance, municipalities have this presumptive power to exclude apartments and industrial uses; to keep residential areas free of "disturbing noises"; to prevent "increased traffic"; to obviate the hazard of "moving and parked automobiles"; and to prevent the deprivation of a child's "privilege of quiet open spaces for play, enjoyed by those in more favored localities."⁴² The Court fur-

37. *Id.* at 912-13.

38. This differing result is possibly explained and its impact lessened by the fact that in *Palo Alto*, the ordinance treated both related and unrelated persons alike until the point at which the number of unrelated, cohabitating people exceeded four. In *Trottner* and *Kirsch* not even two unrelated individuals could legally live together. Therefore, the ordinance in *Palo Alto* may have been seen as a more legitimate attempt to foster traditional zoning goals.

39. See note 13 and accompanying text *supra*.

40. In Justice Douglas' words:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . 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.

416 U.S. at 9.

41. *Id.* at 4.

42. *Id.* at 5, quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926). The Court also discussed *Berman v. Parker*, 348 U.S. 26 (1954), where Justice Douglas had written the opinion which upheld a Washington, D.C., land use project designed to rid the area of substandard housing. The remedy allowed the razing of all buildings in a Black community of 5,000 in the southwestern part of the city, irrespective of the buildings' condition, in order to redevelop the area. *Id.* at 30-31. As in *Euclid*, the *Berman* Court found the maintenance of public health, safety, morals, peace, and quiet to be legitimate goals of the traditional application of police power to municipal affairs sufficient to override adversely affected individual property interests. *Id.* at 33.

ther noted that the ordinance did not constitute discriminatory action based upon race⁴³ or that it was an improper delegation of authority.⁴⁴

With respect to the plaintiffs' equal protection and due process claims, the Court rejected the argument that the ordinance infringed upon plaintiffs' right to travel,⁴⁵ because of the absence of durational residency requirements on the face of the ordinance; therefore, it was not aimed at transients.⁴⁶ The Court found that the ordinance involved no procedural disparities that would have been inflicted on some but not others.⁴⁷ Moreover, it infringed no fundamental right guaranteed by the Constitution, such as voting,⁴⁸ the right of access to the courts,⁴⁹ the right of association,⁵⁰ or any right of privacy.⁵¹ Specifically regarding the right of association, the Court noted that the ordinance expressed no animosity toward unmarried couples, as it allowed two unrelated people to constitute a "family,"⁵² and that "[t]he ordinance places no ban on other forms of association, for a 'family' may, so far as the ordinance is concerned, enter-

43. 416 U.S. at 6, *citing* *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidation of city ordinance based on racial classification).

44. 416 U.S. at 6-7, *citing* *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118 (1928), where the Court struck down an ordinance which in effect allowed local landowners to arbitrarily withhold consent for the building of a philanthropic home.

45. Brief for Appellee at 16-21. The main thrust of the plaintiffs' argument was that the ordinance barred their rights of migration and settlement. *Id.*

46. 416 U.S. at 7, *citing* *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, the Court held that conditioning eligibility for welfare payments upon a one year residency requirement unconstitutionally infringed the recipient's right to travel. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 269 (1974), the Court struck down a statute requiring a 1-year county residence in order to be eligible for free non-emergency medical care. Again, the Court limited its holding of finding a violation of the fundamental right to travel to a case involving a durational residency requirement. *See* Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1650 (1971), for a discussion of an argument based on the right to travel. In *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), the court held that a city's plan to exclude a future influx of population by limiting expansion to 500 new units per year, violated the fundamental right to travel. The *Petaluma* court distinguished *Belle Terre* on the ground that the *Petaluma* ordinance, had as its purpose the exclusion of nonresidents. *Id.* at 584 n.1. This appears to be merely a conclusion on that court's part, as it could be said that one of the purposes of the *Belle Terre* ordinance was to exclude unrelated nonresidents. The distinction lies not in the purpose behind the ordinance, but in the ordinance's treatment of residents and nonresidents. If both are treated alike, then no right to travel is infringed, whereas if the ordinance singles out only nonresidents, the right to travel argument becomes viable.

47. 416 U.S. at 7, *citing* *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigents may not be denied transcripts for appellate review for inability to pay cost).

48. 416 U.S. at 7, *citing* *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (state poll tax invalidated).

49. 416 U.S. at 7, *citing* *NAACP v. Button*, 371 U.S. 415 (1963).

50. 416 U.S. at 7, *citing* *NAACP v. Alabama*, 357 U.S. 449 (1958).

51. 416 U.S. at 7-8, *citing* *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (state's law banning distribution of contraceptives to unmarried persons struck down as irrational under equal protection clause); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state's ban on use of contraceptives struck down as violative of marital right to privacy). *See also* *Stanley v. Georgia*, 394 U.S. 557 (1969) (state may not prosecute person for possession of obscene films in the home). Plaintiffs in *Belle Terre* had asserted an interest in preserving the privacy and sanctity of the home. *See* Brief for Appellee at 21-27.

52. 416 U.S. at 8. *See* note 5 *supra*.

tain whomever they like."⁵³ The Court concluded, therefore, that because there were no fundamental rights or suspect classifications involved, the compelling state interest test did not apply.⁵⁴

Next, according to its equal protection analysis, the *Belle Terre* Court examined the ordinance to determine whether it advanced a legitimate state interest. Rejecting the "sliding scale" test adopted by the Second Circuit,⁵⁵ the Court held that since the ordinance dealt with economic and social legislation, the traditional rational relationship or "minimum scrutiny" test should be applied; that is, did the legislation bear "a rational relationship to a [permissible] state objective"?⁵⁶ Applying this test, the Court found that preservation of the residential or family character of a neighborhood was a valid zoning objective.⁵⁷ The exclusion of boarding houses, fraternity houses, and the like, which present urban problems such as overcrowding, traffic and resultant parking problems, and additional noise, was a valid means to achieve that goal.⁵⁸

Mr. Justice Marshall dissented,⁵⁹ and reiterated that deference should be given to governmental judgments concerning proper land use alloca-

53. 416 U.S. at 9. The Court apparently agreed with the rationale advanced in *Palo Alto* that while the right to form groups was fundamental, the right to live with that group did not rise to the same protected level. See note 36 *supra*. This reasoning was also advanced by the dissenting judge in the court of appeals: "While appellants' rights to live together under the same roof free from the intrusion of government are said to be important, in my view such rights do not rise to the status of 'fundamental interests.'" 476 F.2d at 822 (Timbers, J., dissenting). But see notes 69-72 and accompanying text *infra*.

54. 416 U.S. at 8. For a brief explanation of this equal protection test, see note 18 and accompanying text *supra*.

55. 476 F.2d at 814-15. The court of appeals never reached the compelling state interest test, as it posited that the Supreme Court had moved away from a "two-tier" approach to a more flexible one. *Id.* at 814. Instead of automatically deferring to the legislative judgment as to the nexus between methods employed and desired goals, the Second Circuit would put municipalities to their proof. The court stated that a "sliding scale" test was more equitable as it permitted "consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest in support of it." *Id.* The key was whether the legislative classification was "in fact substantially related to the object of the statute." *Id.* (citations omitted) (emphasis by the court). The court applied the test and found that the blood-related ordinance bore no substantial relationship to traditional zoning objectives. *Id.* at 816.

The Second Circuit's opinion was noted extensively. See 40 BROOKLYN L. REV. 226 (1973); 49 NOTRE DAME LAW. 428 (1973); 48 ST. JOHN'S L. REV. 262 (1973); and 48 TUL. L. REV. 412 (1974). See generally Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 10-20 (1972). Gunther, *supra*, suggests that the Supreme Court has recently moved away from a "two-tier" equal protection analysis. See also Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61, 71-72 (1971).

56. 416 U.S. at 8, quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971). See note 17 and accompanying text *supra*.

57. 416 U.S. at 9. See ANDERSON, *supra* note 13, § 7.25, at 540.

58. 416 U.S. at 9. Specifically, Justice Douglas stated that as a result of these multi-dwelling facilities, "More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds." *Id.*

59. *Id.* at 12-20 (Marshall, J., dissenting). Justice Brennan also dissented, on the ground that no cognizable "case or controversy" existed. He reasoned that since the tenants who originally brought the suit no longer resided there, the present or prospective tenants could assert their own rights before the courts. As to the lessors, Justice Brennan stated that they faced no economic loss and that this was not a proper case for the lessors to assert an alleged denial of the tenants' constitutional rights.

tion, such as restricting population growth, controlling traffic problems, and making the communities attractive to families.⁶⁰ He continued that here, however, the municipality had failed to meet its burden under the compelling state interest test.⁶¹ Unlike the majority of the Court, Justice Marshall thought that the ordinance unnecessarily burdened plaintiffs' first amendment freedom of association and right to privacy.⁶² Those fundamental rights included the freedom to choose one's associates, to select one's living companions,⁶³ and to establish a home.⁶⁴ Justice Marshall concluded that the ordinance was outside the area of proper land use control as it limited the density of occupancy of only those homes occupied by unrelated individuals. Therefore, the ordinance reached beyond the mere control of land use or the density of population; rather, it undertook to regulate the manner in which people chose to associate with each other within the privacy of their own homes.⁶⁵

Justice Marshall's dissent seems to have reflected the identical approach to the fundamental rights of freedom of association and privacy adopted by Justice Douglas in his concurring opinion in *United States Department of Agriculture v. Moreno*.⁶⁶ In that case, the Court struck down a 1971 amendment to the Food Stamp Act of 1964, which limited eligibility to households that contained only related individuals.⁶⁷ Noting that the legislative history of the Food Stamp Act indicated an intent to bar "hippie communes" from participation in the program, the Court held that a classification which discriminated against household units of unrelated persons was arbitrary and unreasonable.⁶⁸

In his concurring opinion in *Moreno*, Justice Douglas rejected the majority's use of the minimum scrutiny test because, in his view, the regulation abridged the right to freedom of association.⁶⁹ He reasoned that

Id. at 10-12 (Brennan, J., dissenting). Justice Douglas hurdled these standing and mootness problems by arguing that since a zoning ordinance usually has an impact on the value of the property which it regulates, that was enough to satisfy the "case or controversy" requirement. *Id.* at 9-10.

60. *Id.* at 13-14 (Marshall, J., dissenting), citing *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See note 13 *supra*.

61. 416 U.S. at 18, citing *Shapiro v. Thompson*, 394 U.S. 618 (1969). For a brief description of this test, see note 18 and accompanying text *supra*.

62. 416 U.S. at 16, citing *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 483, 486 (1965).

63. 416 U.S. at 15.

64. *Id.*, citing *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

65. 416 U.S. at 17. See generally Comment, *supra* note 33, at 401-23; Note, *On Privacy, Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 740-50 (1973).

66. 413 U.S. 528, 538-45 (1973) (Douglas, J., concurring).

67. Act of Dec. 30, 1973, Pub. L. No. 93-233, § 8(a), 87 Stat. 956, amending 7 U.S.C. § 2012(e) (1970) (codified at 7 U.S.C. § 2012(e) (Supp. 1973)).

68. 413 U.S. at 534. Thus, the classification violated the equal protection clause.

69. *Id.* at 541 (Douglas, J., concurring).

people's banding together to better meet economic adversities⁷⁰ was an expression of that right, one deeply embedded in our tradition.⁷¹ Furthermore, freedom of association included inviting a stranger to join one's household as well as inviting a person to one's home for entertainment.⁷²

Thus, while Justice Douglas emphatically stated in *Moreno* that freedom of association included the right to live with the companions of one's choice, he espoused a contrary view in *Belle Terre*. The apparent shift in Justice Douglas' view of freedom of association may have resulted from a difference in the nature of the governmental interests advanced in each case. In *Moreno*, the challenged regulation allegedly was intended to protect against fraudulent procurement of food stamps,⁷³ while in *Belle Terre*, the challenged ordinance was intended to preserve the residential character of the neighborhood and to avoid ensuing urban problems.⁷⁴ According to Justice Douglas' analysis, the effect of the plaintiffs' association on the community environment extinguished their right to live with the companions of their choice as established in *Moreno*. This right, deemed to be a part of the fundamental right of association by Justice Douglas in *Moreno*,⁷⁵ seemingly lost its classification as such in *Belle Terre*.⁷⁶ Hence, had Justice Douglas remained consistent with his opinion in *Moreno*, the ordinance in the instant case could have been justified only by a showing that the village of Belle Terre had a substantial and overriding interest in preserving its residential character.⁷⁷ In light of these seemingly irreconcilable opinions, it is submitted that Justice Douglas, at least, will continue to utilize the broadest possible concept of police power when the governmental classification involves a land use regulation.⁷⁸

In accepting the majority opinion that the zoning ordinance did not infringe upon fundamental rights, it is important to consider its possible impact upon both the allocation of the burden of proof in future litigation in the zoning field, and exclusionary zoning.⁷⁹ First, because *Belle Terre* held that the single-family zoning ordinance dealt with economic and social legislation and neither infringed a fundamental right nor involved

70. *Id.* Similarly, the students in *Belle Terre* banded together to acquire economical housing. While the need for housing might not be as severe as the need for food, which would have been frustrated by the denial of food stamps in *Moreno*, it is submitted that the associational rights are identical. *But see* 416 U.S. at 8 n.6.

71. 413 U.S. at 541.

72. *Id.* at 542.

73. *Id.*

74. *See* text accompanying note 58 *supra*.

75. *See* notes 70-71 and accompanying text *supra*.

76. Justice Douglas, in his majority opinion, stated that there had been no infringement on the fundamental right of freedom of association. *See* note 50 and accompanying text *supra*.

77. According to the "strict scrutiny" test, infringement of a fundamental right may only be justified when it is necessary to serve a compelling state interest. *See* note 18 and accompanying text *supra*.

78. *See* *Berman v. Parker*, 348 U.S. 26 (1954), discussed at note 42 *supra*. Thus, the judicial deference in the zoning field, initiated in *Euclid* and *Berman* has once again been blessed in *Belle Terre*. As Justice Douglas stated in *Berman*, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms which are high conclusive." 348 U.S. at 32.

79. *See* notes 21-25 *supra*.

a suspect classification, a party attacking such an ordinance will have the burden of showing that it bears no rational relation to a legitimate governmental interest.⁸⁰ The effect of applying this minimal scrutiny test is to reaffirm the great judicial deference established by the Supreme Court in *Euclid*.⁸¹ A heavy burden remains upon the party attempting to overturn the ordinance,⁸² while as in *Belle Terre*, local municipalities are free to advance any legislative rationale that purportedly supports their actions, even where the promotion of such governmental interests as population control, prevention of traffic problems, and rent inflation would be better served by means other than a *Belle Terre*-type blood-related zoning ordinance.⁸³ For example, the consequences of an increase in population could be dealt with by placing an equal limitation on the number of blood-related people; the traffic problem might be mitigated by limiting the number of automobiles per dwelling unit, coupled with limitations on noxious uses; and the effect of rent inflation could be lessened by implementing rent controls.⁸⁴ Efforts to further these interests by blood-related zoning were rejected by the district court,⁸⁵ and the court of appeals in *Belle Terre*,⁸⁶ as well as by the courts in *Trottner*⁸⁷ and *Kirsch*.⁸⁸ Justice Marshall also rejected this method of achieving the alleged governmental interests when he stated that the ordinance was both over and underinclusive.⁸⁹ But absent a conflict with a fundamental constitutional right such as freedom of asso-

80. See note 17 and accompanying text *supra*. For examples of the "minimal scrutiny" test employed by the Burger Court, see generally *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970). One commentator has suggested that the Court has created a different test. Gunther, *supra* note 55, at 10-20.

81. See notes 12-13, 41 and accompanying text *supra*.

82. See ANDERSON, *supra* note 13, § 2.15, at 72. "Notwithstanding the differences in languages used to describe the kind and degree of proof needed to upset a zoning ordinance, it seems clear that in nearly all of the states the burden can properly be described as an 'extraordinary' one." *Id.*

83. See Brief for Appellee at 47-59, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), where plaintiffs argued that these goals were largely illusory.

84. All of these alternatives were suggested by the court of appeals. 476 F.2d at 817.

85. 367 F. Supp. at 146. See note 6 *supra*.

86. 476 F.2d at 816. The court held the objectives to be unacceptably speculative and stated:

If some or all of these hypothesized objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state power. Upon the record before us, however, we fail to find a vestige of any such support. To theorize that groups of unrelated individuals would have more occupants per house than would traditional family groups, or that they would price the latter out of the market or produce greater parking, noise or traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed.

Id. (emphasis added).

87. 34 Ill. 2d at 437, 216 N.E.2d at 119. See note 29 and accompanying text *supra*.

88. 59 N.J. at 253-54, 281 A.2d at 520. See note 31 and accompanying text *supra*. But see *Palo Alto Tenants' Union v. Morgan*, discussed at text and accompanying notes 33-37 *supra*.

ciation, neither would he find constitutional infirmity in a town's limiting the density of uses in residential areas by zoning regulations.⁹⁰

It is also doubtful that the *Belle Terre* ordinance actually furthered the goal of preserving the family character of the neighborhood by limiting the number of unrelated cohabitating individuals. For example, since under this ordinance two unrelated persons legally could live together, there would be little to prevent the formation of homosexual or common law heterosexual household units, which are viewed by some as antithetical to traditional family associations.⁹¹ The result of attempting to preserve this family character will be to allow families, no matter how large, to live in the smallest of houses, while at the same time barring three elderly people from occupying the large manor house next door.⁹² Such ordinances would make it difficult for two families to pool their financial resources for a summer home, or for a low-income group to band together to meet economic adversities.⁹³ Even foster parent and summer "fresh air" programs would be in danger of violating local law.⁹⁴

Second, the impact of the *Belle Terre* decision on exclusionary zoning may be to hinder or reverse developments in recent lower court decisions which have struck down other exclusionary tactics employed by local suburban municipalities.⁹⁵ Implicit in these decisions is a rejection of unduly broad methods and a distaste for zoning ordinances that have as their goal the preservation of exclusive residential enclaves⁹⁶ at the expense of the regions that surround them.⁹⁷ The net result is the

90. *Id.* at 17 n.6, citing *Palo Alto Tenants' Union v. Morgan*, 487 F.2d 883 (9th Cir. 1973). In *Palo Alto*, the ordinance limited the number of persons, related or unrelated, to four. *Id.* at 884. Apparently, neither would Justice Marshall question the exclusion of high-density residential uses absent suspect classifications. 416 U.S. at 14 n.3.

91. This justification was rejected as a proper zoning objective by the court of appeals, which stated that such a goal failed to fall within the proper exercise of police power. 476 F.2d at 815. See also text accompanying note 31 *supra*.

92. 416 U.S. at 19 (Marshall, J., dissenting). This, of course, assumes good faith, constitutionally equal application of the ordinance to all parties within its ambit, not merely to "hippie communes." See text accompanying note 99 *infra*.

The court of appeals saw the ordinance as a means to impose social preferences on fellow citizens. 476 F.2d at 816. The court stated:

To permit such action would be to invite, upon similar guise, zoning laws that would restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum income, or those passing muster after interview by a community "Admissions Committee."

Id.

93. See text accompanying notes 69-72 *supra*.

94. See, e.g., *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 248, 281 A.2d 513, 517 (1971), wherein the court stated that it would appear that a violation might occur under the ordinance even were the family to have house guests.

95. See notes 22-24 *supra*.

96. For an excellent discussion on why suburbia uses these devices, see Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1062-72 (1963). See also Sager, *supra* note 21, at 790-98.

97. See, e.g., *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970). The Pennsylvania Supreme Court struck down 2- and 3-acre minimum lot zoning schemes, finding them to be outside the scope of the general welfare. The court stated: "It is not for an individual township to say who may or may not live within its confines, while disregarding the interests of the entire area." *Id.* at 474, 268 A.2d at 768-69.

passing on of the burdens of overcrowding and traffic congestion to the other communities in the region, which, in retaliation, might adopt exclusionary measures of their own.⁹⁸ In light of this possible ramification the *Belle Terre* Court should have been more precise in fixing the boundaries within which local towns can operate to preserve their family or residential character.

In the final analysis, *Belle Terre* may prove to be no more than a manifestation of a guarded fear of communal or "hippie-type" living arrangements, although this seems doubtful in light of the Court's position in *Moreno*.⁹⁹ Instead, *Belle Terre* could add mortar to the great, invisible wall which already separates suburban from urban America.

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Earlier, in *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965), the same court stated:

The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of new comers in order to avoid future burdens, economic or otherwise . . . can not be held valid.

Id. at 532, 215 A.2d at 612.

98. The court of appeals noted: "If *Belle Terre* is permitted to exclude appellants from its borders, other nearby communities, in the absence of a coordinated, enforceable regional plan, may be expected to do likewise. Indeed, many already have." 476 F.2d at 817-18 (footnote omitted). The court went on to list five surrounding villages with "family" ordinances. *Id.* at 818 n.9. See Brief for Appellee at 45, for a more extensive list. In light of the fact that the entire town was zoned only for single-family residences, thereby excluding the plaintiffs from *Belle Terre* altogether, the *Belle Terre* Court's failure to address the posed regional issue is particularly disturbing.

99. See text accompanying notes 67-68 *supra*.

