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No Dogs, Cats, or Voluntary Families Allowed - Village of Belle Terre v. Boraas

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NOTES

During the past term, the Burger Court has decided a number of equal protection cases using an intermediate standard of review. This emerging standard lies somewhere between the minimal rationality and strict scrutiny tests of the more conventional two-tier model.

The following Notes analyze cases which are representative of the Burger Court's recent equal protection decisions where it appears that the Court's sense of fairness of the governmental action involved is the new standard of review.

NO DOGS, CATS, OR VOLUNTARY FAMILIES ALLOWED—*VILLAGE OF BELLE TERRE v. BORAAS*

The Village of Belle Terre is a small community of approximately 220 homes on Long Island, New York, zoned exclusively for single-family dwellings.[1] The zoning ordinance's definition of "family" restricts groups consisting of more than two people not related by blood, adoption or marriage, from living together as a single housekeeping unit.[2]

This provision was the subject of a challenge in *Village of Belle Terre v. Boraas*.[3] The Dickmans, owners of a house within the village, leased it in December 1971, to Michael Truman who was later joined by Bruce Boraas and four others. All of the tenants were students at a nearby State

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1. Village of Belle Terre, N.Y., Building Zone Ordinance art. I, § D-1.34a (1971). This ordinance defines a "single-family dwelling" as:

> A detached house consisting of or intended to be occupied as a residence by one family only, as family is hereafter defined. In no case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family dwelling.

Id.

2. The ordinance defines "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.

Id. art. I, § D-1.35a (1971). *See also What Constitutes a "Family" within Meaning of Zoning Regulations or Restrictive Covenant*, Annot., 172 A.L.R. 1172 (1948).

3. 416 U.S. 1 (1974).

University and none were related by blood, marriage or adoption. The Village served the Dickmans with an "Order to Remedy Violations" of the ordinance, whereupon the Dickmans and three tenants brought an action in U.S. District Court seeking injunctive relief and a declaratory judgment regarding the constitutionality of the provision.[4] While the district court denied such relief,[5] the court of appeals, in a two to one decision, reversed, finding the ordinance to be a violation of the equal protection clause of the fourteenth amendment.[6]

On appeal to the United States Supreme Court,[7] the appellees challenged the ordinance's validity on principally the same grounds relied on in the court of appeals; that the ordinance's classification, which was based on traditional family relationships, impinged on their fundamental rights of travel, association, and privacy[8] and violated the equal protection clause. In a seven to two decision,[9] the Court upheld the ordinance, finding it rationally related to the permissible state objective of land use planning pursuant to the needs of families,[10] and finding no violation of any fundamental rights of the appellees.[11]

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4. Boraas v. Village of Belle Terre, 476 F.2d 806, 810 (2d Cir. 1973). The court notes that the action was brought in the district court under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1973):

> seeking preliminary and permanent injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two persons 'not related by blood, adoption, or marriage.'

5. Boraas v. Village of Belle Terre, 367 F. Supp. 136 (E.D.N.Y. 1972). The court said it was not unconstitutional because the students live cooperatively under zoning ordinances in other nearby communities. *Id.* at 147-49.

6. 476 F.2d at 808. The court said, "[w]e hold that since the discriminatory classification is unsupported by any rational basis consistent with permissible zoning law objectives, it transgresses the equal protection clause."

7. 476 F.2d 806, *prob. juris. noted*, 414 U.S. 907 (1973).

8. 416 U.S. 1 (1974).

9. *Id.* The seven majority justices were Chief Justice Burger, Justices Douglas, Stewart, Powell, Blackmun, White, and Rehnquist. The dissenters were Justices Brennan and Marshall.

10. *Id.* at 9. The Court articulated the guidelines used to measure the validity of legislation involved in cases like the one before it:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be "reasonable, not arbitrary" [quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)] and bears "a rational relationship to a [permissible] state objective," Reed v. Reed, 404 U.S. 71, 76 (1971).

Id. at 8.

11. *Id.* at 7-8. The three fundamental rights raised by the appellees, which have been previously recognized by the Court, were: right of association, NAACP v. Ala-

The history of the Supreme Court is marked by few cases which involve the validity of local zoning ordinances. Indeed, *Belle Terre* ends a hiatus of forty-six years during which the highest court has been silent in the zoning area. While the last zoning decision before *Belle Terre* was in 1928, *Nectow v. City of Cambridge*,[12] the most significant decision occurred two years prior in *Village of Euclid v. Ambler Realty*.[13] *Euclid* sustained a zoning ordinance which classified an area into six categories, each category determining the type of building which could be constructed as well as its height and land area. The Court found the ordinance a proper exercise of the state's police power, and said it would defer to the local legislature if the "classification for zoning purposes was fairly debatable."[14] The *Euclid* Court's attitude of deference to the local legislature has become the means whereby subsequent local zoning legislation has been upheld.[15] The rationale used in *Belle Terre* to uphold the zoning ordinance's definition of a "family" refurbished the *Euclid* decision.

The Supreme Court not only gave vitality to traditional zoning law by re-emphasizing *Euclid*, but it did so without giving commensurate weight to fundamental rights of the appellees. In refusing to recognize these associational rights, the opinion failed to offer any reasoned elaboration on

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bama, 357 U.S. 449 (1958); right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and the right of privacy, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

12. 277 U.S. 183 (1928). The Court in *Nectow* dealt with the specific application of a zoning ordinance challenged by the plaintiff in error as a deprivation of property without due process in violation of the fourteenth amendment. The Court found the ordinance as applied unconstitutional. *Id.* at 188-89.

13. 272 U.S. 365 (1926).

14. *Id.* at 388.

15. In *Euclid*, an owner of unimproved land challenged the zoning ordinance, claiming its building restrictions operated to reduce the normal value of his property and therefore deprived him of liberty and property without due process. The following passages from the opinion illustrate the Court's evaluation of the purpose and weight of the state police power.

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.

Id. at 387.

> If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

Id. at 388, *citing* Radice v. New York, 264 U.S. 292, 294 (1924).

> [I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Id. at 395. *Accord*, Zahn v. Board of Public Works, 274 U.S. 325 (1927); Cusack Co. v. City of Chicago, 242 U.S. 526, 530-31 (1917); Jacobson v. Massachusetts, 197 U.S. 11, 30-31 (1905).

the issue.[16] The majority reached its decision through application of traditional equal protection theory. In contrast, the court of appeals had relied on the new "flexible" equal protection approach[17] which the Supreme Court itself seems to have sanctioned[18] without ever clearly articulating it.[19] *Belle Terre*'s re-establishment of the *Euclid* traditional zoning theory coupled with the failure to recognize the appellee's associational rights marks a victory for exclusionary zoning.

This Note will analyze the Supreme Court's refusal to recognize the associational rights of individuals when confronted with traditional type zoning legislation. It will include a brief examination of state police power, as well as discussion of recent state and federal cases similar to *Belle Terre*. The Note will also examine the difference between the equal protection analysis applied by the court of appeals and the Supreme Court.

VALIDITY OF STATE LEGISLATION

The Police Power Argument

States have historically defended the validity of their legislative enactments by asserting that the legislation was "reasonable" and "not arbitrary" and was a legitimate exercise of their police power.[20] An early definition illustrating the expanse of state police power was advanced in *Barbier v. Connolly*, where the Court described it as the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people. . . ."[21] A more recent and expansive definition of police power was offered by Justice Douglas in *Berman v. Parker*,

16. 416 U.S. 1, 7-9. *See also* note 11 *supra*.

17. 476 F.2d 806, 814 (1973). For an analysis of the court of appeals decision and its treatment of the new test of equal protection, *see* Note, *Up the Down-Sliding Scale:* Boraas v. Village of Belle Terre *and Equal Protection Assault on Restrictive Definitions of "Family" in Zoning Ordinances*, 49 NOTRE DAME LAW. 428 (1973).

18. The cases in which some aspect of the new test can be seen are Kahn v. Shevin, 416 U.S. 351 (1974); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); James v. Strange, 407 U.S. 128 (1972); Police Dep't v. Mosley, 408 U.S. 92 (1972); Reed v. Reed, 404 U.S. 71 (1971).

19. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Development in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969).

20. For a general discussion of state police power, *see* B. Schwartz, *Constitutional Law: A Textbook* 42-46, 166-91 (1972).

21. 113 U.S. 27, 31 (1885).

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and *do not delimit it* (emphasis added).[22]

These definitions taken alone show the discretion afforded states in enacting legislation and suggest judicial deference when courts are asked to pass on their validity. The Supreme Court has gone as far as saying there is a presumption in favor of the legislation's validity.[23]

The Court's hands-off attitude is the result of its assumption that local legislative bodies are more knowledgeable of the relevant facts and thus are better equipped to determine whether particular legislation is necessary.[24] However, the courts will interfere if the legislation exceeds constitutional limitations.[25] The following is an illustration of the criteria which the courts will often use in judging constitutionality:

> [T]he regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil. . . .[26]

In particular, this standard has frequently been used in zoning regulation cases to invalidate statutes similar to the one involved in *Belle Terre*.[27]

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22. 348 U.S. 26, 32 (1954); *accord*, California Auto. Ass'n v. Maloney, 341 U.S. 105 (1951); Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

23. In Gitlow v. New York, 268 U.S. 652 (1925), the Court said, "Every presumption is to be indulged in favor of the validity of the statute [*citing* Mugler v. Kansas, 123 U.S. 623, 661 (1887)]." *Id.* at 668. *See* Dennis v. Village of Tonka Bay, 156 F.2d 672 (8th Cir. 1946).

24. In Cusack Co. v. City of Chicago, 242 U.S. 526 (1917), the Court determined the validity of an ordinance regulating the erection of billboards and noted:

> while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority. . . .

Id. at 530-31. An even stronger cry for judicial deference can be seen in Radice v. New York, 264 U.S. 292 (1924):

> Where the consitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.

Id. at 294. *See also* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510 (1937); Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405, 433 (1935).

25. *See, e.g.*, Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613, 622 (1935); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Buchanan v. Warley, 245 U.S. 60, 74 (1917).

26. Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251, 281 A.2d 513, 518 (1971); *accord*, Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935).

27. Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513

An examination of the principal decisions in the family zoning area prior to *Belle Terre* seems to indicate a trend towards preferential treatment of individual rights over restrictive zoning ordinances (while some cases have found the restrictive legislation valid under a traditional *Euclid* approach).

FAMILY ZONING PRIOR TO *Belle Terre*

State Cases

Most state court decisions have found invalid legislation which has defined "family" so as to exclude persons unrelated by blood, marriage or adoption.[28] State police power arguments are muted in the face of constitutional limitations or when confronted with other judicial devices which had the same effect.[29]

In *City of Des Plaines v. Trottner*,[30] the Illinois Supreme Court examined an ordinance which contained a provision restrictively defining family as:

> one or more persons each related to the other by blood (or adoption or marriage), together with such relatives' respective spouses, who are living together in a single dwelling and maintaining a common household. A "family" includes any domestic servants and not more than one gratuitous guest residing with said "family."[31]

The court recognized the zoning objectives of protecting the stability of the neighborhood and property values as well as insulating the neighborhood from traffic and parking problems. Similar objectives were recognized in *Belle Terre*, but there the Court refused to conclude, as did the *Trottner* court, that to say that property values would decline and traffic problems result from allowing unrelated persons the right to live together

(1971); Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970).

28. Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970); City of Des Plaines v. Trottner, 34 Ill. 2d 432, 438, 216 N.E.2d 116, 120 (1966); Marino v. Mayor and Council of Norwood, 77 N.J. Super. 587, 187 A.2d 217 (L. Div. 1963). *Contra*, City of Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (L. Div. 1961).

29. In City of Des Plaines v. Trottner, 34 Ill. 2d 432, 438, 216 N.E.2d 116, 120 (1966), the court invalidated the ordinance as impermissible zoning legislation because it was beyond the scope of subject matter authorized by the General Assembly. *See* note 33 and accompanying text *infra*.

30. 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

31. *Id.* at 433-34, 216 N.E.2d at 117 (1966).

is an oversimplification and in no manner "reflects a universal truth."[32] Although *Trottner* failed to reach the constitutional questions involved, its attitude toward the legislation can be seen in the choice of words used to invalidate the ordinance on other grounds.

> The General Assembly has not specifically authorized the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit.[33]

Family zoning legislation in New Jersey has been extensive, culminating in a favorable treatment toward unrelated individuals. While *City of Newark v. New Jersey*[34] upheld the validity of a restrictive family zoning ordinance as not unreasonable, arbitrary or discriminatory, the following cases, *Marino v. Mayor and Council of Norwood*,[35] and *Gabe Collins Realty Inc. v. City of Margate City*,[36] invalidated ordinances similar to the one involved in *City of Newark*. The New Jersey Supreme Court finally spoke out on the family zoning issue in *Kirsch Holding Co. v. Borough of Manasquan*,[37] where it invalidated a restrictive family ordiance. It was noted that not only would the ordinance prohibit a small unrelated group of widows or widowers from occupying a resort cottage, but it would equally prohibit two unrelated judges from doing so.[38] The court found the ordinances "so sweepingly excessive" and "legally unreasonable, that they must fall in their entirety."[39] This case, at least in theory, settled the future of restrictive family zoning ordinances in New Jersey.

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32. The court recognized that "not all family units are internally stable and well-disciplined" and that "family groups with two or more cars are not unfamiliar." *Id.* at 437-38, 216 N.E.2d at 119.

33. *Id.* at 438, 216 N.E.2d at 119.

34. 70 N.J. Super. 381, 175 A.2d 500 (L. Div. 1961). The ordinance affected children who were placed in homes by the Board of Child Welfare but were not related by "blood, marriage, or adoption" to the residents of the homes. Even in this emotionally charged situation the court upheld the ordinance.

35. 77 N.J. Super. 587, 187 A.2d 217 (L. Div. 1963). The court allowed an unmarried couple to live together by holding the ordinance which restricted "family" to relationships of "blood or marriage" inapplicable upon a finding of a bona fide housekeeping unit.

36. 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970). The typical "family" ordinance was designed to restrict the summer rental of houses to groups of men and women who failed to meet the relation requirements of the ordinance. The ordinance's purpose was to prevent noise and other disturbances.

37. 59 N.J. 241, 281 A.2d 513 (1971).

38. *Id.* at 248, 281 A.2d at 517.

39. *Id.* at 252, 281 A.2d at 518.

Federal Cases

The two federal cases prior to *Belle Terre* in this area of zoning demonstrate conflicting results. In *Palo Alto Tenants Union v. Morgan*,[40] the definition of "family"[41] survived an equal protection and due process challenge, when the court found that the ordinance did not infringe upon any fundamental interests of the plaintiffs. The court said zoning laws could properly control population density and that this alone might be enough to justify ordinances which limit the number of unrelated individuals living together.[42]

The more recent federal court case to deal with a restrictive family zoning ordinance is *Timberlake v. Kenkel*.[43] There the ordinance defined family so as to preclude occupancy of a single family dwelling by four or more unrelated individuals. The court found the ordinance unconstitutional as a violation of the equal protection clause.

The district court in *Timberlake*, like the court of appeals in *Belle Terre*, applied the more "flexible" equal protection approach and not the rigid "two-tiered" formula.[44] In both cases the courts cited a number of recent Supreme Court decisions to justify the new approach, which they believed to be more equitable than the old equal protection formula. However, the Supreme Court in *Belle Terre* failed to recognize the new approach and adopted the "two-tiered" model. The following section will analyze the difference in equal protection treatment and the possible reasons for the Supreme Court's return to old equal protection.

Belle Terre EQUAL PROTECTION

In challenging legislation on the grounds that it violates the equal protection clause, focus is directed toward the classification implicit in the

40. 321 F. Supp. 908 (N.D. Cal. 1970); *aff'd mem.*, 487 F.2d 883 (9th Cir. 1973).

41. Family was defined as "one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit." *Id.* at 909.

42. *Id.* at 912.

43. 369 F. Supp. 456 (E.D. Wis. 1974).

44. In Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), the appeals court recognized the Supreme Court's move from the ". . . rigid dichotomy sometimes described as the 'two-tiered' formula toward a more flexible and equitable approach. . . . Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute." *Id.* at 814. In Timberlake v. Kenkel the flexible approach is also adopted by the court as an acceptable equal protection formula, 369 F. Supp. at 464.

legislation. In order to determine whether the classification is a means to discriminate against a particular group of individuals unconstitutionally, the Court applies the equal protection test applicable to the given facts. What test will be used depends upon the group as well as the rights which are affected. Generally, the Court has used a "two-tiered" approach to equal protection. The first tier demands that the legislative classification bears only a rational relation to the governmental purpose.[45] In these cases the Court exercises only minimal scrutiny to determine whether the basis for the classification is rational, which effectively amounts to no scrutiny at all.[46] In the second tier, the Court exercises a much closer examination of the classification, often termed "strict scrutiny." This heightened test is used where the classification is "suspect"[47] or when it infringes on a "fun-

45. In F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), the Court set out the test as follows:

> the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Id. at 415.

That test was further diluted in McGowan v. Maryland, 366 U.S. 420 (1961), where the Court said, "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 states of facts reasonably may be conceived to justify it." *Id.* at 425-26. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), four principles were articulated which characterized the equal protection clause:

1. The equal protection clause of the fourteenth amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. at 78-79.

46. *See* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 995 (1974).

47. Classifications the Supreme Court has deemed "suspect" requiring strict scrutiny are those based on race, Yick Wo v. Hopkins, 118 U.S. 356 (1886); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and nationality, Korematsu v. United States, 323 U.S. 214 (1944). It can also be argued that "suspect" classifications include sex, Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); *see* Note, *Tax Benefits for Widows, the Supreme Court's Attitude Toward*

damental interest."[48] In these cases the classification must "be necessary to promote a *compelling* governmental interest,"[49] otherwise it will be held unconstitutional.

The "two-tiered" formula of equal protection seems to leave all classifications which fail to touch suspect criteria or fundamental interests free from judicial intervention. In response to the dissatisfaction with the "two-tiered" formulation, the Burger Court has introduced the "means-scrutiny" approach to equal protection.[50] The court of appeals in *Belle Terre* used this approach and ultimately found the village ordinance unconstitutional.

The court of appeals characterized the new approach as one "which permits 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 urged in support of it."[51] The test was "whether the legislative classification is *in fact* substantially related to the object of the statute."[52] This approach seems to offer more protection for an individual's rights than the presumption of the legislation's validity under minimal scrutiny.

The Supreme Court in *Belle Terre* failed to apply the court of appeals "flexible" approach or any other middle ground equal protection theory.[53] Instead the Justices relied on a "minimal scrutiny" approach[54] which they viewed as particularly applicable to the zoning area where local legislatures have generally been given a free rein.[55] This approach seems appropriate in light of the Court's recent opinion in *San Antonio School Dis-*

Remedial Sex Legislation—Kahn v. Shevin, 24 DEPAUL L. REV. 797 (1975); wealth, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); and illegitimacy, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

48. The list of "fundamental interests" requiring strict scrutiny include the right to privacy, Roe v. Wade, 410 U.S. 113 (1973); the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right of procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); the right to essentials necessary to bring a criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956); and the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Dunn v. Blumstein, 405 U.S. 330 (1972).

49. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

50. *See* notes 17 & 18 *supra.*

51. 476 F.2d 806 at 814.

52. *Id.* at 814.

53. For a discussion of the Supreme Court's discontent with the "two-tiered" approach and its development of a new middle ground scrutiny, *see* Note, *Tax Benefits for Widows, the Supreme Court's Attitude Toward Remedial Sex Legislation*—Kahn v. Shevin, 24 DEPAUL L. REV. 797, nn.16-32 and accompanying text (1975).

54. 416 U.S. 1 at 8; *see* note 10 *supra.*

55. 416 U.S. at 3-6.

trict v. Rodriguez,[56] which rejected an equal protection attack on interdistrict inequalities in school financing. There, too, the Court felt it must defer to the state legislature in an area where the legislature has traditionally been given great discretion. The Court admitted that it "lack[s] both the expertise and the familiarity with local problems so necessary to the making of wise decisions,"[57] and that "[i]n such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny. . . ."[58]

The Supreme Court, in *Belle Terre*, refrained from imposing strict scrutiny, and deferred to the state legislature in an area where the legislature has traditionally been given a free hand. The issue is the effect upon the rights of the individuals involved. As Justice Marshall, in his *Belle Terre* dissent, said, ". . . deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances . . . do not infringe upon fundamental constitutional rights."[59] Yet, *Belle Terre* seems to put traditional zoning concerns and "fundamental interests" on their respective sides of the scale of justice with zoning objectives clearly coming out the more weighty of the considerations.

While *Rodriguez* and *Belle Terre* are compatible, a case decided prior to *Belle Terre* and which remains at odds with it is *United States Department of Agriculture v. Moreno*.[60] There the Supreme Court found a provision in the Food Stamp Act, which denied federal food stamp assistance to households in which all the members were not related, a violation of equal protection.[61] Justice Douglas, in his concurring opinion said, "[t]he 'unrelated' person provision . . . has an impact on the rights of people to associate for lawful purposes with whom they choose. When state action 'may have the effect of curtailing the freedom to associate' it 'is subject to the closest scrutiny.' "[62] Yet, Justice Douglas, who spoke for the majority in *Belle Terre*, said in reference to a similar ordinance that it "involves no 'fundamental' right guaranteed by the Constitution . . .

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56. 411 U.S. 1 (1973).

57. *Id.* at 41.

58. *Id.*

59. 416 U.S. 1, 14 (1974) (Marshall, J., dissenting).

60. 413 U.S. 528 (1973).

61. *But see* Note, United States Department of Agriculture v. Moreno—*The "Red Herring" of Social Welfare*, 23 DEPAUL L. REV. 1485, 1495-98, where it is suggested that the Burger Court, as evidenced by United States Dep't of Agric. v. Moreno, 413 U.S. 528, takes a more liberal attitude toward politically unpopular groups, *e.g.*, "hippy communes."

62. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 544 (1973).

[such as] . . . the right of association."[63] This apparent change of position is in keeping with the Burger Court's tendency to defer to local governments in many areas and in particular to keep zoning law an exclusive domain for the state. This probably explains the Court's failure in *Belle Terre* to apply the greater degree of scrutiny employed in *Moreno*.[64] If the Court recognized the fundamental right of association of the appellees in *Belle Terre*, it would be forced to find the family zoning ordinance unconstitutional and thereby break with traditional *Euclid* zoning theory.

Belle Terre might also be explained as the manifestation of the Justices' views on communal living arrangements.[65] Clearly, the decision is a victory for exclusionary zoning as it affects the plight of non-traditional or voluntary families. The single-family ordinance originally designed to regulate building structure has, especially since *Belle Terre*, become an effective instrument of social control.[66] While *Belle Terre* does not expressly give preference for traditional families, it does so by implication. The Court says, "[T]he provision of the ordinance bringing within the definition of a 'family' two unmarried people belies the charge . . . that the ordinance . . . reeks with an animosity to unmarried couples who live together."[67] Yet *two* unmarried people living together is clearly the most traditional of non-traditional living arrangements. The decison also comments on *family values* and *youth values*, stating "[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."[68]

The Court further seems to imply that non-traditional households are larger than traditional households, thus creating crowds, noise and traffic.[69] Yet, statistics show the average size of a household, which is defined to include a voluntary family, at 3.01 persons in 1973, compared to 3.48 persons for a traditional family and 3.55 persons per household in the Village of Belle Terre.[70] If the Court had applied a heightened

63. 416 U.S. 1, 7 (1974). *But see* Lindsey v. Normet, 405 U.S. 56 (1972), where Justice Douglas in his dissenting opinion said, "The home—whether rented or owned—is the very heart of privacy in modern America." "The 'rational' relationship test applied to strictly economic or business interests . . . is not germane here." *Id.* at 81-82 & n.5.

64. Note, *supra* note 61, at 1488, 1494.

65. *See* note 61 *supra*.

66. *See* Note, 23 HAST. L.J. 1459, 1464 (1972); *see also* Note, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393, 394-95 (1972).

67. 416 U.S. 1, 8 (1974).

68. *Id.* at 9.

69. *Id.*

70. Statistical Abstract of United States, United States Department of Commerce,

scrutiny to the classification which the ordinance created, it would have taken these statistics into consideration. As Justice Marshall, in his dissent, noted, "[t]here is not a shred of evidence in the record indicating that if Belle Terre permitted a limited number of unrelated persons to live together, the residential, familial character of the community would be fundamentally affected."[71]

CONCLUSION

The Supreme Court in *Belle Terre* has indicated that traditional zoning concerns under the auspices of state police power, take preference over the fundamental rights of association and privacy. In light of the Court's articulation of a strong policy of deference to the local legislature in zoning matters, it is doubtful whether it will agree to adjudicate an exclusionary zoning case in the near future.

However, state courts have yet to take an adamant stand on the issue.[72] In the past, the state courts have had a liberal attitude as to what constituted a "family"[73] which may still persist despite the adverse result in *Belle Terre*. These courts may help perpetuate the movement against exclusionary zoning in the non-traditional family sphere.

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Bureau of Census p. 40 (1974). Household is defined as that which comprises:

> all persons who occupy a "housing unit," that is, a house, an apartment or other group of rooms, or a room that constitutes "separate living quarters." A household includes the related family members and all the unrelated persons, if any, such as lodgers, foster children, wards, or employees who share the housing unit. A person living alone or a group of unrelated persons sharing the same housing unit as partners also counted as household.

Id. at 3.

Family is defined as:

> a group of two or more persons related by blood, marriage, or adoption and residing together in a household. A primary family consists of the head of a household and all other persons in the household related to the head. A secondary family comprises two or more persons such as guests, lodgers, or resident employees and their relatives, living in a household and related to each other.

Id. If Belle Terre has a population of 700 and consists of 220 homes, the average population per household is 3.55. 416 U.S. 1, 2 (1974).

71. 416 U.S. 1, 20 (1974).

72. In City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756 (1974), decided after *Belle Terre*, the court invalidated a single-family ordinance which restrictively defined family and implied that a voluntary family which was a permanent living arrangement could not be deprived residence in a single-family dwelling. The court distinguished *Belle Terre* because there the Court dealt with a "temporary living arrangement." *Id.* at 304-05, 313 N.E.2d at 758. *See* text accompanying notes 35-37, *supra*.

73. *See* text accompanying notes 31-41, *supra*.