
Albert G. Marquis
RECENT DEVELOPMENTS

Constitutional Law—Zoning For Single-“Family” Dwellings Is Not Denial of Equal Protection to Unrelated Persons—

Six unrelated persons resided in a single dwelling in Belle Terre, New York, in violation of the Village’s zoning ordinance. The village is zoned exclusively for one-family dwellings; “family” is defined by the ordinance as:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or] 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.

The lessors of the residence were served with notice that failure of their tenants to disband would subject the lessors to criminal liability. They and the three members of the Boraas household commenced an action under 42 U.S.C. § 1983 in federal district court claiming that the Belle Terre ordinance unconstitutionally infringed their rights of travel, privacy and association. The district court upheld the ordinance on the ground that the preservation of the traditional family character in a community is a proper zoning consideration.

The Court of Appeals for the Second Circuit reversed. On appeal, the United States Supreme Court reversed the circuit court in a 7–2 decision. Held: The Belle Terre ordinance did not abridge any fundamental interest and is within the class of economic and social legislation that is upheld if it is “reasonable” and bears “a rational relationship to a [permissible] state objective.”

2. Boraas v. Village of Belle Terre, 476 F.2d 806, 809 (2d Cir. 1973). Liability under the Code constitutes a penalty not to exceed $100.00 or imprisonment for a period not to exceed 60 days or both. A separate and distinct offense is deemed committed each day a violation occurs. Belle Terre, N.Y., Zoning Code art. VIII, Part 4, § M–1.4a(2) (1971).
5. 416 U.S. at 8. Justice Brennan dissented on two grounds: (1) there was no case or controversy presented by the tenants since they had moved out of the house
majority reasoned that the ordinance constituted valid land use legis-
lation reasonably designed to maintain traditional family patterns. 

Three aspects of *Boraas* are worthy of discussion: (1) The equal 
protection test applied; (2) whether *Boraas* was decided correctly 
under that test; and (3) the effect of the decision on equal protection 
litigation and on zoning. It is submitted that the Court upheld the 
Belle Terre ordinance without a thorough analysis. Although it would 
have been preferable for the Court to adopt the "balance-of-interests" 
formula advanced by the Court of Appeals for the Second Circuit, or 
at least reveal the shortcomings of such an approach, *Boraas* should 
have been decided differently even under the Court’s two-tiered ap-
proach. The Court should have found that a fundamental interest was 
involved and subjected the ordinance to strict scrutiny. In the alterna-
tive, no rational relationship should have been found between the 
Belle Terre ordinance and permissible zoning objectives.

I. EQUAL PROTECTION ANALYSIS

The Warren Court developed a “two-tiered” formula by which leg-
islation challenged as violative of the equal protection clause is exam-
ined. Briefly, if the personal interest affected by the legislation is 
“fundamental,” or the classification is “suspect,” the “strict” scrutiny 
test is applied; the classification is upheld only if the state shows a

and no longer had an interest to be vindicated by invalidation of the ordinance; and (2) lessors were unable to assert the alleged denial of lessee’s constitutional rights. *Id.* at 10–12.

Justice Marshall, in a separate opinion, dissented because he believed the ordinance 
burdened the lessee’s fundamental rights of association and privacy. Thus, he would 
have applied strict equal protection scrutiny rather than the practical relationship, 
minimal scrutiny applied by the majority. *Id.* at 13.


7. These include the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); 
Oklahoma, 316 U.S. 535 (1942), and to travel interstate. Dunn v. Blumstein, 405 U.S. 
330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). Some fundamental interests 
have developed outside the sphere of equal protection litigation, e.g., the right of pri-
vacy, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 

8. “Suspect” classifications are those based on race, Loving v. Virginia, 388 U.S. 1 
compelling governmental interest\textsuperscript{9} to justify its legislation. If the statute does not contain a suspect class or impinge upon a fundamental interest, the more relaxed “rational basis” test is applied, and the classification is upheld if “any state of facts reasonably may be conceived to justify it.”\textsuperscript{10}

The Warren Court’s two-tiered system was an analytical shortcut. Scrutiny that was “strict” in theory was nearly always “fatal in fact”; the legislation under review seldom survived strict scrutiny.\textsuperscript{11} On the other hand, scrutiny that was minimal in theory was “virtually none in fact”\textsuperscript{12}; a rational basis was nearly always found for legislation reviewed under this test.\textsuperscript{13}

There are recent indications, however, that the Court, dissatisfied with the extremes inherent in the two-tiered formula,\textsuperscript{14} is inclining

\begin{itemize}
  \item \textsuperscript{9} Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
  \item \textsuperscript{10} McGowan v. Maryland, 366 U.S. 420, 426 (1961).
  \item \textsuperscript{11} In only two instances has legislation survived strict scrutiny and then only during wartime. In Korematsu v. United States, 323 U.S. 214 (1944), the Court upheld a military order during World War II excluding persons of Japanese lineage from remaining in particular military areas. The court held that a compelling state interest in national defense justified the legislation which authorized the order. In Hirabayashi v. United States, 320 U.S. 81 (1943), the court held a compelling state interest in national defense sufficient to uphold a curfew order directed only at persons of Japanese lineage under the same legislation as in Korematsu.
  \item \textsuperscript{12} Gunther, The Supreme Court 1971 Term, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther].

  Imaginations can often be stretched to find a rational basis. Under this test, in a pre-Warren Court case, the Court upheld a statute on the ground that nepotism in selection of river pilots could be intended to promote public safety. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947). This case was cited with approval in McGowan v. Maryland, 366 U.S. 420, 426–27 (1961), where the Court upheld a Sunday blue law which permitted the sale of tobacco, confectionaries, milk, bread, fruits, gasoline, oils, greases, drugs and medicine but prohibited the sale of all other commodities including “a three-ring loose-leaf binder, a can of floor wax, a stapler and staples and a toy submarine.” Id. at 422.

  For example, the Justices are unable to agree on the proper standard for determining whether an interest should be deemed fundamental. Justice Powell has stated: “the answer lies in assessing whether there is a right . . . explicitly or implicitly guaranteed by the Constitution.” San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). Justice Marshall, however, disagrees: “I would like to know where the Constitution guarantees the right to procreate . . . or the right to vote in state elections . . . or the right to an appeal from a criminal conviction . . . .” Id. at 100 (dissenting). Justice Rehnquist feels that leaving to “this Court the determination of what are, and what are not, ‘fundamental personal rights’ . . . can only be described as a judicial superstructure, awkwardly engrafted upon the Constitution itself.” Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 179 (1972) (dissenting). In Justice Burger’s opinion, the articulation of suspect classification “tends to stop analysis

\textsuperscript{14}
toward the use of a "balance-of-interests" or "sliding-scale" test.\textsuperscript{15} Under such a test the particular personal interest affected is weighed against the social interest the state seeks to protect. Without acknowledging a departure from its two-tiered formula, the Court has followed such an intermediate approach.\textsuperscript{16} For example, in \textit{Weber v. Aetna Casualty & Surety Co.},\textsuperscript{17} the Court held unconstitutional a Louisiana statute limiting the rights of unacknowledged illegitimate children to recover under workmen's compensation laws. After stating that a statute must at least bear some rational relationship to a legitimate state purpose, the Court reasoned:\textsuperscript{18}

Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . . The essential inquiry in all . . . cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

---

\textsuperscript{15} See Gunther, note 12 supra. The "balance-of-interests" test is formulated in Justice Marshall's dissent in \textit{Rodriguez}:

As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly . . . . This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.


\textsuperscript{18} \textit{Id.} at 172–73 (emphasis added).
The Court of Appeals for the Second Circuit in *Boraas* interpreted *Weber* and other Supreme Court decisions\(^1\) as an indication of a new equal protection test:\(^2\)

The court is required to determine whether the legislative classification *in fact* (rather than hypothetically) has a substantial relationship to a lawful objective. That determination of necessity requires the court to consider evidence of the nature of the classification under attack, the rights adversely affected and the governmental interest in support of it.

When the Supreme Court noted probable jurisdiction in *Boraas*, one might have assumed that it would clarify\(^2\) its current use of equal protection standards. Justice Douglas, however, writing for the majority, did not discuss the alternative methods for examining an equal protection problem. He simply stated that the Belle Terre ordinance involved no fundamental right but was typical of economic and social legislation which is upheld if it is reasonably related to a permissible state objective.\(^2\) Moreover, he did not specify how the ordinance furthered permissible objectives.

The Court's treatment of the equal protection claim suggests two conclusions: (1) Whatever other indications there may be, the two-tiered formula has not yet been dethroned by a "balance-of-interests" test; and (2) an explanation of why certain decisions seem to deviate


\(^2\) 476 F.2d at 815 n.8 (court's emphasis). This formula was used by Justice Marshall in *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972), although he did not discuss the "in fact" relationship. The "hypothetical conception" to which the Court of Appeals for the Second Circuit referred developed from Chief Justice Warren's definition of "minimal scrutiny" in *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961): "A statutory discrimination will not be set aside if any state of facts may be conceived to justify it."

Judge Timbers dissented in the Second Circuit's opinion not because he felt the Court was adhering to the "two-tiered" formula, but because he felt recent decisions of the Supreme Court indicated that the test should be whether the classification under review is "grossly overinclusive or underinclusive." 476 F.2d at 821.

\(^2\) The lower courts, as may be expected, have demonstrated confusion over the proper application of the equal protection doctrine. See, e.g., *Aguayo v. Richardson*, 473 F.2d 1090, 1109 (2d Cir. 1973); *Lawrence v. Oakes*, 361 F. Supp. 432, 440 (D. Vt. 1973); *Henry v. White*, 359 F. Supp. 969, 972 (D. Conn. 1973).

\(^2\) 416 U.S. at 7–8.
from this formula may not be forthcoming—for it is difficult to con-
ceive of an appellate court opinion more worthy of such comment.\textsuperscript{23}

\textbf{A. Rational Basis}

Declining to recognize that the Belle Terre ordinance infringed on any fundamental interest, the Court applied the test of minimal scru-
tiny:\textsuperscript{24}

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” . . . and bears “a rational relationship to a [permissible] state objective.”

The Court upheld the ordinance, finding that it bore a rational relation-
ship to the Village’s zoning interests which were assumed to in-
clude the protection and maintenance of family needs and family values.\textsuperscript{25} This holding is questionable on two grounds: (1) The finding of a rational relationship between the ordinance and the Village’s legitimate interests in zoning contradicted the factual findings of the dis-
trict court; and (2) the Court legitimated a new objective which is not a proper zoning concern.

1. Traditional zoning objectives

In finding that the Belle Terre ordinance bore a sufficient relation-
ship to traditional zoning objectives (i.e., promotion of the general welfare by controlling population density, rental rates, noise and traffic), the Court observed: “The regimes of boarding houses, fra-
ternity houses, and the like present urban problems. More people oc-

\textsuperscript{23} The Second Circuit’s opinion contained an extensive analysis of recent Supreme Court interpretations of the Equal Protection Clause. Boraas v. Village of Belle Terre, 476 F.2d 806, 812–29 (2d Cir. 1973). And, although Judge Timbers dissented, he agreed with the two-judge majority that the Supreme Court is abandon-
ing the two-tiered formula. \textit{id.} at 821. After \textit{Boraas}, lower courts will no doubt con-
tinue to scrutinize and attempt to comprehend Supreme Court opinions, continue to write detailed equal protection analyses and continue to find their decisions cursorily reversed after relying on Supreme Court opinions which “seem drawn more as efforts to shield rather than to reveal the true basis of the Court’s decisions.” San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 110 (1973) (Marshall, J. dissenting).

\textsuperscript{24} 416 U.S. at 8.

\textsuperscript{25} \textit{id.} at 9.
cupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.” While population density and noise and traffic problems may be legitimate zoning concerns, they are, in Justice Douglas’ words, created by “boarding houses, fraternity houses, and the like.” Yet, a boarding or fraternity house is not necessarily “like” a household of three unrelated persons. Indeed, boarding and fraternity houses were specifically excluded by the Belle Terre ordinance. Obviously, the Belle Terre zoning officials did not consider the two equivalent when they enacted the ordinance. If a boarding or fraternity house and an “unrelated” household are sufficiently alike, there would have been no need for two separate exclusions.

There was no convincing evidence produced at the trial level to show that groups of three or four unrelated persons tend to produce these effects any more than do families related by blood, adoption or marriage. The ordinance places restrictions on three unrelated individuals although that number is smaller than the average size household in Belle Terre. Moreover, a group of students, for example,

---

26. Id.
27. While 8 or 10 unrelated persons living together may be approaching “boarding house” dimensions, the similarity ceases long before the number approaches “two.” One case which seems to support the Boraas decision is Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), in which an ordinance defined “family” as no more than “four” unrelated individuals. However, one reason Judge Wollenberg found the limitation inoffensive was that “the average size of even the traditional family is less than four members.” Id. at 912. Furthermore, in Gabe Collins Realty, Inc., v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970), it was held that a limitation to “two” unrelated persons was not a “significant amelioration” of the unreasonableness of totally excluding unrelated households.

The Boraas majority stated that line drawing is within the discretion of the legislature. 416 U.S. at 8. Yet, by invalidating the statute in United States Dep’t of Agriculture v. Moreno, 413 U.S. 528 (1973), see text accompanying notes 36–40 infra, and upholding the Belle Terre ordinance, the Court has drawn the line between the numbers “two” and “three.” While two unrelated individuals have a constitutional right to live together, three do not.


Such a restricted zoning district might well be all but impossible to justify if it had to be strictly justified by its service of such familiar zoning objectives as safety, adequate light and air, preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewerage, school, park and other public services.

30. The average size household is just above three per household (3.18). See 416 U.S. at 19 (Marshall, J., dissenting).
may own only bicycles while a family with teenagers may own three or four automobiles. But the ordinance places no numerical restriction on “related” households, no matter how distant their relationship, even though such households often have two or three wage-earners and three or four cars.

The unreasonableness of the Belle Terre ordinance is also demonstrated by the availability of alternative means by which a local government can directly and more efficiently control population density, noise and traffic problems. For example, the Village’s ordinance itself, which prohibits boarding and fraternity houses, would accomplish the city’s legitimate objectives of controlling the neighborhood population and concomitant noise and traffic problems. Thus, there is no need for an additional restriction on unrelated households. As stated by Judge Mansfield for the Court of Appeals for the Second Circuit:

[Population control] could be achieved more rationally and without discrimination against unrelated groups by regulation of the number of bedrooms in a dwelling structure, by restriction of the ratio of persons to bedrooms, or simply by limitation of occupancy to a single housekeeping unit. Public and private nuisance laws should provide an adequate remedy to curb noise or other forms of pollution on the part of occupants of a dwelling, regardless of their relationship to each other.

Moreover, the Supreme Court’s conclusion in Boraas is inconsistent with its recent decision in United States Department of Agriculture v. Moreno in which the Court invalidated an amendment to the Food

---

31. Justice Marshall found the ordinance overinclusive for including such groups of students. Id.
32. For these reasons, Justice Marshall labeled the ordinance underinclusive. Id.
34. “[T]he criterion that the occupying group constitute a bona fide single housekeeping unit . . . might . . . effectively curtail occupancy by those unrelated groups whose use is essentially of a dormitory or rooming house character . . . .” Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430, 435 (App. Div. 1970) (court’s emphasis).
35. Boraas v. Village of Belle Terre, 476 F.2d 806, 817 (2d Cir. 1973). Judge Mansfield went on to state:
   If the objective of the ordinance were to avoid rent inflation, the simple remedy would be adoption of rent controls rather than the exclusion of a class of people from the community . . . . If a problem of excessive automobiles existed, it could be met simply by restricting the number of cars per dwelling unit, regardless of the relationship of its occupants.
Zoning

Stamp Act of 1964 which excluded from participation in the food stamp program any household containing an individual unrelated to any other member of the household. The government argued that such a requirement was necessary to prevent fraud and abuse. Justice Brennan, however, writing for the majority, stated: 37

But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with the Government's conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

Justice Douglas concurred because he believed that the amendment infringed the participants' freedom of association. 38 In Boraas, however, he distinguished Moreno because the Food Stamp Act prohibited a household of two unrelated persons from receiving assistance whereas Belle Terre permitted two unrelated persons to reside together. 39 The basis for the distinction apparently lies in the fact that unmarried couples could live together under one restriction but not under the other. Writing for the majority in Boraas, however, Justice Douglas gave no reason why three unrelated persons necessarily cherish their right to associate and to live together any less than do two unrelated persons. 40

In short, whether members of a household are related or unrelated has no bearing on a household's propensity for fraud or abuse in the food stamp program. Similarly, relatedness has no bearing on population density or noise and traffic problems. There is no rational relationship between the city's legitimate interest in reducing population density or noise and traffic problems and legislation restricting to three the number of unrelated individuals who may live together.

2. The recognition of a new zoning objective

As noted, the district court in Boraas upheld the Belle Terre ordinance on the sole ground that the protection and maintenance of the

37. 413 U.S. at 535-36 (emphasis in original).
38. Id. at 541-45 (Douglas, J., concurring).
39. 416 U.S. at 8 & n.6.
40. See text accompanying notes 64-77 infra, discussing the right of privacy.
traditional family pattern is a legitimate zoning objective. The majority of the Court implicitly approved the district court's conclusion, stating:41

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.

The Supreme Court's approval of "family needs" and "family values" as legitimate governmental objectives is directly contrary to the Court's decision in New Jersey Welfare Rights Organization v. Cahill,42 and raises the question whether the Court holds the word "zoning" in special reverence. In Cahill the Court held, per curiam, that a New Jersey welfare program which denied benefits to a family with illegitimate children violates the equal protection clause. The district court had upheld the statute on the ground that it was designed to preserve and strengthen family life.43 The Supreme Court refused, however, to recognize the preservation of the general family lifestyle in Cahill as a legitimate government concern,44 but reversed itself sub silentio in Boraas when zoning was involved.

If the restriction in Cahill was in pursuit of an impermissible objective, one may question why the Court approved "family needs" and "family values" as legitimate objectives in Boraas. Is it merely because Boraas involved zoning? To conclude that judicial deference is the appropriate standard of review merely because zoning is involved—without a complete examination of the interests affected and the relevancy of the classification to the legitimate state purpose—is blind legalism. Whatever the approach, "deference does not mean abdication."45 Although a "State cannot foreclose the exercise of constitutional rights by mere labels,"46 the use of the zoning label seems to have accomplished just that.

41. 416 U.S. at 9 (emphasis added). This statement represents approval of the sole ground upon which the district court upheld the Belle Terre ordinance: the protection and maintenance of the traditional family pattern in a community.
44. 411 U.S. at 620–21.
45. 416 U.S. at 14.
Boraas represents more than a misapplication of the rational basis test; it places limitations on specific fundamental interests and creates problems by recognizing family needs and family values as legitimate zoning objectives.

B. Possible Fundamental Interests

Under either the two-tiered or balance-of-interests formula, legislation affecting a fundamental interest should be subjected to strict scrutiny. Three fundamental interests were arguably affected by Belle Terre's ordinance: the right to travel, the right of association and the right of privacy. While the Court found none of these interests present in Boraas, the constitutional issues presented deserved more than the cursory treatment they received.

I. Right to travel

The Belle Terre ordinance was challenged on the ground that it interfered with a person's right to travel because it discouraged new residents from settling in the Village. The Court declined to hold that the right to travel was unconstitutionally infringed because the restriction on unrelated households was not aimed specifically at transients but was applied to longtime residents as well as recent arrivals. Thus, the effect of the Belle Terre ordinance on the right to travel was merely incidental, and the Court properly held that strict scrutiny was inappropriate in this context.

47. It is undisputed that strict scrutiny is required under the two-tiered formula when legislation affects a fundamental interest. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969). This requirement is unmodified by the balance of interests formula. See Gunther, note 12 supra, at 24. After Justice Marshall recited his balance-of-interests test in Dunn v. Blumstein, 405 U.S. 330, 335 (1972), he stated that the State must show a "compelling reason" for its infringement on the fundamental rights to vote and travel.


51. 416 U.S. at 7.

2. Freedom of association

The Court rejected the argument that the Belle Terre ordinance encroached on unrelated persons’ right of association, stating: “The ordinance places no ban on other forms of association, for a ‘family’ may, so far as the ordinance is concerned, entertain whomever it likes.” The Court’s rationale, however, is unclear.

The Court’s statement may indicate that one’s freedom to associate with whomever one chooses is not violated if that freedom is merely restricted rather than totally denied; in Belle Terre, two unrelated persons may entertain whomever they please although three such persons may not legally reside together. If this interpretation were correct, however, the efficacy of strict scrutiny of legislation affecting fundamental interests would be severely attenuated. The Court on many occasions has invalidated legislation that merely discourages the exercise of a fundamental right. For example, in Shapiro v. Thompson, a Connecticut statute required a 1-year residency period before welfare assistance could be obtained. The statute was invalidated as an unconstitutional infringement on the right to travel even though travel into the state was merely discouraged, not prohibited. In NAACP v. Alabama, the Court held that the state’s scrutiny of NAACP membership lists impermissibly infringed on members’ rights to associate freely with others—even though the state’s effort to obtain membership lists did not prohibit, but merely discouraged, NAACP members from associating. In light of these and other cases, it is unlikely that the Court intended to require an individual to show the total denial of a fundamental right before strict scrutiny would be applied.

---

53. In arguing before the Supreme Court, the members of the Boraas household apparently abandoned their claim that the Belle Terre ordinance encroached on unrelated persons’ freedom of association. But the Village argued that it did not. Brief for Appellants at 16–18, and the Court’s treatment of the issue is worthy of comment.
54. 416 U.S. at 9.
57. See, e.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968). In Levy, the Court struck down a statute that denied workmen’s compensation benefits to illegitimate children. In Weber, the Court held that the mere relegation of illegitimates to a less favorable recovery position under the state’s workmen’s compensation laws was as unconstitutional as total denial. 406 U.S. at 169.
The only other implication to be drawn from the Court's opinion is that personal association, unlike political association, is not fundamental. Because the right of political association occupies fundamental status, statutes impairing that right are strictly scrutinized. The Belle Terre ordinance, however, was subjected only to minimal scrutiny.

The Court's opinion contains a further refinement on the scope of freedom of association. The Court found *United States Department of Agriculture v. Moreno* not controlling because the prohibition there ran against two, rather than three, unrelated individuals. This distinction suggests that personal association involving the degree of intimacy of two individuals warrants greater protection than the less intimate association among three or more members of a household. Of course, intimacy involves privacy as well as association, and it may be that a combination of the two is necessary to result in a fundamental interest when political association is not involved.

3. Right of privacy

In dismissing the claim that the Belle Terre ordinance impinged on unrelated persons' right of privacy, Justice Douglas wrote for the Court: "[The record] involves no 'fundamental' right guaranteed by the Constitution, such as... any rights of privacy..." Despite this cursory rejection, the constitutional issue is far from frivolous.

---

58. This distinction may have arisen because freedom of association is a first amendment corollary of freedom of speech and press, freedoms which the court increasingly has held to be grounded on a political need for educated self-government. See Comment, *In Quest of a "Decent Society": Obscenity and the Burger Court*, 49 WASH. L. REV. 89, 123–28 & n.175 (1973).

59. In *United States v. Robel*, 398 U.S. 258 (1967), for example, the Court strictly scrutinized, and struck down, a statute which prohibited registered members of Communist organizations from engaging in employment in any defense facility because it infringed upon their freedom to associate. See also *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Court strictly scrutinized the state's effort to obtain NAACP membership lists.

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

61. 416 U.S. at 8 & n.6. The argument presented was "that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together." Id. The Court rejected this argument simply because the Belle Terre ordinance permits two unmarried people to live together.

62. See text accompanying notes 69–77 infra.

63. "The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy." 416 U.S. at 15 (Marshall, J., dissenting).

64. 416 U.S. at 7.
Griswold v. Connecticut\(^{65}\) and Roe v. Wade\(^{66}\) firmly established that the right of privacy is a constitutionally protected, fundamental right even though it is not explicitly enumerated in the Constitution. The Roe Court also affirmed that the right has some extension to activities related to marriage, procreation, contraception, family relationships, child rearing and education.\(^{67}\) A closer analysis than that supplied by the Court in Boraas reveals that the right of privacy is broad enough to encompass a person's decision to live with others.

Individuals live together for many different reasons—not only because of marriage or consanguinity. Students may congregate in pursuit of an educational environment; young lawyers or doctors may wish to ally themselves in furtherance of their professions; the needy may join forces against inflation and the high cost of living; or close friends may seek nothing more than each other's companionship. In short, the choice to live with others is a highly complex and personal decision. As Justice Marshall suggested in Boraas:\(^{68}\)

The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates or others— involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.

Members of a household may share chores and bills, eat together, sleep together and generally share a day-to-day personal relationship. Although not involving bodily privacy, such as a decision to use contraceptives\(^{69}\) or have an abortion,\(^{70}\) the decision to live with whom ever one chooses is no less private. The government has as little interest in dictating who will live with whom as it does in "telling a man, sitting alone in his house, what books he may read or what films he may watch."\(^{71}\) As Justice Marshall appropriately noted:\(^{72}\)

\(^{65}\) 381 U.S. 479 (1965) (statutes prohibiting the use of contraceptives violate the right of privacy).

\(^{66}\) 410 U.S. 113 (1973) (statutes prohibiting abortions in the first tripartite of a woman's pregnancy violate the right of privacy).

\(^{67}\) Id. at 152–53 (citations omitted).

\(^{68}\) 416 U.S. at 16 (Marshall, J., dissenting).


\(^{72}\) 416 U.S. at 15 (Marshall, J., dissenting). Although the Court did not address
Zoning

Zoning authorities cannot validly consider who household members are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.

The only consideration of zoning authorities should be land use; the consanguineous status of household members is as irrelevant to land use as whether those members use contraceptives or obtain abortions. Although zoning authorities are granted "considerable latitude" in drafting ordinances, the Court "has an obligation to ensure that zoning ordinances, even when adopted in furtherance of . . . legitimate aims, do not infringe fundamental constitutional rights." 73

The Belle Terre ordinance could not have withstood strict scrutiny if the Court had determined that the right of privacy was involved. As noted earlier, it is doubtful that the ordinance furthers its purported objectives; 74 moreover, the classification is grossly over- and under-inclusive. 75 These shortcomings are amplified by the fact that there are other less intrusive means 76 of furthering the government's objectives. When such means are available, legislation affecting a fundamental interest cannot stand. 77

II. THE IMPACT OF BORAAS

The Court in Boraas failed to examine the ramifications of legitimizing the Village's concern for traditional family patterns as a permissible zoning objective. Since 1926 zoning ordinances have been upheld only if they bore a "substantial relation to the public health, safety, morals or general welfare." 78 Many courts have struck down ordi-

---

73. 416 U.S. at 14 (Marshall, J., dissenting).
74. See text accompanying notes 29-32 supra.
75. See notes 31 & 32 & accompanying text supra.
76. See note 33 & text accompanying note 34 supra.
77. See Dunn v. Blumstein, 405 U.S. 330, 343 (1972), in which the Court said: And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Shelton v. Tucker, 364 U.S. 479 (1960).
nances similar to Belle Terre's on the belief that one segment of the citizenry cannot be excluded in an attempt to further the general welfare.\textsuperscript{79} As the district court noted in \textit{Boraas}, preserving the family atmosphere as a zoning objective has the effect of permitting existing inhabitants to compel all others who would take up residence in the community to conform to its prevailing ideas of lifestyle.\textsuperscript{80} The Court of Appeals for the Second Circuit held that such an objective was not within the proper exercise of state police power.\textsuperscript{81} Zoning was created as a means to regulate land use, not as a prophylactic control over human behavior.\textsuperscript{82}

In light of the doubts expressed by the lower courts, one would have expected the Supreme Court to have considered the possible consequences of recognizing this new zoning objective. The Supreme Court should have considered the ramifications of one class of citizens excluding another. The appellate court in \textit{Boraas} properly feared the exercise of exclusionary zoning pursuant to ordinances which would:

\begin{itemize}
  \item Restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum
\end{itemize}


To decide that alternative lifestyles are not protected by the right of privacy would be to decide that no one has a right to pursue happiness in a way that is alien to our traditions and thus to the Justices of the Supreme Court.

\textsuperscript{81} Boraas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973).


\textsuperscript{83} 476 F.2d at 816. In cases upholding the fundamental interest of interstate travel the Court seemed apprehensive of such exclusions. See Dunn v. Blumstein.
Zoning

Can retirement communities exclude everyone under 50 years of age, or "swinger" communities exclude everyone over 50? A community's majority should not be permitted to decide who will or will not be admitted into a community. Boraas potentially initiates the first step toward an archipelagic society with dominant groups clustered within specified boundaries.

More particularly, the broad sweep of Boraas represents a green light for the proliferation of zoning ordinances which subtly discriminate against racial minorities and the poor. Such discrimination

405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). Indeed, both decisions involved the fundamental interest of the right to travel, but this aspect is conceivably the result rather than the reason. Both cases involved a state attempt to exclude an undesirable class of citizens. Such action is no different than a town or village enacting exclusionary policies, and the result is one class of citizens excluding another. If the Court felt such action ran counter to the principles of "equality" basic to the Constitution and our way of life, what better way to manifest this feeling than to declare that the action infringed the fundamental right to travel? Yet, the sole, although unarticulated, reason for this result was that the Court would not tolerate one class of citizens excluding another. In other words, citizen-citizen exclusion may be what violates the equal protection clause, not infringements on the right to travel.


85. In Women's Kansas City St. Andrew Soc. v. Kansas City, 58 F.2d 593, 603 (8th Cir. 1932), the court struck down an ordinance which would have excluded a home for the elderly from a single family residence zone: "[R]estricting . . . districts to particular classes of residents . . . has been quite universally condemned . . . ."


87. In another context, the Court has commented that one state cannot "isolate itself from difficulties common to all." Edwards v. California, 314 U.S. 160, 173 (1941) (right to travel—exclusion of indigents). This same attitude was expressed recently by the Michigan Court of Appeals in Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322, 328 (1971):

[S]trictly local interests of a municipality must yield if such conflict with the overall state interests of the public at large . . . . [A] balancing must be reached between the effect of local considerations, concerns and desires against the greater public interest.

88. The exclusion of indigents and minorities often run hand-in-hand, but ordinances effectuating such a result usually refrain from expressly stating that intent:

The methods used to achieve racial discrimination have become increasingly
usually takes the form of "larger lot requirements, prohibition of multi-family units, and minimum floor area standards." The short-range effects of these restrictions are an increase in land acquisition and construction costs, the discouragement of low income housing projects and the inflation of rental rates and purchase prices beyond the means of the lower income wage-earner. Since these restrictions are incorporated into suburban zoning plans, the long-range result is that the cities become surrounded by high-income residential areas. Thus, the low and moderate income city-dweller is left with no alternative but to remain in the deteriorating slums.

To continue present [land use] policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominately white and affluent, located in the suburbs.

Nearly any type of restriction based either directly or indirectly on wealth would seem justified in terms of "family needs" and "family values."

III. CONCLUSION

When read in conjunction with the court of appeals decision, Boraas is a declination by the Court to clarify the standards of equal protection review. In Boraas the Court upheld the authority of communi-
ties to restrict unrelated households, suggested that the freedom of association is not fundamental in personal settings, and cut off the right of privacy somewhere between decisions concerning contraception and abortions and the decision to live with whomever one chooses. Although the holding in Boraas is very narrow, the Court's attitude suggests that, to the chagrin of many libertarian commentators,\textsuperscript{92} it is highly doubtful that exclusionary zoning will, in the near future, be declared unconstitutional by the Court.

\textit{Albert G. Marquis}