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CONSTITUTIONAL LAW

LOCAL ZONING ORDINANCE VIOLATIVE OF EQUAL PROTECTION

Boraas v. Village of Belle Terre

Local authorities traditionally have been given broad discretion in zoning matters. As long as the exercise of this power does not constitute an arbitrary deprivation of a property right, a wide range of zoning objectives may be accomplished. Zoning ordinances usually are evaluated in terms of constitutional due process, that is, in terms of their substantial relationship to the purposes of the police power: public health, safety, morals, and welfare. However, in instances where ordinances involve neither the traditional use nor area restrictions, but deal in classifications of persons, the equal protection clause also comes into play. This was the case in Boraas v. Village of Belle Terre wherein the Second Circuit found an ordinance which distinguished between family groups related by blood, marriage, or adoption and unrelated groups living as a family unit violative of the equal protection clause.

Belle Terre is an incorporated village within the town of Brookhaven, Long Island, and is in close proximity to the State University at Stony Brook. The village is zoned exclusively for one-family residences. These are defined in the zoning ordinance as detached buildings used for the residence of one family, and exclude a "lodging house,

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2 N.Y. VILLAGE LAW § 7-704 (McKinney 1973), enumerates several such objectives: to lessen congestion in the streets; to secure safety from fire, panic, floods and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. See Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955); 6 R. POWELL, THE LAW OF REAL PROPERTY § 867 (P. Rohan ed. 1971). New York also allows zoning for aesthetic purposes. Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).


boarding house, fraternity house, sorority house or multiple dwelling." 5

The village ordinance defines "family" as:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit . . . 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. 6

Edwin and Judith Dickman are homeowners in Belle Terre who leased their six-bedroom house to Michael Truman, a doctoral candidate at Stony Brook, in December of 1971. Truman was joined by two other students, Bruce Boraas and Anne Parish, in June of 1972. Shortly thereafter three other students moved into the house. The six students were not related but were joined by a mutual interest in graduate studies. Seeking an economic alternative to dormitory living, they formed a single housekeeping unit in the Dickman house. Rent and household chores were shared, community meals were eaten, and a common treasury was organized. 7

In June 1972, the students applied for a beach permit as village residents. 8 Within a few weeks the Dickmans received a summons ordering them to comply with the ordinance, presumably by evicting the "illegal tenants," or be subject to a penalty. 9

Alleging a violation of their constitutional rights, the Dickmans brought a section 1983 action in the district court, seeking injunctive relief. 10 The Dickmans were joined by three of the students in the action. The student plaintiffs contended that the ordinance violated their constitutional rights of privacy and association. 11 They also claimed infringement of their right to travel. 12

District Judge Dooling issued a temporary restraining order pending a hearing on the merits. 13 At the hearing on plaintiffs' motion for a

5 Village of Belle Terre, Building Zone Ordinance art. I, § D-1.4a (1971), quoted in 476 F.2d at 809 n.1.
6 Id. § D-1.35a (June 8, 1970), quoted in 476 F.2d at 809.
7 476 F.2d at 809.
8 Id.
9 The penalty for breach was a fine not to exceed $100 or 60 days imprisonment or both for each day of the violation. Village of Belle Terre, Building Zone Ordinance art. VIII, pt. 4, § M-1.4a(2) (Oct. 17, 1971), quoted in 476 F.2d at 809.
11 Brief for Appellants at 8-43.
12 476 F.2d at 813.
13 Id. at 812.
preliminary injunction, the court held that there was a justiciable controversy and that the abstention doctrine was inapplicable.

Turning to the merits, Judge Dooling concluded that Belle Terre’s zoning ordinance was constitutional. Although he admitted that the ordinance was not justified by traditional zoning objectives, Judge Dooling was of the view that it was justified by the village’s legitimate interest in maintaining homogeneous family group areas. The decision was appealed to the Second Circuit.

On appeal, the court, per Judge Mansfield, indicated that to be constitutional the challenged zoning ordinance must satisfy both the due process and equal protection clauses. The court noted that controversies involving zoning ordinances had been traditionally considered under the due process clause. The court cited Nectow v. City of Cambridge wherein the Supreme Court stated that local zoning laws

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14 The district court found that the suit was barred neither by the anti-injunction statute, 28 U.S.C. § 2283 (1970), nor by Younger v. Harris, 401 U.S. 37 (1971), because no case was then pending in the state courts to which this suit could be addressed. Boraas v. Village of Belle Terre, Civil No. 72-1030, 12-13 (E.D.N.Y., filed Sept. 20, 1972); see Boraas v. Village of Belle Terre, 476 F.2d 806, 810-11 (2d Cir. 1973).

15 Civil No. 72-1030 at 15-24. The defendant village had contended that there were issues of state law which should be resolved before a decision was rendered in the federal courts. Judge Dooling concluded that due to prior New York zoning decisions, in this case a state court decision holding that the ordinance, construed as the village has construed it, was beyond the authority granted to the village by the New York Village Law, could apparently be based only on the argument that to hold otherwise would impose on Section 175 and 177 of the Village Law an unconstitutional interpretation. Any unresolved question of the state law detectable here is, therefore, the federal question differently stated.

Id. at 24. Neither Judge Dooling nor the circuit court believed that a state court would find the zoning ordinance in Belle Terre ultra vires the New York Village Law. 476 F.2d at 812. Judge Dooling remarked that although the New York courts have not “directly considered the issue” here involved, “it would appear that New York does countenance the use of a single family definition which requires the existence of blood relationship and marriage.” Civil No. 72-1030 at 20. See City of Schenectady v. Alumni Ass’n of Union Chapter, 5 App. Div. 2d 14, 168 N.Y.S.2d 754 (3d Dep’t 1957); Laporte v. City of New Rochelle, 2 App. Div. 2d 710, 152 N.Y.S.2d 916 (2d Dep’t 1956), aff’d, 2 N.Y.2d 921, 141 N.E.2d 917, 161 N.Y.S.2d 886 (1957); Town of Henrietta v. Fairchild, 53 Misc. 2d 862, 279 N.Y.S.2d 992 (Sup. Ct. Monroe County 1967).

16 476 F.2d at 812.

17 A one-family dwelling zoning district limited to families made up essentially of parents and their children needs no apologia. Such zoning is simply another of countless statutes of bounty and protection with which the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children . . . .

Civil No. 72-1030 at 31. The court went on to observe that due to the implications of Eisenstadt v. Baird, 405 U.S. 438 (1972), municipalities may not be able to zone out parents and their children simply because the parents are not ceremonially married. Civil No. 72-1030, at 31-32. However, this prohibition was not extended to groups of unrelated adults living together as “voluntary families.”

18 476 F.2d at 813.

19 Id. at 812-13.

20 277 U.S. 183 (1928).
must "bear a substantial relation to the public health, safety, morals, or general welfare"\textsuperscript{21} in order to be deemed constitutional.

In addition to the due process standard, the ordinance must not incorporate any classifications which violate equal protection. The threshold question in equal protection analysis is the standard of review to be employed. The plaintiff-appellants contended that the ordinance impinged upon their fundamental rights of privacy, association, and travel.\textsuperscript{22} Accordingly, they urged the court to apply a strict scrutiny test whereby the village would have to show that the ordinance furthered a compelling state interest.\textsuperscript{23} The appellees, on the other hand, claimed that the ordinance could be justified in terms of control of population density and maintenance of the character of the neighborhood. They thus considered the rational basis test the proper standard of scrutiny.\textsuperscript{24}

\textsuperscript{21} Id. at 188.
\textsuperscript{22} Brief for Appellants at 7-43.

Freedom of association also has been recognized as a first amendment right. Shelton v. Tucker, 364 U.S. 479 (1960) (holding unconstitutional a requirement that, as a condition of continued employment, a teacher list the associations to which he belongs); NAACP v. Alabama, 357 U.S. 449 (1958) (requirement that NAACP membership lists be turned over to the state held unconstitutional); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state may not require children to attend public schools). See notes 68-88 and accompanying text infra.

The right to travel as a "fundamental interest" was first announced in Shapiro v. Thompson, 394 U.S. 618 (1969). At first blush, the Belle Terre ordinance might appear to affect the right to travel by "detering" students from moving off campus or by "penalizing" them for living in a communal fashion after their arrival in the community. However, prior equal protection decisions involving violations of this right considered statutes which used recent travel as a basis for classification: "Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter...." Dunn v. Blumstein, 405 U.S. 330, 334 (1972). The Belle Terre ordinance has as a basis of classification not the recent movement of the household unit but its composition. The restriction on non-family living arrangements applied equally to newcomers and longterm residents. The penalty is not one "imposed solely because the newcomer is a new resident." Id. at 342 n.12.

\textsuperscript{23} 476 F.2d at 813. See notes 26-33 and accompanying text infra for a discussion of the strict scrutiny test.
\textsuperscript{24} 476 F.2d at 813. Support for this approach is found in Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970). The ordinance there prohibited more than four unrelated persons from living together as one household. Plaintiffs claimed constitutionally protected rights of privacy, association, and freedom to choose their own life style. The district court found no fundamental rights infringed and held the ordinance to be rationally based within the meaning of the due process and equal protection clauses. Id. at 911-15. It should be noted that Palo Alto, unlike Belle Terre, was not exclusively zoned for single-family residences. Thus, groups of unrelated persons in Palo Alto could legally live together in other areas of the community.

The rational basis test maximizes judicial deference to legislative classifications. The court need only find some hypothetical, rational relationship between the legislation in
The court began its analysis by dispensing with the compelling state interest test. This standard is called into play when discriminatory legislation affects "fundamental" rights or creates suspect classifications such as race, alienage, lineage, and now sex. Under this test the state must establish that a compelling state interest or end outweighs the individual's claim to a personal right. The Belle Terre question and a valid governmental objective in order to find it constitutional. It need not even seek the actual purpose of the legislation. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

In McGowan v. Maryland, 366 U.S. 420, 425-28 (1961), the Supreme Court upheld the Maryland Blue Laws which allowed only certain goods to be sold on Sunday. Using the minimum scrutiny test that Court said:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

366 U.S. at 426-26. The Court felt it possible for the legislature to believe that valid health and recreational purposes were being served by allowing the sale of exempt goods. This mere conjecture was sufficient to uphold the legislation. *Id.* at 426.

In *Williamson* the statute in question made it illegal for an optician to fit, duplicate, or replace lenses without a prescription from either an ophthalmologist or optometrist. Once the Court was satisfied that there was no invidious discrimination, it allowed the legislators free rein to handle whatever "evils" they believed to be present. 348 U.S. at 489.

In *Lindsley* the Court explained the use of the test thusly:

When the classification in such a law is called in 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.

220 U.S. at 78 (emphasis added).


In *Dunn* the Supreme Court stated:

[If there are other, reasonable ways to achieve those goals with a lesser burden]
court was unwilling to explore and perhaps expand the perimeter of fundamental rights which would demand strict scrutiny. Judge Mansfield refused to consider the exclusionary zoning at issue as violating any fundamental interests. Although the court indicated that the infringement on the appellants' rights to privacy and travel might warrant the operation of the strict scrutiny test, it chose to avoid these issues.

Notwithstanding its reluctance to find a "fundamental right," the court was impressed by the personal and basic nature of the rights asserted and characterized them as unquestionably important. Accordingly, Judge Mansfield eschewed the hypothetical legislative justification of the rational basis test in favor of an examination of the "true rationale" supporting the ordinance. The court fashioned a means-scrutiny test to determine whether there was in fact a substantial relationship between the classification and the purpose of the statute.

Support for this approach was gleaned from recent Supreme Court decisions. Several cases decided by the Burger Court indicated some dissatisfaction with the "two-tiered" approach and appeared to be

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32 476 F.2d at 813-14.
33 The court said:
Fortunately we do not have to decide whether there has been an infringement of the right of privacy or travel because we believe that we are no longer limited to the either-or choice between the compelling state interest test and the minimal scrutiny permitted by the Lindsley-McGowan formula.
476 F.2d at 814.
34 Id. at 813.
35 Id. at 814.
36 Gunther, supra note 25, at 17-18. "A number of Justices, from all segments of the Court, sought formulations that would narrow the gap between the widely separated tiers of the Warren Court's equal protection." Id. at 17.
nurturing a vaguely formulated, intermediate standard.\textsuperscript{37} This standard, a more active one than the minimum scrutiny test, would be implemented by evaluating the means employed rather than the ends attained.\textsuperscript{38} The strict scrutiny test would still be applied where a fundamental interest or a suspect classification was involved.

Judge Mansfield relied upon a core of five Supreme Court cases suggestive of this third, albeit protean, trend in equal protection decisions.\textsuperscript{39} However, the degree of relationship between means and ends which would validate a legislative enactment, and the mechanics of the intermediate standard, were not consistently elucidated by these cases. In \textit{Eisenstadt v. Baird}\textsuperscript{40} and \textit{Reed v. Reed},\textsuperscript{41} on which the \textit{Belle Terre} court relied most heavily, a standard just falling short of strict scrutiny was used.\textsuperscript{42} The weighing of personal rights against state

\begin{itemize}
\item 38 Gunther, supra note 25, at 21.

In \textit{James v. Strange} and \textit{Jackson v. Indiana}, without finding cause for use of the strict scrutiny standard, the Court looked to the means employed to attain the legitimate ends of the statutes. In both cases a determination of whether any fundamental constitutional right had been infringed was carefully avoided, yet the statutes were overturned as violative of fourteenth amendment rights. \textit{James} involved a statute allowing the state to recover from an indigent defendant the cost of his defense. \textit{Jackson} was concerned with an Indiana statute which provided different standards for commitment of mentally deficient defendants and incompetents not charged with crimes. Although the language of these cases is that of the rational basis test, the methodology of review is more flexible than that of the traditional approach. This increased judicial sensitivity may be attributable to the nature of the individual interests involved in \textit{James} and \textit{Jackson}.

\item 40 405 U.S. 438 (1972). Massachusetts law made it illegal for anyone but a registered physician or a pharmacist acting on a physician's prescription to provide a contraceptive to an unmarried person. \textit{See} note 42 infra.
\item 42 In \textit{Baird} the controversy appeared similar to the right of privacy issue considered in \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), in which Connecticut's ban on the use of contraceptives was found unconstitutional. The \textit{Baird} Court said, however:

\begin{itemize}
\item We need not, and do not, . . . decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.
\item 405 U.S. at 453. One commentator noted that this approach served not only to avoid the more difficult constitutional questions involved, but may have also been a tactical consideration to obtain a majority against the statute. Gunther, \textit{supra} note 25, at 34-35. The \textit{Baird} Court struck down Massachusetts' alleged public health statute by going so
interests, characteristic of these cases, is indicative of a sliding scale rather than a fixed standard of review.

The *Belle Terre* court applied this ill-defined test to the merits. Judge Mansfield focused on the district court's finding that the village had a legitimate interest in maintaining its nuclear family composition. He felt that the purpose and effect of the ordinance was to exclude people from the community because of their lifestyle. In reversing the district court he concluded that the maintenance of a prevailing lifestyle within a community did not come within its police powers and, hence, was not a valid zoning objective. Judge Mansfield wrote: "Although local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens."\(^4\)

The court next assumed *arguendo* that a valid zoning objective existed. Applying the means scrutiny test, Judge Mansfield inquired whether the ordinance in fact furthered the assumed objective. He determined that for each conceivable statutory objective, the classification was overbroad and that alternative less burdensome regulations would serve the same purposes. The court remarked:

To theorize that groups of unrelated members 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.\(^5\)\(^6\)

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far as to disbelieve the legislature's declared purpose of moral or health considerations. 405 U.S. at 443-52. In objecting to this approach as being too aggressive for a moderately interventionist test Professor Gunther wrote:

Intensified rationality scrutiny justifies focus on actual purposes rather than court-conceived ones; it does not justify rejecting several properly offered state objectives in the interest of molding the controversy into an equal protection violation.


The Court in *Reed* sought a "substantial relationship" between the classification and the purpose of the legislation and denominated sex an arbitrary classification. 404 U.S. at 76. That the Court was on the verge of finding sex a suspect classification is apparent from its recent decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973). *See note 30 supra.*


44 476 F.2d at 816.

45 *Id.* (emphasis added). *See note 95 infra.*
Judge Timbers dissented, objecting to what he believed was a "sliding scale" analysis by the majority. Although he admitted that the means used by the Belle Terre ordinance were not perfectly suited to its purpose, Judge Timbers did not find them unconstitutionally over-inclusive, nor did he indulge in the majority's speculations as to better means to attain the same ends. While recognizing that there appeared to be a movement away from the rigid "two-tiered" scheme, Judge Timbers believed that it should not be applied in the "unchartered area" of zoning. However, if it were to be applied, Judge Timbers would have used the new formula in a more restrained manner and on a less extensive basis than, in his view, the majority had. He interpreted the majority's view as mistakenly dependent on the Baird and Reed decisions which implemented the balancing aspect of strict scrutiny. Judge Timbers saw the means scrutiny test most clearly illustrated by the decisions in James v. Strange, Jackson v. Indiana, Weber v. Aetna Casualty & Surety Co. If applied at all, he would use the new test only to make "narrow value judgments," i.e., to mechanically ascertain rationality of means, rather than the rationality of ends as is done in the minimum scrutiny test. Accordingly, Judge Timbers felt that the Belle Terre ordinance substantially contributed to a legislative objective and did not violate the equal protection clause.

Subsequent to the panel's decision in Belle Terre, a poll of the judges to rehear en banc resulted in a 4-4 vote, and rehearing was

46 Id. at 821 (Timbers, J., dissenting).
47 Id. at 822.
48 The traditional equal protection test would preclude judicial inquiry unless the "legislature's classification scheme is so palpably arbitrary that the court cannot conceive of any constitutionally permissive objective to which it might rationally be related." Comment, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 62 (1970). The test of James, Jackson, and Weber would permit intervention whenever the means are not substantially related to a legitimate end. See notes 39-42 and accompanying text supra. The Court has exhibited some hesitancy in expanding application of the new standard. See Jefferson v. Hackney, 407 U.S. 128 (1972); Lindsey v. Normat, 405 U.S. 56 (1972); Richardson v. Belcher, 404 U.S. 78 (1971). The question in Lindsey was the constitutionality of Oregon's forcible entry and wrongful detainer statute. In response to appellant's request for a stricter standard of review than minimum scrutiny, the Court said that "the Constitution does not provide judicial remedies for every social and economic ill." 405 U.S. at 74.
51 406 U.S. 164 (1972). For a discussion of the test as applied in James, Jackson, and Weber see note 39 supra.
52 Judge Timbers did not believe that Baird and Reed were representative of the new test, nor that a sliding scale approach should be used on the facts of Belle Terre. 476 F.2d at 820-21 (Timbers, J., dissenting).
53 See note 24 supra.
54 476 F.2d at 824 (Timbers, J., dissenting).
denied.\textsuperscript{55} The Supreme Court, however, has since noted probable jurisdiction.\textsuperscript{56}

\textit{Belle Terre} is in the vanguard of a Second Circuit trend advocating a third equal protection test.\textsuperscript{57} The court seemed to vacillate between the intensified "minimum scrutiny" test of James, Jackson, and Weber\textsuperscript{58} and the almost strict scrutiny approach of Baird and Reed.\textsuperscript{60} Despite the absence of a clear judicial statement upon which to base the third test,\textsuperscript{60} the court formulated a "substantial basis" test, whereby, even if there is a legitimate objective, the means employed must substantially advance the legislative purpose. The Belle Terre ordinance was deemed to have failed this test.\textsuperscript{61}

Although the \textit{Belle Terre} court articulated and applied the intermediary equal protection test, the decision turned on the lack of a substantial relationship between the ordinance and the police power of the village.\textsuperscript{62} While this approach may be interpreted along equal protection lines, it is suggestive of a substantive due process analysis.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{55}Id.
\item \textsuperscript{56}42 U.S.L.W. 3213 (U.S. Oct. 16, 1973) (No. 73-191).
\item \textsuperscript{57}See, e.g., Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973); City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973), cert. denied, 41 U.S.L.W. 3655 (U.S. June 19, 1973) (No. 1451); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973).
\item Judge Kaufman, in \textit{City of New York v. Richardson}, commented on the uncertainty prevalent in this area: "Clearly, these decisions [Reed, Baird, Weber] seem to foreshadow an expanded judicial inquiry under the Equal Protection Clause, although the outer boundary of that inquiry remains ambiguous." 473 F.2d at 931. There, the test was described as one of a sliding scale. However, the context in which the case reached the Second Circuit did not require the court to implement that test. See p. 287 infra for detailed treatment of \textit{City of New York v. Richardson}.
\item \textsuperscript{58}See note 39 supra.
\item \textsuperscript{59}Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1972).
\item \textsuperscript{60}See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973), wherein Mr. Justice Marshall said:
\begin{quote}
Opinions such as those in Reed and James seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the basis for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.
\end{quote}
\textit{Id.} at 110 (dissenting opinion).
\item \textsuperscript{61}476 F.2d at 816-17. As a result of its vagueness, Judge Timbers interpreted the majority's approach as a sliding scale measure, \textit{see id.} at 821 (Timbers, J., dissenting).
\item \textsuperscript{62}476 F.2d 814.
\item The concept of substantive due process is an elusive term referring to substantive rights which are not expressly delineated in the Bill of Rights, but which are considered inherent in the fourteenth amendment's concept of "liberty." \textit{See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).}
\item A "substantial relationship" has traditionally been a standard of inquiry under the due process clause. \textit{See Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).}
\end{itemize}
Nevertheless, the Second Circuit decided to confine itself to the equal protection issue and framed its decision accordingly.

In several recent cases, the Supreme Court, rather than give the third test its imprimatur, has simply avoided it.\textsuperscript{64} The most explicit example of this approach is \textit{San Antonio Independent School District v. Rodriguez}.\textsuperscript{65} There, after explaining in detail why there was no basis for strict scrutiny,\textsuperscript{66} the Court invoked the traditional rational basis test.\textsuperscript{67} In light of this uncertainty, the decision of the Second Circuit represents a bold move forward.

Conceivably, the \textit{Belle Terre} court may have had a stronger basis for its holding under either of the established equal protection tests. Had the court of appeals analyzed the case under the "two-tiered" approach, it could have considered more intensely the possible fundamental rights adversely affected by the zoning ordinance. By penalizing three or more unrelated persons for living together in a single house, the ordinance directly infringes the freedom of such persons to live with whomever they choose. The analysis then could have focused on whether the associational right involved is of constitutional proportions.

In \textit{NAACP v. Alabama},\textsuperscript{68} Mr. Justice Harlan announced, for a unanimous court, that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."\textsuperscript{69} He went on to state that it was "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . ."\textsuperscript{70} While freedom of association does not permit a person to ally himself with others for the pursuit of criminal activities, he is protected when


\textsuperscript{65}411 U.S. 1 (1973). The issue here was whether school funding based on an ad valorem property tax unconstitutionally discriminated against less affluent districts.

\textsuperscript{66}\textit{Id.} at 18-44. The Court gave three reasons: (1) there was no "definable" class discriminated against, hence no suspect classification; (2) education is not included in the restricted class of fundamental interests; and (3) as a question of local fiscal policy, it is not an area in which strict scrutiny may be used.

\textsuperscript{67}\textit{Id.} at 40. Justice Marshall, dissenting, advocated use of the sliding scale standard of review. \textit{Id.} at 102-08.

\textsuperscript{68}397 U.S. 449 (1938).

\textsuperscript{69}\textit{Id.} at 460.

\textsuperscript{70}\textit{Id.} at 460-61.
his associational activities are lawful.\textsuperscript{71} Although the Supreme Court cases involving this freedom have involved membership in associations which advocate specific beliefs,\textsuperscript{72} were the right given general scope it would encompass group membership where the advancement of ideas is not necessarily the raison d'\'être.\textsuperscript{73}

In \textit{Belle Terre}, the six unrelated students were exercising a right of personal association. They were not banding together for the purpose of advocating political or economic beliefs, but rather for the purpose of forming an economically advantageous housekeeping unit. On the other hand, their association could also be seen as an expression of their attitude concerning lifestyle—one which does not view the traditional nuclear family as the only legitimate association to be housed under one roof.\textsuperscript{74}

Although the Supreme Court has not squarely addressed the issue whether unrelated persons such as those in \textit{Belle Terre} fall within the purview of freedom of association, the Court was recently presented with a classification issued by the Secretary of Agriculture which drew a similar line of demarcation between traditional families and “voluntary” families. In \textit{United States Department of Agriculture v. Moreno},\textsuperscript{75} the Court struck down an agency regulation under the Federal Food


\textsuperscript{72} See generally Emerson, \textit{Freedom of Association and Freedom of Expression}, 74 \textit{YALE L.J.} 1 (1964) [hereinafter cited as Emerson]. The recent case of Healy v. James, 408 U.S. 169 (1972), illustrates the type of associational rights commonly brought within first amendment protection. A college administration refused to give official recognition to the Students for a Democratic Society, a campus political organization, thereby denying the group the use of campus facilities for meetings. In finding an impermissible burden on the group's associational freedom, the Court reiterated: “Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs.” Id. at 181 (emphasis added). To date, the Court has not been called upon to expand freedom of association beyond the more obvious first amendment areas of political expression.

\textsuperscript{73} Emerson, \textit{supra} note 72, at 4-5, 20-21. A federal district court in Maryland has recognized that the freedom of association covers a wide range of associations. In Bruns \textit{v. Pomerlau}, 319 F. Supp. 58 (D. Md. 1970), a practicing nudist was denied employment in the city police department solely on the basis of his nudist club membership. The court granted relief to the rejected applicant, holding that “plaintiff's private, non-political association with those who espouse nudism should be no less protected than associations of a political nature.” Id. at 68. Chief Judge Northrop stressed that “the Fourteenth Amendment protects all persons, no matter what their views or means of expression.” Id. at 64-65. See also Roberts \textit{v. Clement}, 252 F. Supp. 835 (E.D. Tenn. 1966), where the concurring judge expressed his conviction that private nudist colonies fall within the protection of freedom of association. Id. at 849 (Darr, J., concurring).

\textsuperscript{74} Such a form of expression would be easier to identify, perhaps, where the group is a “hippie commune.” See \textit{All in the “Family”: Legal Problems of Communes}, 7 \textit{HARV. CIV. RIGHTS-CIV. LIB. L. REV.} 393, 414-15 (1972).

\textsuperscript{75} 93 S. Ct. 2821 (1973).
Stamp Act which limited the distribution of food stamps to household units consisting only of "related" persons. The Court held that a classification which discriminated against household units of "unrelated" persons was arbitrary and unreasonable.\(^7\) By applying the rational basis test, the Moreno majority found no need to question whether the associational rights of unrelated persons had been violated.\(^7\) In a concurring opinion, however, Mr. Justice Douglas addressed the issue directly, holding that minimum scrutiny was inappropriate since the case involved the right of association:

The "unrelated" person provision of the present Act 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."\(^7\)

Justice Douglas viewed the association as a banding together for the purpose of combatting "the common foe of hunger" and other economic adversities: "This banding together is an expression of the right of freedom of association that is very deep in our traditions."\(^7\) Similarly, the Belle Terre students pooled their individual resources for the purpose of acquiring economical housing. To be sure, their financial problems were not as acute as those of the appellees in Moreno, but their interest in associational rights, \(i.e.,\) furthering their personal "beliefs" in an unorthodox social and economic lifestyle, would appear to be the same.

Closely related to freedom of association is the right of privacy. Indeed, when, in Griswold v. Connecticut,\(^8\) the right of privacy was held to be constitutionally guaranteed, it was viewed as a "penumbra" which emanated, in part, from the associational rights of the first amend-

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\(^{76}\) Assuming a legitimate governmental purpose, \(i.e.,\) the provision of food for indigents, the means bore no rational relationship to the goal. Both related and unrelated persons are similarly situated in respect to nutritional needs, and if the government was seeking to deter fraudulent claims, it selected an unreasonable means of doing so. \textit{Id.} at 2825-27. Although the Court applied minimum scrutiny, it stressed that if the purpose of the legislation had been to prevent a politically unpopular group, such as a hippie commune, from acquiring food stamps, then the statute would be per se unconstitutional. \textit{Id.} at 2826. There was testimony to the effect that the statutory classification was aimed at hippies, but the Court cloaked the congressional purpose with a presumption of innocence. \textit{Id.}

\(^{77}\) The district court had stressed that freedom of association and right of privacy in the home could not be infringed if the "hypothesized" purpose of Congress had been the regulation of morality. Moreno v. United States Dept. of Agriculture, 345 F. Supp. 310, 314 (D.D.C. 1972).

\(^{78}\) 93 S. Ct. at 2831.

\(^{79}\) \textit{Id.} at 2829.

\(^{80}\) 381 U.S. 479 (1965).
Lest any lingering doubts be entertained about the independent nature of the right, the majority declared in *Roe v. Wade* that the right of privacy was "founded in the fourteenth amendment's concept of personal liberty and restrictions upon state action." To date, the right of privacy has provided a shield against governmental interference with "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."

Possibly two of these "zones of privacy," namely, marriage and the home, are touched upon by the Belle Terre ordinance. *Eisenstadt v. Baird*, in which the denial of contraceptives to unmarried persons was deemed a violation of equal protection, strongly suggests that marriage is not the only personal relationship with a claim on the right of privacy. Although the Court struck down the law involved because it created an arbitrary classification, Mr. Justice Brennan's opinion stressed that the right of privacy is "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Thus posited is a zone of privacy in which the individual may freely make any decision in the personal realm of marriage and procreation. The Belle Terre ordinance arguably intrudes upon this zone by requiring that where three or more persons share a house, at least two of them must be married or related through family ties. Failure to accept the community's choice regarding marriage or family precludes the individual from living in Belle Terre, unless he is content to share his house with only one other nonrelated person.

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81 See Note, *Privacy in the First Amendment*, 82 Yale L.J. 1462, 1475 (1973). Justice Douglas, author of the *Griswold* opinion, has continued to link the right of privacy to freedom of association:

[T]he First Amendment and the related guarantees of the Bill of Rights . . . create a zone of privacy which precludes government from interfering with private clubs or groups. . . . Government may not tell a man or woman who his or her associates must be.


83 *Id.* at 153. The *Wade* majority makes explicit that which was implied in *Griswold*, i.e., that the right of privacy is an element of substantive due process. The right is nowhere mentioned in the Constitution, yet it is given effect through the due process clause of the fourteenth amendment.


86 *See* note 42 *supra*.

87 405 U.S. at 453.

88 Of course, all fundamental rights may be circumscribed by a compelling state interest as the Court made clear in *Roe v. Wade*, 410 U.S. 113 (1973). The woman's otherwise private decision to have an abortion was held subject to state regulation after the first trimester of pregnancy, since legitimate health factors intervene. *Id.* at 163.
A more compelling argument lies in the contention that the ordinance invades the privacy of the home, a clearly-defined private sphere. In addition to the unreasonable search and seizure provision of the fourth amendment, the private nature of the home has received special protection from the Supreme Court, most notably in obscenity cases. *Stanley v. Georgia*\(^9\) held that the state may not prosecute a man for possession of obscene films in his home. In subsequent cases, the Court has stated that the *Stanley* holding "reflects no more than what Mr. Justice Harlan characterized as the law's 'solicitude to protect the privacies of the life within [the home],'"\(^90\) and that it is "hardly more than a reaffirmation that a man's home is his castle."\(^91\) While the Belle Terre ordinance may have only a remote or indirect effect on marital decisions, its impact on "the privacies of the life within the home" is more apparent. Traditional zoning, which might legitimately restrict the maintenance of a boarding house, would be regulating the use to which the land is put, having a neutral effect on the personal relationships of the building's occupants. In Belle Terre, the legality of the one-family dwelling is explicitly defined in terms of the personal relationship of the dwelling's occupants, and "family" is narrowly defined\(^92\) in accordance with the social views of the community. The village would appear to be regulating otherwise lawful associations by peering into the privacy of the home.\(^93\) Surely the right of association in the home, regardless of whether the association has the purpose of furthering the personal beliefs of its members, is as worthy of protection as the right to privately view obscene movies.

Considered either separately, or as a hybrid zone of "associational privacy," the rights of association and privacy are likely subjects for strict scrutiny when subjected to equal protection analysis. However, despite the validity of freedom of association and right of privacy as conceived and applied in prior cases, the Supreme Court might very well conclude that in the village zoning context, associational privacy lacks "fundamental" dimensions.\(^94\) Conversely, if the Court charts a

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\(^9\) See text accompanying note 6 supra.

\(^39\) United States v. 12 200-Ft. Reels of Super 8mm Film, 93 S. Ct. 2665, 2668 (1973).


\(^92\) See text accompanying note 6 supra.

\(^93\) Such a conclusion would accord with Judge Timber's position: "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).

The "social importance"—"fundamental interest" dichotomy was employed by the
fundamental zone of privacy enveloping non-family associations within the home, the Village of Belle Terre will be required to show that its intrusions on this zone are necessary to further a compelling state interest. Obviously, the ordinance has a greater chance of success if subjected to minimum scrutiny. No matter which standard of review is employed, it will be necessary for the Court to reconcile local zoning power with "the vital relationship between freedom to associate and privacy in one's associations."

Supreme Court in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) in distinguishing education from explicit and implicit constitutional guarantees. By re-examining prior equal protection cases, the Court concluded that "social importance is not the critical determinant for subjecting state legislation to strict scrutiny." Id. at 32. See Jefferson v. Hackney, 406 U.S. 535 (1972) (minimum scrutiny of legislation affecting welfare); Lindsey v. Normet, 405 U.S. 56 (1972) (right to decent housing not a fundamental interest). Unlike education, welfare, and decent housing, however, freedom of association and right of privacy are both well-established constitutional guarantees. The Court would not be "creating" totally new fundamental interests but would merely be expanding the coverage and substance of two existing rights.

The village has advanced a number of rationales in support of the ordinance: (1) traditional Euclidean zoning objectives, such as the control of population density, noise, parking, and traffic problems; (2) preservation of the community's existing rent structure, 476 F.2d at 816-17; and (3) the "interest of the local community in the protection and maintenance of the traditional family pattern ... ." 476 F.2d at 815.

In the area of density control, the village justifies the ordinance on the grounds that traditional families tend to be self-limiting in size while unrelated groups can mushroom beyond reasonable limits. The court of appeals suggested another way to achieve the same result, viz., the imposition of a ratio between the number of bedrooms in each house and a corresponding allowable number of persons. Id. at 817. Noise, traffic, and pollution problems could be met by limiting the number of automobiles per dwelling unit and by enforcement of local nuisance laws. Id. The "rent inflation" argument is based on the fear that a group of individuals with independent sources of income can afford to pay higher rents than traditional families, thus pricing traditional families "out of the market." Rent control is the Second Circuit's suggested solution to this problem. Id. In all of these areas, the same ends can be achieved without resorting to a legislative classification that interferes with the personal relationships of a dwelling's occupants.

The third purported governmental interest, preserving the family relationship as the touchstone of the community, was a primary source of disagreement between the district court and the court of appeals. While Judge Dooling used this rationale as the sole basis for upholding the ordinance, the Second Circuit majority felt that "such a goal fails to fall within the proper exercise of state police power." Id. at 815. Even if the maintenance of the traditional family can be established as a compelling state interest, it is doubtful that the Belle Terre ordinance actually furthers this goal. Since two unrelated persons can legally live together, there would be little to prevent the formation of homosexual household units which are generally viewed as antithetical to traditional family associations. Cf. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (denial of homosexual marriage not a violation of due process).

Although each governmental objective failed to pass the Second Circuit's application of the rational basis test, a court with a more sympathetic view toward legislative rationality might have reached a different conclusion. At any rate, it is doubtful that the village's arguments would pass muster under the more exacting strict scrutiny test which requires a showing that the valid state interests cannot be achieved by other, less burdensome means. See Dunn v. Blumstein, 405 U.S. 330, 337 (1972).