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RECENT DEVELOPMENT

Zoning—Equal Protection—Right of Privacy—Supreme Court Upholds Restrictive Definition of Family in Zoning Ordinance


After almost fifty years of silence on the constitutional limits of zoning, the Supreme Court once again has spoken, upholding in Village of Belle Terre v. Boraas the exclusion, by means of zoning, of a "voluntary family" from the Long Island, New York, village of Belle Terre. In reaching its decision the Court had to face not only issues involving the constitutionally permissible extent of the zoning power, but also questions concerning the parameters of the right of privacy and the appropriate tests for the evaluation of classifications under the equal protection clause of the fourteenth amendment. Because its rationale is an amalgam of constitutional doctrines hitherto seldom tied together, an understanding of Boraas requires a careful examination of the underlying constitutional theories involved and of their juxtaposition in the case itself. This Note, therefore, will first examine the doctrinal setting of the issues presented by Boraas in the fields of equal protection, the

1 See notes 49-55 and accompanying text infra.
3 The term "voluntary family" will be used as a common designation for all types of family arrangements except the traditional family; that is, a "voluntary family" is any group of people living as a household unit which includes one or more members who are not related to the others by blood, marriage, or adoption. See id. at 1537; notes 40-41 and accompanying text infra; cf. Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 911 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973), cert. denied, 94 S. Ct. 2608 (1974).
5 Over the years, most zoning cases have involved such constitutional questions as due process requirements, the extent of the police power, and eminent domain. See, e.g., Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693, appeal dismissed, 344 U.S. 919 (1952) (validity of minimum floor area requirement); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (validity of residential zoning classification); National Land Inv. Co. v. Easttown Township, 419 Pa. 504, 215 A.2d 597 (1965) (validity of four-acre minimum area requirement); notes 85-92 and accompanying text infra.

Cases asserting that zoning may infringe "personal" rights, such as freedom of travel, as principal arguments have only recently begun to arise. See Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973), cert. denied, 94 S. Ct. 2608 (1974).
right of privacy, and zoning, as these have been developed by the Supreme Court. Then, it will present several lower court cases dealing with the specific issue of restrictive family definitions in zoning ordinances, in order to delineate more clearly the legal issues posed by such definitions. Finally, it will analyze the Supreme Court decision in Boraas.

I

THE CONSTITUTIONAL BACKGROUND OF THE BORAAS DECISION

In the Boraas case, Justice Douglas grounded his majority opinion on three major lines of constitutional reasoning: equal protection,6 the right of privacy,7 and deference to local legislative discretion in such regulatory matters as zoning.8 In order to understand how these three bodies of constitutional thought function together as the foundation for the decision, it is essential to examine each separately.

A. The Equal Protection Clause

Prior to 1971, the outcome of equal protection challenges was determined, for all practical purposes, by the particular standard of review found to be applicable by the Supreme Court.9 Until recently, two tests—one “permissive,” the other “strict”—were used to determine the standard to be applied.10 Under the “permissive” test of equal protection, no legislative classification was to be set aside “if any state of facts reasonably [might] be conceived to justify it.”11 In only one case12 was the statutory scheme ever found to have transgressed this permissive measure of equal protection.13 On the other hand, under the “strict” test of equal protection,14 the

6 See notes 9-31 and accompanying text infra.
7 See notes 32-48 and accompanying text infra.
8 See notes 49-61 and accompanying text infra.
11 McGowan v. Maryland, 366 U.S. 420, 426 (1961) (citations omitted) (Sunday “blue laws” exempting from their operation various classes of merchandise and small retail establishments held not violative of equal protection or due process).
12 Morey v. Doud, 354 U.S. 457 (1957) (Illinois statute exempting only American Express Company from prohibition applicable to all companies selling money orders).
14 The strict test of equal protection is invoked if the challenger demonstrates that the
burden lay on the state to demonstrate that the legislative classification "promote[d] a compelling governmental interest."

Only once did the state successfully meet this burden.

During the last several years, this rigid "two-tiered" approach to equal protection challenges has been eroded to some extent by the decisions of the Supreme Court. Its demise has been noted by commentators; in fact, its obsolescence was assumed by the Second Circuit Court of Appeals in its decision in Boraas. It apparently has been supplanted by a "three-tiered" approach, utilizing a "substantial relationship in fact"—of the legislative classification to the object of the legislation—test as an intermediate standard, although arguably the Supreme Court has merely substituted this more stringent test for the earlier and overly permissive lower rung of the two-tiered system. As a result of this change, the Court has repeatedly intervened since 1971 to invalidate legislative schemes without invoking the strict test of equal protection.

legislative scheme in question either utilizes a suspect classification or impinges upon a fundamental interest. Suspect classifications include race, see, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886); alienage, see, e.g., Graham v. Richardson, 403 U.S. 365 (1971); sex, see, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); nationality, see, e.g., Oyama v. California, 332 U.S. 633 (1948); and perhaps illegitimacy. See, e.g., Levy v. Louisiana, 391 U.S. 68 (1968).


16 Korematsu v. United States, 323 U.S. 214 (1944); cf. Comment, supra note 9, at 812.
17 See notes 20-23 and accompanying text infra.
19 476 F.2d 806, 814 (2d Cir. 1973), rev'd, 94 S. Ct. 1536 (1974); see note 106 and accompanying text infra.
20 The Supreme Court has resurrected a 1920 formulation of the equal protection test which is apparently more stringent than the McGowan formulation. According to this test, "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." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); cf. Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 FORDHAM L. REV. 605, 616-18 (1973).
21 See Comment, supra note 9, at 817-22.
22 See Gunther, supra note 18.
The Supreme Court has failed thus far, however, to arrive at an articulated doctrinal basis to account for the results it has reached under the “substantial relationship in fact” test.\textsuperscript{24} In recent years, this failure has engendered a great deal of commentary proposing various modes for systematizing the Supreme Court’s apparent approach to equal protection.\textsuperscript{25} The two most frequent paradigms proposed are the “sliding-scale” model, under which the intensity of scrutiny varies largely with the importance of the interest which is being infringed,\textsuperscript{26} and the “means-oriented” model, which entails an evaluation of the means selected by the legislature to implement its goals in view of other available means which may be less offensive from an equal protection standpoint.\textsuperscript{27}

The Justices of the Supreme Court have thus far been unable to agree on any one model to rationalize their decisions.\textsuperscript{28} It was

\textsuperscript{24}See, e.g., Gunther, \textit{supra} note 18.

A closer look at the cases will reveal grounds to doubt that the new tendency rests on a carefully considered, fully elaborated rationale. Expediency may have influenced some of the votes; haste may have shaped some of the opinions. Yet there is a new trend; and it is possible to suggest reasons that may make continuation of the new direction justifiable, attractive, and feasible.

\textit{Id.} at 19 (footnote omitted).

\textsuperscript{25}See, e.g., Gunther, \textit{supra} note 18; Comment, \textit{supra} note 20; Note, \textit{supra} note 18; Comment, \textit{supra} note 9.


\textsuperscript{27}See, e.g., 49 \textit{NOTRE DAME LAW.} 428, 431-33 (1973).

\textsuperscript{28}This diversity is illustrated by the five separate opinions handed down in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 59, 62, 63, 70 (1973). Justice Powell, writing the majority opinion, supported by Justices Blackmun, Burger, Rehnquist, and Stewart, held that “[t]he constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest.” \textit{Id.} at 55 (citation omitted). Justice Stewart, concurring in the opinion and judgment of the Court, argued that the \textit{McGowan} test was still the applicable standard. \textit{Id.} at 60. Justice Brennan, dissenting, argued that a stricter test of equal protection should have been utilized since “‘fundamentality’ is, in large measure, a function of the right’s importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed.” \textit{Id.} at 62. This is presumably one version of the “sliding-scale” standard. Justice White, dissenting in an opinion which was supported by Douglas and Brennan, apparently accepted Powell’s standard but felt that its application should have produced the opposite result, i.e., that the classification in \textit{Rodriguez} was not rationally related to the end sought to be achieved. \textit{Id.} at 67. Finally, Justice Marshall, dissenting in an opinion supported by Douglas, argued for the abolition of the two-tiered test altogether, writing that “[t]he Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court’s decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.”

\textit{Id.} at 98-99.
hoped by some commentators that the Court would use the *Boraas* case to clarify its approach to equal protection, particularly since the Second Circuit Court of Appeals in its decision below split on this issue, the majority adopting a "sliding-scale" approach while the dissent urged a "means-oriented" inquiry.

B. *The Right of Privacy*

The right of privacy, as an identifiable interest worthy of constitutional protection, was first delineated by the Supreme Court in *Griswold v. Connecticut*. This right, although not expressly mentioned in the Constitution, has been deemed to arise from such explicitly enumerated rights as the right of association, the prohibition against the quartering of soldiers in private homes, the right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures, and the privilege against self-incrimination. As described by Justice Douglas in the *Griswold* case, this right preserves the freedom of an individual to make certain decisions regarding the conduct of his personal life. Included within the zone of privacy created by *Griswold* are "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members."

The parameters of the right of privacy have been refined further by subsequent Supreme Court cases, most notably *Roe v.*

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31 See notes 106-09 and 115-16 and accompanying text *infra*.
32 381 U.S. 479, 484-85 (1965). In that case, two directors of a planned parenthood group were convicted as accessories under a Connecticut statute which made it a crime to use contraceptives. The Court held that the statute was unconstitutional since it violated the right of marital privacy.
33 *Id.* at 484.
34 As Douglas put it, the Court dealt with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.
36 381 U.S. at 483 (citation omitted). The Court pointed to membership in the NAACP, involved in *NAACP v. Button*, 371 U.S. 415 (1963), and to admission to the bar, involved in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), as examples of such "forms of association."
37 See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (Texas criminal abortion laws held
According to the majority opinion in that case, the "decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy." The Court, however, extended the right of privacy to cover a woman's choice to terminate her pregnancy by abortion.

In a recent case, United States Department of Agriculture v. Moreno, the Supreme Court faced an equal protection challenge to Section 3(e) of the Food Stamp Act of 1964, which excluded from participation in the food stamp program "voluntary" families, defined as "households containing an individual who is unrelated to any other member of the household." Writing for the majority, Justice Brennan found that "[t]he challenged statutory classification [was] clearly irrelevant to the stated purposes of the Act," and therefore violated even the more permissive test of due process under the fifth amendment.

In a concurring opinion, Justice Douglas further amplified his understanding of the right of privacy, especially the limitations it placed upon governmental regulation of associational rights:

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."
These recent decisions have helped to clarify the basic content of the right of privacy; they do not, however, address the more difficult question of the scope of that right. For example, several factual elements present in Griswold may be used, either singly or in combination, to delineate the general parameters of the right of privacy. The legislation in Griswold impinged an activity taking place in a private home; its enforcement threatened unwarranted police intrusions into the home; it affected the choice of whether or not to have children; and finally, it purported to regulate the choice of marital status. Lower courts have been baffled by the question of which of these factors should be assigned paramount importance in deciding whether an activity which involves one or more, but not all, of these factors, deserves protection under the right-of-privacy umbrella. The factual setting of Boraas arguably provided the Supreme Court with an opportunity to clarify further the dimensions of the right of privacy.

C. Legislative Discretion in the Field of Zoning Regulation

The Supreme Court has dealt directly with zoning only twice. In the first case, Euclid v. Ambler Realty Co., decided in 1926, it established the presumptive validity of zoning. The single unrelated person, it draws a line that can be sustained only on a showing of a "compelling" governmental interest.

Id. at 544.

The extremes, of course, can be ruled out. The Supreme Court could not have intended the right of privacy to protect, in any absolute sense, "the freedom to live one's life without governmental interference . . . for such a right is at stake in every case. Our life styles are constantly limited, often seriously, by governmental regulation." Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 932-33 (1973).

See Note, supra note 34, at 687.

381 U.S. at 485-86.

See Note, supra note 34, at 677; cf. notes 77-80 and accompanying text infra.


The Supreme Court has dealt incidentally with zoning ordinances in other cases. See, e.g., Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Buchanan v. Warley, 245 U.S. 60 (1917). See also Note, "Burning the House to Roast the Pig": Unrelated Individuals and Single Family Zoning's Blood Relation Criterion, 58 CORNELL L. REV. 138, 141-42 n.17 (1972).

272 U.S. 365 (1926).

This case involved a challenge to what has since become the typical zoning ordinance, dividing the village of Euclid, Ohio, into several classes of use district. The challenger, an owner of land in the residential district, based his attack on both the equal protection and due process clauses of the fourteenth amendment. The thoroughness with which these claims were rejected by the Court has been interpreted since 1926 to mean that zoning ordinances carry the same presumption of validity as other legislative enactments.
Court reaffirmed this approach in the second case, *Nectow v. City of Cambridge*, although in that case the plaintiff successfully rebutted the presumption of validity by demonstrating that the zoning ordinance as applied to him was unreasonable.

Since 1928, the Supreme Court has not intervened in the further evolution of the constitutional principle of reasonableness as a test of the means chosen by local authorities in order to achieve their zoning objectives. However, two more recent decisions, although not dealing directly with zoning issues, have had an impact in the zoning area. The first of these, *Berman v. Parker*, extended the concept of "public welfare," which is frequently used to justify zoning regulations, to include values which "are spiritual as well as . . . monetary," and declared that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

In the second case, *Lindsey v. Normet*, the Supreme Court refused to grant "fundamental interest" status to housing. The

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53 277 U.S. 183 (1928).
54 Id. at 188.
55 Many state courts and lower federal courts have recently been active in the development of the standard of reasonableness, as applied to zoning ordinances. See, e.g., Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971); In re Kit-mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970). See also 49 NOTRE DAME LAW. 428, 437 (1973).
59 348 U.S. at 33.
60 405 U.S. 56 (1972).
61 Id. at 74. As Justice White wrote in the majority opinion, "we do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . ."
challenges in that case were based in part on the claim that housing is a fundamental interest and therefore all zoning ordinances denying housing to a particular group of people—the poor, for example—must withstand scrutiny under the strict test of equal protection. The Court, however, rejected this argument, thus maintaining the presumption of constitutional validity of legislative enactments regulating housing, and, in effect, validating zoning ordinances which exclude certain income groups from a neighborhood.62

The Boraas case, therefore, presented the Court with an opportunity to address the zoning issue directly and to clarify the permissible limits of zoning in view of these developments.

II
LOWER COURT RESPONSES TO RESTRICTIVE FAMILY DEFINITIONS IN ZONING ORDINANCES

There has been only a handful of reported cases dealing with constitutional challenges to restrictive family definitions for zoning purposes.63 The outcomes in these cases have ranged from rejection of the constitutional claims64 to invalidation of the zoning ordinance on non-constitutional grounds65 to acceptance of the constitutional arguments and consequent invalidation of the ordinance.66

A. City of Des Plaines v. Trottner

One of the earliest cases dealing with a restrictive family definition in zoning was City of Des Plaines v. Trottner.67 That case


63 See cases cited in notes 64-66 infra. See generally, Note, supra note 50; Note, Excluding the Commune from Suburbia: The Use of Zoning for Social Control, 23 Hastings L.J. 1459 (1972).


67 34 Ill. 2d 432, 216 N.E.2d 116 (1966).
involved a challenge to the zoning ordinance of the city of Des Plaines, Illinois, which declared that

[a] "family" consists of 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."68

The city of Des Plaines had attempted to enforce the ordinance against the owner of a house in a single-family residence district and four young men who rented the house from her by instituting a civil action in an Illinois district court.69 The defendants moved to dismiss the complaint on the ground, among others, that the zoning ordinance in question exceeded the city's statutory authority and violated the constitutions of both Illinois and the United States.70 The trial court denied the motion, the defendants failed to present a defense, and a judgment was awarded to the city.71 The defendants appealed directly to the Supreme Court of Illinois, which assumed jurisdiction in view of the broad concern engendered throughout the state by the defendants' challenge to the ordinance.72

The Illinois Supreme Court held that in the absence of specific authorization by the legislature for "the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit,"73 the city exceeded the statutory authorization; its definition of family was therefore invalid.74 In arriving at this conclusion, the court relied, at least in

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68 Id. at 433-34, 216 N.E.2d at 117.
69 Id. at 432-33, 216 N.E.2d at 117. In a two-count complaint, the city moved for an injunction to enforce the ordinance, and sought to recover fines from defendants for violation of the ordinance. Id. at 433, 216 N.E.2d at 117.
70 Id. The defendants relied upon the due process and equal protection clauses of the Federal Constitution and the due process clause of the Illinois Constitution. Id. at 435, 216 N.E.2d at 118.
71 Id.
72 Id.
73 Id. at 438, 216 N.E.2d at 120.
(4) to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential, and other uses; (5) to divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this Division 13; (6) to fix standards to which buildings or structures therein shall conform; (7) to prohibit uses, buildings, or structures incompatible with the character of such districts . . . .
part, on "[t]he considerations that the defendants advance[d] to show that the ordinance classification . . . violates the due process and equal protection provisions of the constitution of the United States." It was unpersuaded by the city's arguments that the restrictive definition tended to improve the stability of the neighborhood and restrict traffic and parking problems.

B. Palo Alto Tenants Union v. Morgan

A restrictive family definition was also challenged by members of several communes in Palo Alto, California, in Palo Alto Tenants Union v. Morgan. The city zoning ordinance in that case defined a family as "one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit." The plaintiffs claimed that this definition, which in effect barred communes from portions of Palo Alto zoned for single family dwellings, infringed their constitutionally protected rights of association and privacy.

The right of association claim was given short shrift by the federal district court. It held that the protected right did not extend to the right to live under one roof anywhere in the city, because "[t]o define 'association' so broadly . . . would be to dilute the effectiveness of that special branch of jurisprudence which our tradition has developed to protect the truly vital interests of the citizenry." The right of privacy, as developed by Griswold, however, received more detailed treatment. The element of state interference with private activities occurring within a home was clearly present. The other three elements present in Griswold, however, were not found by the court in the instant case. The choice to have children could be affected only remotely by the zoning ordinance since the very act of having a child qualifies the particular couple as a "family." Thus, the court did not discuss this element. On the issue of unwarranted police intrusions, the court

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75 34 Ill. 2d at 435, 216 N.E.2d at 118.
76 Id. at 437-38, 216 N.E.2d at 119.
77 321 F. Supp. 908 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973), cert. denied, 94 S. Ct. 2608 (1974). Since the challenge was brought in the form of a class action, the communal living groups were defined merely as "voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation." 321 F. Supp. at 911.
78 Id. at 909.
79 Id. at 909-10. The plaintiffs argued that the right of unrelated persons to live together as a family is an "emanation" of the freedom of association specifically guaranteed by the Bill of Rights. They also invoked the right of family privacy deemed so important by the Griswold court.
80 Id. at 912.
81 See notes 47-48 and accompanying text supra.
found "no showing of warrantless searches, unreasonable prying, or of any inevitability of the 'repulsive' investigative tactics which the Supreme Court in Griswold found antithetical to the constitutional ideal of individual and marital privacy." With regard to the final element in Griswold, namely interference with marital choice, the district court distinguished traditional from "voluntary" families. It wrote that

there is a long recognized value in the traditional family relationship which does not attach to the "voluntary family". The traditional family is an institution reinforced by biological and legal ties which are difficult or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings.

The communal living groups represented by plaintiffs share few of the above characteristics.

Having found no interference with a fundamental interest, the court proceeded to examine the rationality of the zoning restriction, that is, the extent to which the definition of "family" furthered "aesthetic, economic, and other legitimate goals of zoning." On this point, the court found it significant that the zoning ordinance permitted up to four unrelated individuals to live as a "voluntary" family while the average size of a traditional family is smaller than four members. Thus, because of the threat of increased noise, traffic, and parking problems resulting from permitting an unlimited number of individuals to live in each single family dwelling, and because of the possibility of driving rents in neighborhoods now zoned for single families beyond the means of the traditional families currently living there, the court found "the ordinances rational within the meaning of the equal protection and due process clauses of the 14th Amendment."

C. Kirsch Holding Co. v. Borough of Manasquan

A 1971 decision of the Supreme Court of New Jersey, Kirsch Holding Co. v. Borough of Manasquan, culminated a brief line of

82 321 F. Supp. at 912.
83 Id. at 911 (footnote omitted).
84 Id. at 912. The court did not indicate the source of these "legitimate goals."
85 Id.
86 The court stressed that a traditional family is not likely to have more than one or two wage-earners, while a "commune" is likely to have many more. Id. at 912-13.
87 Id. at 912.
New Jersey cases dealing with restrictive family definitions. In *Kirsch*, the court was faced with a challenge to zoning ordinances designed to prevent seasonal renting of houses in two seashore resort communities to groups of unrelated young people whose "uninhibited social conduct" tended to make "life not only unpleasant but practically unbearable to neighboring vacationers and permanent residents and [had] a general adverse effect on the whole municipality."

The New Jersey court found these zoning provisions unconstitutional based on substantive due process grounds. The court declared:

We think it clear that these "family" definitions and prohibitory ordinance provisions preclude so many harmless dwelling uses, as we have earlier pointed out by examples, in the effort to ban seasonal uses and rentals by unruly unrelated groups of young adults who indulge in anti-social behavior, that they must be held to be so sweepingly excessive, and therefore legally unreasonable, that they must fall in their entirety.

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90 One of the ordinances involved, that of the Borough of Belmar, defined a "family" as:

a. One or more persons related by blood or marriage occupying a dwelling unit and living as a single, nonprofit housekeeping unit.
b. A collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct domestic character, and cooking as a single housekeeping unit. This definition shall not include any society, club, fraternity, sorority, association, lodge, combine, federation, group, coterie, or organization, which is not a recognized religious order, nor include a group of individuals whose association is temporary and resort-seasonal in character or nature.

91 Belmar and Manasquan, New Jersey.
92 The court described such behavior as including "excessive noise at all hours, wild parties, intoxication, acts of immorality, [and] lewd and lascivious conduct." 59 N.J. at 245, 281 A.2d at 515.
93 *Id.*
94 *Id.* at 251-52, 281 A.2d at 518. The court stated:

It is elementary that substantive due process demands that zoning regulations, like all police power legislation, must be reasonably exercised—the 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 and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.

*Id.*
95 *Id.* In essence the court determined that the "excessive" behavior used as a
The justifications advanced by the municipalities to support the zoning provisions were more concrete than those usually marshalled in support of such regulations. Whether the zoning provisions are thus casualties of governmental candor, or whether the New Jersey Supreme Court would have invalidated a restrictive family definition even if the customary justifications were presented, is not clear. It is logical to assume, however, that the court would not be receptive to such restrictive ordinances regardless of the arguments used by the local governmental units in support of them.

D. Boraas in the Court of Appeals

In 1973 the Second Circuit Court of Appeals, in a split decision, declared unconstitutional the zoning ordinance of the village of Belle Terre. The ordinance restricted the territory of the entire village to one-family dwellings, and defined a family as follows:

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 village of Belle Terre is a small community of 700 people and 220 homes, occupying less than one square mile. It adopted the zoning ordinance allegedly in order to control population density, avoid escalation of rental rates, minimize parking, traffic, and noise problems, and increase the stability of the community. The plaintiffs challenging the ordinance were the owners of a house in Belle Terre, and six students, unrelated to one another, who leased the house for a period of seventeen months.

The court of appeals, in reversing the lower court's determina-

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96 The municipalities pointed to the "uninhibited social conduct," including excessive noise at all hours, wild parties, intoxication, and immoral acts, and traffic and parking congestion, as the undesirable consequences of group rentals. Id. at 245, 281 A.2d at 515.
98 Id. at 809, quoting BELLE TERRE, N.Y., BUILDING ZONE ORDINANCE art. I, § D-1.35a (June 8, 1970).
100 476 F.2d at 816.
101 Id. at 808-09.
tion that the ordinance was valid, ultimately found that "[t]he six [were] organized and function[ed] as a single housekeeping unit." There was no suggestion of any immoral conduct by the plaintiffs. The court simply determined that the "cooperative housing arrangement was considered by them to be pleasant, convenient, promotive of scholarly exchange, and within their pocketbooks."

The local authorities apparently had become aware of the plaintiffs' living arrangement when two of them attempted to secure residents' beach passes. Shortly after this attempt, the owners of the house were served with an "Order to Remedy Violations" which would have subjected them to various penalties, unless the violations were remedied within forty-eight hours. The plaintiffs thereupon sought injunctive relief against enforcement of the ordinance and a declaratory judgment that the Belle Terre ordinance was unconstitutional. The district judge upheld the constitutionality of the ordinance. Conceding that traditional zoning objectives, such as facilitation of public service or preservation of land from overintensive use, could not support the restrictive definitions, he nevertheless held the ordinance justified as an attempt by the village to protect and encourage the traditional family structure.

Plaintiffs next sought reversal in the Court of Appeals for the Second Circuit. According to that court, since the ordinance discriminated against voluntary families, "[t]he basic issue . . . [was] whether this unequal legislative classification violate[d] the Equal Protection Clause."

The plaintiffs alleged that their fundamental interests of privacy, association, and travel were being infringed, and, therefore,

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102 Id. at 809.
103 Id.
104 Id. Four of the plaintiffs were pursuing graduate studies in sociology at the State University of New York at Stony Brook. Id.
105 The ordinance provided for a $100 fine and/or imprisonment not exceeding 60 days for each day of violation. 476 F.2d at 809, quoting BELLE TERRE, N.Y., BUILDING ZONE ORDINANCE art. VIII, pt. 4, § M-1.4a(2) (Oct. 17, 1971).
106 476 F.2d at 809-10. Specifically, the complaint alleged that the ordinance denied the plaintiffs equal protection of the law and violated their right of association, right of privacy, and right to travel. Id. at 810 n.3.
108 Id. at 146.
109 476 F.2d at 811.
110 Id. at 811.
111 Id.
that strict scrutiny of the legislative classification was required.\textsuperscript{112} The court of appeals found it unnecessary to address this issue since it found that the Belle Terre ordinance failed to meet the requirements of even the more lenient "intermediate" test of equal protection.\textsuperscript{113} Writing for the majority, Judge Mansfield observed that

the Supreme Court appears to have moved from this rigid . . . "two-tiered" formula, toward a more flexible and equitable approach, 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.\textsuperscript{114}

Thus, the majority apparently adopted the "sliding-scale" test of equal protection.\textsuperscript{115}

It then proceeded to examine the interests or rights affected, and the possible objectives furthered, by the Belle Terre zoning ordinance definition of a family, and the means adopted to achieve these objectives. Although failing explicitly to find an infringement of fundamental interests, the court asserted that "where individual human rights of groups as opposed to business regulations are involved"\textsuperscript{116} greater than minimal scrutiny is required.\textsuperscript{117} According to the court, the most plausible and likely governmental interest furthered by the zoning ordinance was "the interest of the local community in the protection and maintenance of the prevailing traditional family pattern."\textsuperscript{118} The court found this objective unacceptable, holding that "social preferences" cannot be imposed "under the mask of zoning ordinances,"\textsuperscript{119} notwithstanding the

\textsuperscript{112} Id. at 813.

\textsuperscript{113} Id. at 808; see notes 17-31 and accompanying text supra.

\textsuperscript{114} Id. at 814 (footnote omitted).

\textsuperscript{115} See notes 25-26 and accompanying text supra.

\textsuperscript{116} 476 F.2d at 815.

\textsuperscript{117} Id. at 814-15. In reaching this conclusion, the court relied on five recent Supreme Court decisions. See James v. Strange, 407 U.S. 128, 140-41 (1972) (Kansas recoupment statute permitting state to recover legal defense fees for indigent defendants invalidated); Jackson v. Indiana, 406 U.S. 715, 723-30 (1972) (Indiana procedure for pretrial commitment of incompetent criminal defendants found unconstitutional); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-76 (1972) (Louisiana law denying recovery under workmen's compensation to illegitimate children held violative of equal protection); Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972) (Massachusetts law forbidding dispensing of contraceptives invalidated); Reed v. Reed, 404 U.S. 71, 76 (1971) (Idaho probate code preferring men over women as executors held unconstitutional).

\textsuperscript{118} 476 F.2d at 815.

\textsuperscript{119} Id. at 816.
discretion given to local governments in imposing legitimate zoning regulations.

The court went on to hold, however, that even assuming that the zoning ordinance was designed to further the more traditional zoning objectives, such as population density control, avoidance of rental rate escalation, abatement of parking, traffic, and noise problems, or improvement of the stability of the community, "the classification established may well be vulnerable as too sweeping, excessive and overinclusive."\(^{120}\) The court reached this conclusion because positing a connection between the admission of "voluntary" families into a community and the various problems listed above would be "rank speculation, unsupported either by evidence or by facts that could be judicially noticed."\(^{121}\) This was particularly true, the court pointed out, because the average traditional family has more than two members, and there is a variety of local legislative means, including other types of zoning regulations, available to allow local governments to achieve the objectives mentioned "without impinging upon the rights of privacy and association of unrelated persons."\(^{122}\) In other words, it is unreasonable to limit voluntary families to two members when traditional families usually exceed that number, and the problems believed to attend the presence of voluntary families—i.e., traffic congestion—can be eliminated by more reasonable means.\(^{123}\)

Judge Timbers, dissenting, expressed doubts concerning the applicability of a "new rationality test" in "traditional 'hands-off' areas of legislative activity."\(^{124}\) He rejected the majority's "sliding-scale" approach in favor of a "means only" scrutiny. He read recent Supreme Court decisions as "requir[ing] a judge to make only the narrow value judgments needed in evaluating means."\(^{125}\) In addition, Judge Timbers considered "the maintenance of the tradi-

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\(^{120}\) Id. at 817.

\(^{121}\) Id. at 816.

\(^{122}\) Id. at 817.

\(^{123}\) Id. The feared congestion from the disproportionately large number of cars projected to accompany voluntary families, however, could easily be eliminated by limiting the number of cars per household. See note 145 infra.

\(^{124}\) Id. at 822.

\(^{125}\) Id. at 821. Citing Reed v. Reed, 404 U.S. 71, 76 (1971), Judge Timbers added that [a] legislative classification must contribute substantially to the achievement of the state's purpose. It must "rest on a ground of difference having a fair and substantial relation to the object of the legislation."
tional family character of the Village arguably . . . a legitimate objective."

Finally, in his view, the ordinance was rationally related to the maintenance-of-village-character objective, as well as the more traditional objectives proposed by the village in defense of its zoning ordinance. Thus, since he viewed the means chosen by Belle Terre as being rationally related to these legitimate objectives, Judge Timbers would have sustained the constitutionality of the ordinance.

III

Boraas in the Supreme Court

Following the court of appeals decision in the Boraas case, the Supreme Court noted probable jurisdiction, and in April 1974 reversed in a seven to two decision, thus upholding the constitutionality of the zoning ordinance. The factual setting of the Boraas case presented the Court with an opportunity to clarify and develop several controversial points of constitutional law, particularly in the fields of zoning, the right to privacy, and equal protection. Writing for the Court, Justice Douglas did not take advantage of the opportunity to deliver a far-reaching opinion, however, preferring instead to confine the decision to the resolution of the narrow issues presented by the specific facts of the case, with a possible exception in the area of zoning. Justice Brennan, in his dissent, urged that the case should have been remanded to the district court for further proceedings, with instructions to dismiss the complaint on the ground of mootness if it was deter-

126 476 F.2d at 822.
127 Judge Timbers wrote that under the circumstances . . . the maintenance of the traditional family character of the Village arguably is a legitimate objective. . . . The Belle Terre ordinance apparently was enacted for the purpose of zoning for a particular neighborhood character in a community that had always been of that character. The development decision was made over a period of time by the families moving into the Village. The zoning ordinance therefore merely reinforced the sum of many individual choices.

128 See note 118 and accompanying text supra.
129 476 F.2d at 824.
132 See notes 49-61 and accompanying text supra.
133 See notes 32-49 and accompanying text supra.
134 See notes 9-31 and accompanying text supra.
135 94 S. Ct. at 1537-41; see notes 138-49 and accompanying text infra.
minded that a cognizable case or controversy no longer existed. Justice Marshall, the other dissenter, argued that the zoning ordin-

ance infringed the rights of privacy and of association; therefore, since the state had failed to show a substantial and compelling governmental interest, the zoning provisions in question should be invalidated.

A. Limits of Permissible Zoning Regulation

Both Justices Douglas and Marshall concurred in reaffirming the broad discretion of local governmental units in enacting zoning regulations. Justice Douglas quoted several passages from Euclid v. Ambler Realty Co., emphasizing the latitude of the zoning power, because it "is not capable of precise delimitation." Douglas also stressed that zoning regulations enjoy a presumption of validity, and may be extended to include safety margins. Furthermore, he concluded that the zoning 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 clear air make the area a sanctuary for people." Zoning may be used to achieve values which "are spiritual as well as physical, aesthetic as well as monetary.

Justice Marshall, too, believed that zoning was "one of the primary means by which we protect that sometimes difficult to define concept of quality of life." Furthermore, he considered it necessary to "afford zoning authorities considerable latitude in choosing the means by which to implement such purposes." But he would have imposed narrower limits on the zoning power in

136 94 S. Ct. at 1541-42. Justice Brennan was of this opinion because the tenant plaintiffs moved out before the case reached the Supreme Court, and because the landlord plaintiffs made no showing that the values of their property were affected by the ordinance or that their own rights of privacy were violated.

137 Id. at 1542-46.

138 272 U.S. 365 (1926); see 94 S. Ct. at 1538-39.


140 94 S. Ct. at 1538. Justice Douglas again quoted Euclid: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388.

141 94 S. Ct. at 1538. Borrowing yet again from Euclid, Douglas stressed that "[t]he inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." Id., quoting 272 U.S. at 388-89.

142 94 S. Ct. at 1541.

143 Id. at 1539, quoting Berman v. Parker, 348 U.S. 26, 33 (1954).

144 94 S. Ct. at 1543 (dissenting opinion).

145 Id. Among the means suggested by Justice Marshall for coping with the problems said to be created by "voluntary" families were rent control and limits on the number of vehicles per household. Id. at 1546.
areas where it impinged upon such fundamental rights as the rights of privacy and of association.\[146\]

Although in theoretical agreement with Marshall on this issue, Douglas only pointed to two instances where a zoning ordinance would offend the equal protection clause. One example was an ordinance which segregates by race.\[147\] Such an ordinance would result in unequal treatment based on the most suspect of all classifications, namely race. The other was an ordinance requiring the consent of two-thirds of the property owners in a neighborhood in order to permit the construction of an orphanage or an old age home. Such an ordinance would be offensive since it would permit the caprice of a minority of property owners to arbitrarily ban an innocuous activity.\[148\] The Belle Terre ordinance, according to Douglas, contained no such flaws.\[149\]

In view of the wide spectrum of permissible zoning objectives envisioned by Douglas and Marshall, and in view of the Court's reluctance to second-guess the means chosen by local zoning officials to achieve these goals, the role of courts in limiting excessive zoning zeal will necessarily be severely curtailed. It remains to be seen whether this broad grant of power will be used to create the idyllic oases of tranquility envisioned by Douglas or to preserve existing enclaves of affluence as sanctuaries from, rather than for, the people.\[150\]

B. Continued Failure to Define the Right of Privacy

Justice Douglas only briefly discussed the right of privacy claim. Distinguishing the Court's decisions in *NAACP v. Alabama*,\[151\] *United States Department of Agriculture v. Moreno*,\[152\] *Griswold v.*

\[146\] *Id.* at 1543-45. Justice Marshall has long advocated a flexible test of equal protection. He has urged that

[c]oncentration . . . be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.

Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). He has singled out the right of privacy as one of the most important "governmental benefits," writing that "[c]onstitutionally protected privacy is, in Mr. Justice Brandeis' words, 'as against the government, the right to be let alone . . . the right most valued by civilized man.'" 94 S. Ct. at 1544, quoting Olmstead v. United States, 277 U.S. 438, 478 (1928).


\[149\] 94 S. Ct. at 1540.

\[150\] See cases and articles cited note 62 supra.

\[151\] 357 U.S. 449 (1958) (Alabama sought injunction against NAACP activities in state).

\[152\] 413 U.S. 528 (1973); see notes 39-42 and accompanying text supra.
Connecticut,\textsuperscript{153} and Eisenstadt \textit{v.} Baird,\textsuperscript{154} he declared that the zoning ordinance in the instant case “involve[d] no ‘fundamental’ right guaranteed by the Constitution, such as . . . the right of association . . . or any rights of privacy.”\textsuperscript{155} This summary treatment, however, does not appear to be well-founded.

In the \textit{Moreno} case, Douglas had reached the opposite result in dealing with the “unrelated person” provisions of the Food Stamp Act.\textsuperscript{156} There, he found that the provision had “an impact on the rights of people to associate.”\textsuperscript{157} Citing NAACP \textit{v.} Alabama, he declared that “[w]hen state action ‘may have the effect of curtailing the freedom to associate’ it ‘is subject to the closest scrutiny.’”\textsuperscript{158} Douglas distinguished \textit{Moreno} in a footnote on the ground that the statute in that case permitted no unrelated individuals living together to qualify as a household, whereas the Belle Terre ordinance allowed for unrelated families of two.\textsuperscript{159} He considered this distinction important since the Belle Terre ordinance permitted unmarried couples to live together.\textsuperscript{160} Presumably, a zoning ordinance which went so far as to prohibit cohabitation by unmarried couples would profoundly and impermissibly interfere with an individual’s choice of life-style. The prohibition against cohabitation by more than two, on the other hand, is not as fundamentally flawed, perhaps because it is so far beyond the accepted standards of our society. Curiously, however, Douglas did not respond to the more basic argument, grounded in the language of the NAACP case, that the Belle Terre ordinance might “have the effect of curtailing the freedom to associate” and would therefore be “subject to the closest scrutiny.”\textsuperscript{161} After all, as was the case in \textit{Boraas}, several individuals may clearly choose to share a household for reasons entirely unrelated to sexual cohabitation.\textsuperscript{162}

Equally puzzling is the facility with which Douglas avoided the impact of the Griswold and Eisenstadt cases. Although both cases were clearly distinguishable from the instant case on their facts,\textsuperscript{163}

\begin{footnotes}
\item[153] 381 U.S. 479 (1965).
\item[154] 405 U.S. 438 (1972) (Massachusetts law making dispensing of contraceptives felonious held unconstitutional).
\item[155] 94 S. Ct. at 1540.
\item[156] 413 U.S. at 540-45 (concurring opinion); see 7 U.S.C. § 2012(e) (1970).
\item[157] 413 U.S. at 544 (Douglas, J., concurring).
\item[158] \textit{Id.} at 544-45.
\item[159] 94 S. Ct. at 1541 n.6.
\item[160] \textit{Id.} at 1541.
\item[161] 413 U.S. at 544-45, \textit{quoting} 357 U.S. at 460-61.
\item[162] See note 104 and accompanying text \textit{supra}.
\item[163] See note 48 and accompanying text \textit{supra}; note 168 and accompanying text \textit{infra}.
\end{footnotes}
they nevertheless laid down broad definitions of the right of privacy which arguably could apply to the Boraas facts. Griswold's suggestion that constitutional protection of the right of association could extend beyond protection of the marital relationship and beyond protection of politically-oriented activity to include a group of people living together for "the social, legal, and economic benefit of the members,"\textsuperscript{164} would appear to have been applicable in the present case. Eisenstadt, which dealt with the use of contraceptives by unmarried persons,\textsuperscript{165} would appear to have been even more in point. Although the Supreme Court did not decide in that case whether a fundamental right of privacy had been infringed,\textsuperscript{166} since it invalidated the statute in question on minimal scrutiny equal protection grounds,\textsuperscript{167} it nevertheless pointed out, by way of dictum, that the Griswold right of privacy does not inhere in the institution of marriage itself, but rather in the individuals living as a family, whether married or not:

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . . .\textsuperscript{168}

Eisenstadt's broad language, however, apparently was not sufficient to overcome the factual differences between Griswold and the present case. Since only one of the principal factual elements present in Griswold—interference with decisions concerning procreation—was not present in Boraas,\textsuperscript{169} the majority opinion implies that the right of privacy is only available in cases involving

\textsuperscript{164} 381 U.S. at 483.
\textsuperscript{165} 405 U.S. 438 (1972).
\textsuperscript{166} Id. at 453.
\textsuperscript{167} Id. at 446-47.
\textsuperscript{168} Id. at 453 (emphasis in original).
\textsuperscript{169} The Belle Terre zoning ordinance clearly impinges upon activity taking place in a private home. The element of unwarranted police intrusions is also present, because in order to establish a zoning violation, the authorities must show that the unrelated individual was not being merely "entertained by" the "family" as a guest, but was "living with" them as part of the "family." Proof of such status might well require police intrusions into the private precincts of the home. Finally, the element of interference with the marital relationship is neutralized, if the Eisenstadt interpretation is correct, since one need not be married in order to have one's marital relationship impinged upon. In other words, according to Eisenstadt, the term "marital relationship" refers principally to cohabitation, and not to marriage. Therefore, it would seem one is entitled to the privacy of the marital relationship even if one chooses to conduct such a relationship outside the framework of conventional marriage.
procreation. Although it is quite doubtful that Justice Douglas would have intended this implication, his sketchy treatment of the right of privacy nevertheless permits a strong inference that the scope of *Griswold* has been dramatically reduced.\(^{170}\)

The majority's apparent construction of the right of privacy in *Boraas* prompted Justice Marshall to dissent vigorously. He pointed out that "[t]he freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy."\(^{171}\) In his view, "[t]he choice of household companions . . . falls within the ambit of the right to privacy protected by the Constitution."\(^{172}\) He also argued that "freedom of association encompasses the 'right to invite a stranger into one's home' not only for 'entertainment' but to join the household as well."\(^{173}\) On this basis, he considered the Belle Terre ordinance unconstitutional.\(^{174}\)

C. *The Test of Equal Protection*

Neither the majority nor the dissent in *Boraas* discussed at any length the appropriate test of equal protection. Justice Douglas did assert that a law will be sustained in the face of an equal protection challenge if it is found to be "'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective,'"\(^{175}\) thus indicating that the "permissive" test\(^{176}\) is no longer viable even in such a hands-off area as zoning. The Court, however, did not provide any new clues to a principled application of the "rational relationship" test, preferring instead to continue its case-by-case approach.

As Justice Marshall pointed out in an earlier treatment of equal protection,

\(^{170}\) Cf. Note, *supra* note 34; *see also* notes 37-38 and accompanying text *supra*.

\(^{171}\) 94 S. Ct. at 1544.

\(^{172}\) *Id*.

\(^{173}\) *Id.* at 1545, *quoting* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538-45 (1973) (Douglas, J., concurring).

\(^{174}\) Justice Marshall stated:

> By limiting unrelated households to two persons while placing no limitation on households of related individuals, the village has embarked upon its commendable course in a constitutionally faulty vessel. . . . I would find the challenged ordinance unconstitutional. But I would not ask the village to abandon its goal of providing quiet streets, little traffic, and a pleasant and reasonably priced environment in which families might raise their children. Rather, I would commend the town to continue to pursue those purposes but by means of more carefully drawn and even-handed legislation.

94 S. Ct. at 1546.


\(^{176}\) *See* note 11 and accompanying text *supra*.
[t]he Court apparently seeks to establish . . . that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization.177

It is disappointing that the Court did not take advantage of the opportunity presented in Boraas to clarify, and explicitly delineate, its standards of review in equal protection cases.

CONCLUSION

The Supreme Court's decision in Boraas will provide only limited assistance in resolving constitutional issues beyond those raised by the immediate facts of the case. In the area of zoning, the discretion of local government units remains broad. The parameters of the zone of privacy remain unclear, although Boraas may be an indication of the reluctance of the Court to expand its scope, perhaps in the belief that the intermediate level of scrutiny provided by the "substantial relationship in fact" test is better suited to the resolution of the conflicting claims often involved in right-of-privacy cases. As for the doctrine of equal protection itself, the Supreme Court has continued its case-by-case examination of equal protection challenges. Thus, the Court has preserved an uncertain status quo. Further guidance for the bench and the bar must await future "lightnings from Olympus."178

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