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Zoning and Land Use—Village of Belle Terre v. Boraas: Belle Terre Is a Nice Place to Visit—But Only "Families" May Live There

VILLAGE OF BELLE TERRE v. BORAAS: BELLE TERRE IS A NICE PLACE TO VISIT—BUT ONLY "FAMILIES" MAY LIVE THERE

The Village of Belle Terre, New York, passed a zoning ordinance limiting occupancy of single-family dwellings to no more than two unrelated persons.[1] This restriction did not apply to persons related by blood, adoption or marriage, any number of whom could live in one of Belle Terre's 220 homes. Plaintiff-homeowners leased their Belle Terre house to six students attending a nearby state university. During their tenancy, two of the students were denied resident beach passes because they were violating the ordinance and thus were considered "illegal residents." When plaintiff-homeowners were served with an "Order to Remedy Violations" of the ordinance, they joined with three of their tenants and brought an action under 42 U.S.C. § 1983[2] for injunctive relief against enforcement of the ordinance and a declaratory judgment that the ordinance was unconstitutional. The district judge denied a preliminary injunction and upheld the validity of the ordinance.[3] He concluded that although the exclusionary classification failed to promote such traditional zoning objectives as safety, preservation of land from excessive use, or reduction of traffic congestion, it nevertheless represented a lawful effort to maintain the traditional family character of the community.[4]

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1. BELLE TERRE, N.Y., BUILDING ZONE ORDINANCE art. 1, § D-1.35a (1970). 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.

Id.

2. 42 U.S.C. § 1983 (1970). Under § 1983 plaintiffs must show two separate elements: that defendant has deprived them of a right secured by the "Constitution and laws" of the United States; and that defendant has deprived them of this right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

3. Boraas v. Village of Belle Terre, 367 F. Supp. 136 (E.D.N.Y. 1972).

4. *Id.* at 146.

The Court of Appeals for the Second Circuit reversed,[5] holding that the discriminatory classification created by the ordinance was unsupported by any rational basis consistent with permissible zoning objectives. Specifically, the court held that a zoning ordinance that purports to protect prevailing consanguineous "family" patterns to the exclusion of all others is beyond the proper exercise of the state's police power.[6] Municipalities "cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens."[7]

The court of appeals agreed with the trial court that the ordinance did not promote traditional zoning objectives and furthermore held that it would not hypothesize legitimate goals to rescue the legislation.[8] The latter position is a departure from standard judicial analysis of discriminatory legislation that does not involve fundamental rights or suspect criteria.[9] The court of appeals expressly refused to consider whether the ordinance restricted plaintiffs' rights of privacy or travel, for it believed itself to be "no longer limited to the either-or choice between the compelling state interest test and the minimal scrutiny . . . formula."[10] The court believed that a new equal protection test was dictated by recent Supreme Court decisions[11]—whether

5. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973); *see* Note, *Up the Down-Sliding Scale:* Boraas v. Village of Belle Terre *and Equal Protection Assault on Restrictive Definitions of "Family" in Zoning Ordinances,* 49 NOTRE DAME LAW. 428 (1973); 60 VA. L. REV. 154 (1974).

6. 476 F.2d at 815.

7. *Id.* at 816.

8. *Id.* at 815.

9. The Supreme Court has developed two equal protection analyses. Legislation impairing a "fundamental right," Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); Reynolds v. Sims, 377 U.S. 533 (1964) (voting); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (association), or predicated upon a "suspect" criterion, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race), is presumed unconstitutional and will be struck down unless the state can demonstrate a compelling interest to justify the classification. This more rigid standard for equal protection is known as the "strict scrutiny" test. Other legislative determinations require a showing that the distinctions made are rationally related to a legitimate state goal, and they "will not be set aside if any state of facts reasonably may be conceived to justify" the legislation. This standard constitutes the "minimal scrutiny" test. McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

10. 476 F.2d at 814.

11. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,*

the legislative classification was *in fact* substantially related to the ordinance's objective.[12] Because Belle Terre failed to show any factual relation between the ordinance and legitimate zoning objectives, the classification created by the ordinance was unjustified. The minimal scrutiny equal protection test, which permits a court to hypothesize legitimate goals to sustain the classification, was held inapplicable to cases in which the rights allegedly denied cannot be classified as economic, yet are not within the special class of rights deemed fundamental. The court viewed the right to live where and with whom one pleases as an "important" right entitled to protection under the new intermediate scrutiny formulation.[13]

In *Village of Belle Terre v. Boraas*[14] the Supreme Court reversed the appellate court without discussing its equal protection approach. The Court rejected appellees' claims that their fundamental rights of travel, privacy and association had been violated by the ordinance,[15] and instead reviewed the classification using the minimal scrutiny test. The ordinance was considered to be economic and social legislation entailing discretionary line drawing and was therefore immune from judicial interference. Furthermore, Belle Terre's objective of protecting its traditional family character was found to be within the state's police power. This power, the Court stated, can be exercised to "lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."[16] Concern for the preservation and sanctity of the environment was apparent in this justification of the ordinance: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs."[17]

The *Belle Terre* decision will come as a bitter disappointment to those who have opposed parochial land use regulation and the exclusionary impact such regulation necessarily entails. The impact of *Belle*

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86 HARV. L. REV. 1 (1972); Note, *Up the Down-Sliding Scale, supra* note 5, at 432-33 & nn.35-42.

12. 476 F.2d at 814.

13. *Id.* at 813-14.

14. 94 S. Ct. 1536 (1974).

15. Six justices joined the majority opinion. Justice Brennan dissented on the ground of mootness, maintaining that because the named tenants had moved out the action was no longer a cognizable case or controversy. Justice Marshall wrote the sole dissent on the merits.

16. *Id.* at 1541.

17. *Id.*

Terre will extend beyond restrictive definitions of "family." The sweeping permissiveness afforded to municipal land use control evidenced by this decision may in the future immunize zoning from interference by the federal judiciary in all but the most blatantly unconstitutional situations.[18]

In the landmark zoning decision, *Village of Euclid v. Ambler Realty Co.*,[19] the Supreme Court was confronted with a land use regulation that diminished the value of plaintiff's property. Plaintiff therefore presented a due process rather than an equal protection challenge. The Court there sustained an ordinance that divided the municipality into residential, commercial and industrial zones against plaintiff's claim that a reduction in value of its property due to the classification constituted a taking without due process. Legislation, the Court noted, necessarily entails line drawing to the disadvantage of some, and "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[20] With few exceptions,[21] *Euclid's* "hands-off" approach to municipal zoning has been the standard Supreme Court approach.[22] In *Belle Terre,* however, the Court was confronted with a zoning ordinance challenged on equal protection, not due process, grounds. Yet, the Court relied upon *Euclid* as controlling precedent for its holding that the Belle Terre ordinance did not deny equal protection.

The *Belle Terre* Court correctly viewed *Euclid* as sanctioning mu-

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18. For example, racial discrimination in land use regulation has consistently been held unconstitutional. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917); Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), *aff'd in part, rev'd in part per curiam,* 461 F.2d 1171 (5th Cir. 1972) (en banc); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972); Anderson v. Town of Forest Park, 239 F. Supp. 576 (W.D. Okla. 1965).

19. 272 U.S. 365 (1926).

20. *Id.* at 388; *see* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.16 (1968).

21. *See* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

22. It is most likely that had the *Belle Terre* case been brought on due process grounds, it never would have reached the Supreme Court:

> Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is not and should not be to sit as a zoning board of appeals.

94 S. Ct. at 1543 (Marshall, J., dissenting).

nicipal exclusion of "harmful uses" (*e.g.*, industry and apartments)[23] from residential areas for the preservation of peace and quiet. The Court concluded that the Belle Terre ordinance legitimately excluded potentially harmful "urban problems" (*i.e.*, greater density, more traffic, and increased noise)[24] in order to preserve municipal peace and quiet. The Village of Euclid, however, merely placed different uses of land into separate districts to insure, *inter alia*, municipal tranquility. The Belle Terre ordinance, purportedly to achieve similar results, adopted a classification—consanguinity—that is wholly unrelated to land usage. The dissent recognized this distinction:

> Zoning officials properly concern themselves with the uses of land —with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.[25]

Justice Douglas, writing for the majority, relied upon his opinion in *Berman v. Parker*[26] for the proposition that once an objective is within the authority of a legislative body, the means employed to attain that objective are for that body to determine.[27] The "legitimate goal" in *Berman* was the development of a better balanced and more

23. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

24. 94 S. Ct. at 1541.

25. *Id.* at 1544. In Women's Kansas City St. Andrew Soc'y v. Kansas City, 58 F.2d 593 (8th Cir. 1932), the court invalidated an ordinance that would have excluded a home for elderly women from a residential district:

> To justify such restriction the police power would have to be extended, not only to restricting certain districts to residence purposes, but to restricting such districts to particular classes of residents, and this has been quite universally condemned . . . .

Id. at 603. *See also* Buchanan v. Warley, 245 U.S. 60 (1917); Village of University Heights v. Cleveland Jewish Orphans' Home, 20 F.2d 743 (6th Cir. 1927). Courts have also invalidated ordinances limiting residential occupancy to elderly citizens. Hinman v. Planning & Zoning Comm'n, 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965). In Taxpayers Ass'n v. Weymouth Township, 125 N.J. Super. 376, 381, 311 A.2d 187, 189 (App. Div. 1973), the court concluded: "A municipality may not regulate the age or makeup of the family unit permitted to reside in the structure."

26. 348 U.S. 26 (1954).

27. *Id.* at 33.

attractive community.[28] Once this goal was adopted, the legislature had the power to condemn non-slum property in accordance with a comprehensive plan of urban renewal, even if it meant that the land would ultimately be used for a private rather than a public purpose.[29] "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[30] This goal-oriented approach to municipal legislation led the Court in *Belle Terre* to a summary disposition of the ordinance's alleged constitutional violations.

Plaintiffs asserted that the ordinance restricted their constitutional right to travel into the community since the uniform character of Belle Terre provided no housing for three or more unrelated persons. Their contention was summarily rejected on the ground that the ordinance "is not aimed at transients."[31] The statement apparently implies that an ordinance restricting or penalizing a transient's right to travel is impermissible, while the same ordinance applied to a permanent resident is valid. This approach is contrary to other Supreme Court decisions concerned with the constitutional right to travel. In *Shapiro v. Thompson*[32] the Court held that a one-year residency requirement for receipt of welfare benefits unduly inhibited migration of indigents into the state and therefore was unconstitutional. The Court focused on the "indigent who desires to migrate, resettle, find a new job, and start a new life"[33] in the community, thus indicating that permanence, not transiency, elicits the constitutionally protected right to travel.[34] In *Dunn v. Blumstein*[35] the Court invalidated a Tennessee statute requiring state residency for one year as a condition precedent to voter registration. Again the Court emphasized the permanence of plaintiff's residency as a determinative factor in protecting his right to travel.[36]

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28. *Berman* is an eminent domain case that involved governmental acquisition of private property for a public purpose. *Belle Terre* is a police power regulation case. For a discussion of the distinction between these two areas see D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 180 (1971).

29. 348 U.S. at 33.

30. *Id.* at 32.

31. 94 S. Ct. at 1540.

32. 394 U.S. 618 (1969).

33. *Id.* at 629.

34. *See* Brief for Appellees at 17-18 & n.15, Village of Belle Terre v. Boraas, 94 S. Ct. 1536 (1974) [hereinafter cited as Brief for Appellees].

35. 405 U.S. 330 (1972).

36. *Id.* at 334 & n.4.

In both *Shapiro* and *Dunn* the right to travel was curtailed by the denial of a constitutional or demonstrably important right[37] during the early stages of residency, and the Court invalidated such a denial. The Belle Terre ordinance in fact renders the right to travel an exercise in futility: three unrelated persons may travel to the village, yet they can be prohibited from residing together therein.[38] This result merited a more detailed judicial analysis. The Court's failure to elaborate its reasons for denial of the right to travel claim will be of no assistance to courts that are subsequently faced with parochial land use regulations. Somewhat encouraging is a recent district court decision[39] holding *Belle Terre* inapplicable to a municipal growth control plan. The court held that such a plan violates an outsider's right to travel into the community.

Plaintiffs also asserted that because the ordinance only regulates occupancy of homes in which unrelated persons live, it reached beyond land use or density control and undertook to regulate the way people choose to associate with each other in the privacy of their own homes.[40] The Supreme Court has stressed repeatedly that personal privacy within the confines of one's own home is closely guarded from state interference.[41] Plaintiffs argued that the intimate social, cultural and intellectual interaction present in their living arrangements was analogous to any traditional family relation and was there-

37. Dandridge v. Williams, 397 U.S. 471 (1970), determined that welfare is not a fundamental constitutional right. In light of *Dandridge*, Shapiro v. Thompson, 394 U.S. 618 (1969), can be read as holding that the right to travel was the central issue and not that welfare rights per se were fundamental. Arguably then, *any* set of facts that present a right to travel question should have that issue dealt with independently and as involving a fundamental right.

38. One commentator labels this hardship a "minimal sacrifice" and equates its imposition on plaintiffs with the levy of a service charge or fee on commercial airline passengers that was sustained in Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc., 405 U.S. 707 (1972). 60 VA. L. REV. 163, 173-74 (1974).

39. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 584 & n.1 (1974). *Petaluma*, in accordance with lower federal court opinions, did not distinguish between interstate and intrastate travel. King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970). Although the issue was before the Supreme Court in *Belle Terre*, Brief for Appellees 19-20, the Court failed to consider whether intrastate travel, in addition to interstate travel, was a constitutionally protected fundamental right.

40. Brief for Appellees 22.

41. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973).

fore entitled to equivalent protection.[42] Furthermore, plaintiffs, as graduate sociology students, urged that their living arrangement constituted a "useful forum for scholarly exchange"[43] and as such was entitled to constitutional protection within the purview of the first amendment.

The Court rejected the right of privacy argument and held that plaintiffs' freedom of association was not infringed since under the ordinance they could "entertain whomever they like."[44] This narrow reading of the right of association conflicts with *United States Department of Agriculture v. Moreno*[45] and most notably with Justice Douglas' concurrence in that decision. In *Moreno* the Court invalidated an amendment to the Food Stamp Act[46] that rendered any household containing unrelated members ineligible for food stamps. The Court rejected the Government's contentions that unrelated households are more likely to abuse the program and that, because of their "relative instability," such abuse would go undetected.[47] Concurring in *Moreno,* Justice Douglas noted that the banding together of the poor to better meet the adversities of poverty constitutes an expression of the freedom of association ingrained in the American tradition.[48] "The right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod."[49] "Invite" in the *Moreno* context did not mean "entertain"[50] but rather to accept an unrelated person into the household as a part of the "family" unit.[51] Justice Douglas also stated that the right of association in

42. Brief for Appellees 25-26

43. *Id.* at 25 n.20.

44. 94 S. Ct. at 1541.

45. 413 U.S. 528 (1973).

46. 7 U.S.C. § 2012(e) (Supp. II, 1972), *amending* 7 U.S.C. § 2012(e) (1970).

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

413 U.S. at 535-36. *See* Tussman & tenBroek, *supra* note 9, at 344-53.

48. 413 U.S. at 514 (Douglas, J., concurring).

49. *Id.* at 543.

50. *Cf.* text at note 44 *supra.*

51. As the facts of [*Moreno*] show, the poor are *congregating in households* where they can better meet the adversities of poverty. *This banding together*

Moreno was a fundamental right entitled to protection absent a showing of a compelling state interest.[52] Arguably, Justice Douglas' views on the right of association, as expressed in *Moreno*,[53] if applied to *Belle Terre*, would lead him to invalidate the ordinance. Contrary to his position in *Moreno*, however, he adopted in *Belle Terre* a narrow interpretation of the first amendment right of association.[54] Given Justice Douglas' express reasons for concurring in *Moreno*,[55] perhaps he would have viewed *Belle Terre* differently had plaintiffs been two widows with several dependent children who were banding together to make ends meet[56] instead of six college students living in a "communal" arrangement.[57]

Belle Terre presented an opportunity for the Supreme Court to decide two important and pressing legal issues. The ordinance was invalidated by the court of appeals on the basis of the novel equal protection doctrine of "factual rationality." This doctrine provides a middle ground that attempts to ameliorate the rigidities of the minimal and strict scrutiny tests. "Two-tiered" equal protection satisfactorily protects rights that the Court has deemed fundamental. A state has yet to demonstrate a sufficiently compelling interest to permit the impairment of a fundamental right.[58] The narrow delimitation

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is an expression of the right of freedom of association that is very deep in our traditions.

. . . .

. . . *Taking a person into one's home* because he is poor or needs help or brings happiness to the household is of the same dignity [as other first amendment rights].

413 U.S. at 541-42 (Douglas, J., concurring) (emphasis added). *Accord*, 94 S. Ct. 1545 (Marshall, J., dissenting).

52. 413 U.S. at 543-45 (Douglas, J., concurring). *See also* note 9 *supra*.

53. *See* 413 U.S. at 541-45 (Douglas, J., concurring).

54. 94 S. Ct. at 1541; *cf.* 413 U.S. at 541-45 (Douglas, J., concurring).

55. *See* note 51 *supra*.

56. In People v. Skidmore, 69 Misc. 2d 320, 329 N.Y.S.2d 881 (J.P. Ct. 1971), two husbandless women, in violation of a municipal ordinance narrowly defining "family" as no more than five unrelated persons, pooled their money and, with their seven children, rented a home. The court dismissed the complaint reasoning that "these are merely two individuals who have for economic or other reasons joined forces in occupying a one-family dwelling as a family unit." *Id.* at 322, 329 N.Y.S.2d at 883. *But see* City of Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (L. Div. 1961).

57. It was conceded by all that plaintiffs had always behaved in a responsible manner, and no immoral or disorderly conduct on their part was ever suggested. Brief for Appellees 3.

58. *But cf.* Roe v. Wade, 410 U.S. 113 (1973).

of fundamental rights,[59] however, has left a host of essential personal rights unprotected, including the right to welfare,[60] housing,[61] education[62] and now, choice of life-style. Theoretically these rights are protected, for the state must show that a classification impairing them bears a rational relation to a legitimate state objective. Yet minimal scrutiny allows the court to exercise its imagination to save legislation that the state has failed to justify adequately.[63] The minimal scrutiny test applies whenever "economic and social legislation" is involved.[64] The real problem is presented by the radically divergent interests that are catalogued together under the classification "economic and social." Commercial advertising[65] differs significantly from the need of an indigent family to receive welfare benefits,[66] yet under standard equal protection analysis both are treated alike. The factual rationality test proposed by the Second Circuit would treat the more important of the non-fundamental rights, including choice of life-style, with a greater degree of concern. Discriminating against these rights would not trigger the extremely difficult requirement of demonstrating a compelling state interest. On the other hand, neither would the courts be allowed to indulge in abdicatory judicial hypothesis. The factual rationality test would simply require that the legislative body show that its classification actually relates to a legitimate purpose. Applying this test to the Belle Terre ordinance, however, would not have changed the result reached by the Supreme Court. Although traditional zoning objectives were not available that would "factually justify" this ordinance,[67] the Court's holding that social homogeneity was a legitimate municipal goal would have been sufficient to sustain the classification.

The decision that social homogeneity constitutes a legitimate zoning goal is arguably the first exposition of the Supreme Court's

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59. *See* note 9 *supra.*

60. Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

61. Lindsey v. Normet, 405 U.S. 56 (1972).

62. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1972).

63. *See* text at notes 10-13 *supra.*

64. *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Gunther, *supra* note 11, at 23; *Developments in the Law, supra* note 9, at 1080-81.

65. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

66. Dandridge v. Williams, 397 U.S. 471 (1970).

67. *See* text at note 4 *supra.*

position on exclusionary land use regulation. Exclusionary zoning has become a topic of great concern in recent years, and commentators are in near-unanimous agreement that the practice is unconstitutional.[68] Such zoning is aimed at excluding persons who differ from those presently residing in a particular community. The exclusionary aim is manifested by that community's prohibition of apartments,[69] or by adoption of large-lot zoning,[70] or, as in *Belle Terre,* by restrictive definitions of "family."[71] Municipal motivation for exclusionary practices may be economic,[72] racial[73] or psychological.[74] These practices endure and increase primarily because such motivat-

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68. *See, e.g.*, Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339 (1970); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970). For detailed discussions of the specific problem in *Belle Terre* see Note, *"Burning the House to Roast the Pig": Unrelated Individuals and Single Family Zoning's Blood Relation Criterion*, 58 CORNELL L. REV. 138 (1972); Comment, *All in the "Family": Legal Problems of Communes*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393 (1972); Note, *Excluding the Commune From Suburbia: The Use of Zoning for Social Control*, 23 HASTINGS L.J. 1459 (1972).

69. *E.g.*, Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958).

70. *E.g.*, County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967).

71. *E.g.*, Palo Alto Tenants' Union v. Morgan, 487 F.2d 883 (9th Cir. 1973). *Compare* Comment, *The Constitutional Implications of a Restrictive Definition of Family in Zoning Ordinances*, 17 S.D.L. REV. 203 (1972), *with* 1973 URBAN L. ANN. 319.

72. An influx of low- and middle-income persons into a community may require an increased need for capital expenditure. *E.g.*, Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (1974). A recent study concludes that such fiscal incentives for exclusion are negligible. Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483, 501-02 (1973).

73. *E.g.*, Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); *see* Aloi & Goldberg, *supra* note 68, at 11.

74. The major goals of planning and zoning for residential areas are widely recognized. The most important [is] . . . protection against "psychological nuisances," based on irrational dislikes—fear of the unknown, or dislike of "the wrong sort of people."

N. WILLIAMS, THE STRUCTURE OF URBAN ZONING 62 (1966).

ing factors remain the "hidden agenda" never openly discussed by municipalities when justifying an ordinance. Such considerations remain covert, while population density, traffic control, and noise control provide the express justifications and suffice to uphold the ordinance given "Euclidian"[75] judicial deference. In *Belle Terre,* however, these rationalizations were unnecessary. The Court's conclusion that maintaining the traditional family character of Belle Terre is a legitimate zoning objective eliminates the need for secondary justifications. In fact, the reason for this conclusion—that the municipality can "lay out zones where family values [and] youth values" will flourish[76]—was not responsive to the situation facing the Court. Belle Terre's ordinance created no zone for "youth values." Clearly no zone was created for values that inhere in groups of three or more unrelated persons. The entire community was zoned as a "quiet place." Therefore, the Court sanctioned not a division of the community on grounds of use compatibility, but rather a complete exclusion of unrelated persons from Belle Terre based upon parochial municipal perceptions.[77]

Belle Terre read narrowly determines that a restrictive definition of "family" is permissible for the maintenance of the traditional character of the community. *Belle Terre* read broadly stands for the proposition that a municipality can exercise its zoning power to exclude "incompatible people" as well as incompatible uses. Under *Belle Terre* certain people can be excluded for the purpose of making the community "a quiet place," with "the blessings of quiet seclusion" as the ultimate goal. "While such selective exclusion may be practiced

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75. *See* text at notes 19-22 *supra.*

76. 94 S. Ct. at 1541.

77. Zoning, important as it is within limits, is too rapidly becoming a legalized device to prevent property owners from doing whatever their neighbors dislike. Protection of minority rights is as essential to democracy as majority vote. In our age of conformity it is still not possible for all to be exactly alike, nor is it the instinct of our law to compel uniformity wherever diversity may offend the sensibilities of those who cast the largest numbers of votes in municipal elections. The right to be different has its place in this country.

People v. Stover, 12 N.Y.2d 462, 472, 191 N.E.2d 272, 278, 240 N.Y.S.2d 734, ... (1963) (Van Voorhis, J., dissenting).

Should local units be granted the power to exclude individuals they do not want, however, individuals would be unable to choose to join communities which most satisfy their own lifestyle preferences. The promise of diversity would become a straitjacket of local conformity, with change precluded by one group's exclusion of all others.

Note, *The Constitutionality of Local Zoning, supra* note 68, at 902.

by private institutions, it cannot be tolerated on the part of a governmental body such as Belle Terre, which is bound to serve the public."[78]

Belle Terre could effectively discourage zoning litigation in federal courts except in instances of obvious racial discrimination.[79] While the decision does not preclude litigation in state courts, and indeed, similar ordinances have been invalidated under state constitutions,[80] it does constitute a pronouncement by the United States Supreme Court that municipal parochialism will be judicially tolerated. Building upon Euclid's physical division of uses within the community, *Belle Terre* has sanctioned the use of municipal zoning as a tool of social control.

Robert J. Hartman

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78. Boraas v. Village of Belle Terre, 476 F.2d 806, 816 (2d Cir. 1973).

79. *See* note 18 and accompanying text *supra.*

80. *See* City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971). In Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 349, 271 A.2d 430, 434 (App. Div. 1970), the court reasoned:

> Dwelling units of a size adequate to accommodate a normal family are reasonably susceptible of occupancy by more than two unrelated persons without such accompanying threat to the public welfare, in any of its many aspects . . . as warrants a restriction of occupancy to so few a number.