Up the Down-Sliding Scale: Boraas v. Village of Belle Terre and Equal Protection Assault on Restrictive Definitions of Family in Zoning Ordinances

Thaddeus Marciniak

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UP THE DOWN-SLIDING SCALE: BORAAS V. VILLAGE OF BELLE TERRE AND EQUAL PROTECTION ASSAULT ON RESTRICTIVE DEFINITIONS OF “FAMILY” IN ZONING ORDINANCES

I. Introduction

The Village of Belle Terre, a community of 700 residents occupying approximately 220 homes in Suffolk County, New York, is zoned exclusively for one-family dwellings. A village ordinance defines “family” as:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit . . . [A] number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

As a sanction, the ordinance further provides that each violation entails a $100 fine or 60-day imprisonment, or both. Moreover, a separate and distinct offense takes place on each day during or on which a violation occurs.

On December 31, 1971, plaintiffs Edwin and Judith Dickman, owners of a house in Belle Terre, leased the premises to six unrelated students at the State University of New York at Stony Brook, including plaintiffs Bruce Boraas, Anne Parish, and Michael Truman. On July 31, 1972, the Dickmans received an “Order to Remedy Violations” from the village warning them of possible liability under the zoning ordinance commencing August 3, 1972.

Plaintiffs commenced an action in the United States District Court for the Eastern District of New York on August 2, 1972, under the federal Civil Rights Act of 1871 against the mayor and trustees of Belle Terre seeking injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two unrelated persons. Specifically, plaintiffs asserted that the ordinance denied them equal protection of the law under the fourteenth amendment, violated their right of association under the first and fourteenth amendments, intruded on their right to privacy, and contravened their right to travel. The district court denied injunctive relief and upheld the validity of the ordinance.

On appeal, the United States Court of Appeals for the Second Circuit

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1 Building Zone Ordinance of the Village of Belle Terre, art. I, § D-1.34a (1971) defines one-family dwelling as:
A detached house consisting of or intended to be occupied as a residence by one family only, as family is hereafter defined. In no case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family dwelling.

2 Id. art. I, § D-1.35a (1970).
3 Id. art. VIII, Part 4, § M-1.4a(2) (1971).
reversed, holding the ordinance unconstitutional as a denial of equal protection of the law.\textsuperscript{9} In the court’s opinion, the legislative classification permitting traditional families of more than two members to occupy one-family dwellings while prohibiting groups of more than two unrelated individuals from doing so could not be sustained on the basis of the local community’s interest in the protection and maintenance of the traditional family pattern. Further, the court refused to sustain the ordinance on the grounds that it did not have a rational basis in traditionally recognized zoning objectives.\textsuperscript{10}

In reaching its conclusion the court refrained from characterizing the rights asserted by plaintiffs as “fundamental,” thereby avoiding a “strict scrutiny-compelling state interest” equal protection analysis.\textsuperscript{11} Nor did the court utilize a “minimal scrutiny” approach which would uphold the ordinance if any conceivable rational basis for it could be ascertained.\textsuperscript{12} The court of appeals instead concluded that the important nature of the rights asserted by the plaintiffs warranted an intermediate approach, one which allows “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{13} Under such an analysis, “the test for application of the Equal Protection Clause is whether the legislative classification is in fact substantially related to the object of the statute.”\textsuperscript{14}

Using this “sliding-scale” or “means-evaluation” test, the court first determined that the goal of preservation of the traditional family pattern “fails to fall within the proper exercise of state police power.”\textsuperscript{15} More importantly, the court scrutinized the relationship of the “family” ordinance to the admittedly legitimate goals of controlling population density, avoiding rent inflation, and curbing parking, traffic, and noise problems. None of these goals could validate the ordinance since the objectives “could be achieved more rationally and without discrimination against unrelated groups” through the use of alternative means.\textsuperscript{16}

This note will first briefly examine the Supreme Court’s development of equal protection doctrine, focusing on the “sliding-scale” or “means-evaluation” test. A short survey of the history of restrictive definitions of “family” in the courts will follow. The \textit{Boraas} case itself will then be analyzed in detail, and finally the alternatives open to the Supreme Court on appeal will be considered.

II. Equal Protection: Old, New, and Newer Still

\textbf{A. Old: Minimal Scrutiny}

Traditionally the demands of equal protection have given the legislature wide latitude in establishing classifications; the Supreme Court has carefully

\textsuperscript{9} \textit{Id.} at 808.
\textsuperscript{10} \textit{Id.} at 815-17.
\textsuperscript{11} \textit{Id.} at 813-814.
\textsuperscript{12} \textit{Id.} at 814.
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.} at 815.
\textsuperscript{16} \textit{Id.} at 816-17.
restricted its inquiry when faced with claims of denial of equal protection. In one classic formulation: 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. Chief Justice Warren formulated an even more permissive criterion to govern such “minimal scrutiny” analysis in McGowan v. Maryland:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective . . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

The essence of “minimal scrutiny” thus consists of a hypothetical, and not factual, inquiry into the rational basis for a given classification.

B. New: Strict Scrutiny

Recent judicial dissatisfaction with the limitations of the “old” equal protection led to a search for an analytical method allowing closer judicial examination of allegedly discriminatory classifications. When the classification has been along the lines of “suspect criteria” or when it has infringed upon a “fundamental right,” the Court has invoked a “strict scrutiny” approach under which the classification must be “shown to be necessary to promote a compelling governmental interest.”

Race has always been considered a “suspect criterion” under the equal protection clause; indeed, for many years it was the only such criterion. More recently the Court has added alienage and nationality to the “suspect” category. Arguably the list also includes sex and wealth.

The list of “fundamental” rights has also expanded slowly. They presently include the right to marriage and procreation, the right to privacy, the right to education, and the right to freedom of religion.

22 Graham v. Richardson, 403 U.S. 365, 371-72 (1971): “[T]he Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” In re Griffiths, 413 U.S. —, 93 S. Ct. 2851 (1973); Sugarman v. Dougall, 413 U.S. —, 93 S. Ct. 2842 (1973).
24 Reed v. Reed, 404 U.S. 71 (1971). In Reed, the Court invalidated the statute on purportedly “minimal scrutiny” grounds, but one may argue that in reality a stricter test was utilized; for a fuller discussion of this case, see note 35 infra. In Frontiero v. Richardson, 411 U.S. 677, 688 (1973), four of the Justices concluded that sex classifications were inherently suspect and subject to strict judicial scrutiny.
25 San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) has made substantial inroads on the viability of wealth as a suspect classification. Speaking for the majority, Mr. Justice Powell noted that “[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.” Id. at 29.
to essential facilities for the prosecution of a criminal appeal, the right to vote, and the right to travel.

This "two-tiered" equal protection scheme thus resolves itself into a question of constitutional presumptions. "Minimal scrutiny" analysis in effect clothes the classification with a strong presumption of constitutional validity. "Strict scrutiny," though nowhere expressly so stated, apparently subjects the classification to an equally strong presumption of unconstitutionality.

C. Newer Still: Means-Evaluation

During the 1971-1972 and 1972-1973 terms, the Supreme Court voiced some dissatisfaction with the rigidities of the "two-tier" approach, evincing a desire for a more flexible and equitable model for equal protection analysis. One commentator offered the components of such an inquiry as early as 1965:

1) What are the character and importance of the interests which the state is attempting to protect or promote by the rule in question?

2) What are the character and importance of the interests adversely affected by the rule in question?

3) How substantial is the connection between the particular basis of classification represented by the rule in question and the legitimate purpose(s) it is designed to serve?

4) Are there available to the state alternative means of serving those purposes adequately, without so adversely affecting the significant interests of those who are placed at a disadvantage by the rule in question?

Under such an analysis, as the importance of the allegedly infringed right increases, the state must demonstrate a correspondingly more important governmental interest to justify its classification. Moreover, hypothetically rational bases will not suffice; the state must demonstrate a rational and factual relationship between the classification and the interests it seeks to promote.

An early appearance of this "means-evaluation" model occurred in Dunn v. Blumstein in which the Supreme Court invalidated Tennessee's durational residency requirement for voters. Although ostensibly applying a "strict scrutiny" test, the Court appeared to place more stress on "sliding-scale" than "compelling state interest" criteria. As to the latter, the Court noted:

33 Id. at 335;

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

NOTES
Thus phrased, the constitutional question may sound like a mathematical formula. But legal "tests" do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.24

A marked tendency to move beyond the confines of "two-tier" equal protection in the manner hinted by Dunn emerges from a consideration of decisions during the 1971 and 1972 terms. The Supreme Court has applied some type of "sliding-scale" or "means-evaluation" test in cases involving sex discrimination,35 distribution of contraceptives,36 pretrial commitment of the mentally incompetent,37 the rights of illegitimates,38 recoupment of legal defense fees expended on behalf

34 Id. at 342-43.
35 Reed v. Reed, 404 U.S. 71 (1971). The Court invalidated a provision of the Idaho probate code giving preference to men over women when persons of the same priority applied for appointment as administrator of a decedent's estate. In the course of his opinion for a unanimous Court, Chief Justice Burger observed:

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. . . . [W]hatsoever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex. Id. at 76-77.
36 Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court struck down a ban on the distribution of contraceptives to unmarried persons, noting:

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, §§ 21 and 21A. Id. at 447.

The very terms of the State's criminal statutes, coupled with the de minimis effect of §§ 21 and 21A in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons. Id. at 450.

[Health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations. Id. at 452.
37 Jackson v. Indiana, 406 U.S. 715 (1972). In holding the State's provisions for pretrial commitment of mentally incompetent criminal defendants violative of equal protection, the Court observed:

The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release.

As we noted above, we cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence. Id. at 729-30.
38 Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972). This case invalidated a provision of Louisiana's workmen's compensation laws disadvantaging illegitimates. In the course of his opinion for the majority, Mr. Justice Powell observed:

Though the latitude given state economic and social regulations is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. . . . The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? Id. at 172-73.

[The regulation and protection of the family unit have indeed been a venerable state concern. We do not question the importance of that interest; what we do question is how the challenged statute will promote it. Id. at 173.

. . .
of indigents, residency requirements for state college tuition purposes, and sections of the Food Stamp Act of 1964.

Clarity characterizes none of these decisions; to paraphrase Mr. Justice Holmes, the Court appears animated by an imagination fired with a desire to obfuscate. The ad hoc quality of these opinions leaves unresolved which situations properly invoke "sliding-scale" analysis, as well as how that test should be applied. To compound this confusion, other recent Supreme Court decisions indicate a continued adherence to the "two-tier" approach. Boraas v. Village of Belle Terre affords the Court an excellent opportunity to resolve these difficult problems. To adequately examine that case and the possibilities it offers on appeal, a brief survey of judicial attitudes toward restrictive definitions of "family" in zoning ordinances is necessary.

The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve. Id. at 175.

... [The Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. Id. at 176.]


James v. Strange, 407 U.S. 128 (1972): We thus recognize that state recoupment statutes may betoken legitimate state interests. But these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law. Id. at 141-42.

Police Dep't v. Mosley, 408 U.S. 92 (1972). The Court here invalidated an ordinance prohibiting picketing within 150 feet of a school unless that school was involved in a labor dispute, noting:

As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. Id. at 95.

... Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Id. at 100-101.


United States Dep't of Agriculture v. Moreno, 413 U.S. —, 93 S. Ct. 2821 (1973). The Court struck down an amendment to the Food Stamp Act of 1964 excluding from participation in the food stamp program any household containing an individual unrelated to any other member of the household. Mr. Justice Brennan spoke for the majority:

The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. ... The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest. Id. at 2826.

... Moreover, in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. Id. at 2827.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding Texas system of public education financing); Salyer Land Co. v. Tulare Lake Basin Water Storage Dis., 410 U.S. 719 (1973) (allowing the district to permit only landowners to vote and to apportion votes according to the assessed value of the land); Hurtado v. United States, 410 U.S. 578 (1973) (involving compensation to an incarcerated material witness); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (validating Illinois' imposition of personal property taxes on corporations but not on individuals); McGinnis v. Royster, 410 U.S. 263 (1973) (upholding denial of "good time" credit for presentence incarceration in county
III. Zoning and the Traditional Family: The Position of the Courts until Boraas

A. State

In City of Des Plaines v. Trottner,44 the Illinois Supreme Court considered the validity of a zoning ordinance defining "family" as:

one or more persons each related to the other by blood (or adoption or marriage), together with such relatives' respective spouses, who are living together in a single dwelling and maintaining a common household. A "family" includes any domestic servants and not more than one gratuitous guest residing with said "family."45

In the course of his opinion, Justice Schaefer considered the relationship of the ordinance to stabilizing neighborhoods, limiting intensity of land use, and curbing traffic and parking problems:

[None of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the "respective spouses" of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the size of family units.46]

The court, however, resolved the issue by declaring the ordinance ultra vires the state's enabling legislation, thus failing to reach the constitutional questions posed by the case.47

On three occasions New Jersey courts have considered restrictive zoning definitions of "family." In City of Newark v. Johnson,48 the court upheld such an ordinance as not arbitrary, unreasonable, or discriminatory contending that "the family status, as defined and restricted by said ordinance, does have a bearing toward preventing overcrowding of a one-family building."49


The language of even these decisions, however, suggests uneasiness with the "minimal scrutiny" standards of McGowan. In McGinnis, the Court took pains to note it had "supplied no imaginary basis or purpose for this statutory scheme." 410 U.S. at 277. In Rodriguez, the Court stated the proper inquiry to be "whether [the scheme] rationally furthers some legitimate, articulated state purpose." 411 U.S. at 17.

44 34 Ill.2d 432, 216 N.E.2d 116 (1966).
45 Id. at 433-34, 216 N.E.2d at 117.
46 Id. at 437-38, 216 N.E.2d at 119.
47 Id. at 438, 216 N.E.2d at 120.
48 70 N.J. Super. 381, 175 A.2d 500 (Essex County Ct., L. Div., Crim. 1961). The ordinance defined "family" as "one or more persons who live together in one dwelling unit and maintain a common household and who are related by blood, marriage, or adoption." Id. at 384, 175 A.2d at 501.
49 Id. at 387, 175 A.2d at 503.
In Gabe Collins Realty, Inc. v. City of Margate City, a New Jersey lower court invalidated a similar “family” ordinance designed to prevent summer rental of houses to unrelated groups of young men and women in order to prevent noise and disturbance. The plaintiff-owners contended that the ordinance worked a deprivation of substantive due process, and the court agreed:

[Even in the light of the legitimate concern of the municipality with the undesirable concomitants of group rentals experienced in Margate City, and of the presumption of validity of municipal ordinances, we are satisfied that the remedy here adopted constitutes a sweepingly excessive restriction of property rights as against the problem sought to be dealt with, and in legal contemplation deprives plaintiffs of their property without due process.]

The highest New Jersey court finally spoke to the issue in Kirsch Holding Co. v. Borough of Manasquan. As in Gabe Collins, the ordinances in question were designed to prohibit group rentals of seasonal seashore resorts to unrelated individuals. The New Jersey Supreme Court held the ordinances “so sweepingly excessive, and therefore legally unreasonable, that they must fall in their entirety.” The court pointed out that under the ordinance, “two unrelated families of spouses and children cannot share an adequate cottage or house for the summer, nor could a small unrelated group of widows, widowers, older spinsters or bachelors — or even of judges.”

Believing that effective enforcement of general police power regulations and criminal statutes could suffice to curb any obnoxious behavior inherent in group rentals, the court noted: “Zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations.”

B. Federal

Prior to Boraas, only one federal court had considered the constitutional implications of a restrictive zoning definition of “family.” In Palo Alto Tenants Union v. Morgan, a federal district court in California sustained the validity of the city’s definition of “family” against a constitutional challenge by members of a commune. Plaintiffs alleged that the ordinance constituted an infringement on their freedom of association and right to privacy and also contended that it

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50 112 N.J. Super. 341, 271 A.2d 430 (App. Div. 1970). The ordinance in question defined “family” as “one or more persons related by blood, marriage or adoption or not more than two unrelated persons occupying a dwelling unit as a single non-profit housekeeping unit.” Id. at 342, 271 A.2d at 430.
51 Id. at 349, 271 A.2d at 434.
53 Id. at 252, 281 A.2d at 518.
54 Id. at 248, 281 A.2d at 517.
55 Id. at 253-54, 281 A.2d at 520.
57 Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970). Palo Alto’s ordinance defined “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.” Id. at 909.
violated more general rights to equal protection and due process of law.\footnote{58 \textit{Id.} at 910.}

Operating within the "two-tier" equal protection doctrine, the court first determined that the ordinance did not intrude upon a constitutionally protected fundamental right. With regard to freedom of association, the court held: "The right to form such groups may be constitutionally protected, but the right to insist that these groups live under the same roof, in any part of the city they choose, is not."\footnote{59 \textit{Id.} at 911-12.}

Further, the court found no violation of the right to privacy since the ordinance did not entail any of the "'repulsive' investigative tactics" that so distressed the Supreme Court in \textit{Griswold}.\footnote{60 \textit{Id.} at 912.}

Turning therefore to "minimal scrutiny" analysis, the court found that the ordinance had a rational basis in the light of three legitimate zoning objectives: (1) limiting population density, (2) alleviating noise and traffic problems, and (3) maintaining the rent structure of a neighborhood, which might undergo inflation upon an influx of unrelated persons with separate sources of income.\footnote{61 \textit{Id.} at 912-13.}

In the course of its opinion the court emphasized "the State's clear interest in preserving the integrity of the biological and/or legal family,"\footnote{62 \textit{Id.} at 912.} suggesting that preservation and maintenance of the traditional family pattern could in itself constitute a legitimate zoning objective.

IV. Analysis of \textit{Boraas}

The initial question in \textit{Boraas} was, of course, the applicability \textit{vel non} of the "means-evaluation" test to zoning ordinances. If such analysis was found to apply, two further questions remained. Could the ordinance survive such "means-evaluation" as an attempt to preserve and maintain the traditional family? If not, could it nonetheless be upheld on the basis of its relationship to other zoning objectives such as controlling population density, eliminating traffic, noise, and parking problems, and curbing rent inflation?

A. \textit{Applicability of the "Sliding-Scale"}

Based on the recent Supreme Court decisions discussed above\footnote{63 See text accompanying notes 32-42 supra.} (which, as has been seen, present anything but an unambiguous mandate), the majority in \textit{Boraas} formulated the test for "means-evaluation" as "whether the legislative classification is in fact substantially related to the object of the statute."\footnote{64 \textit{Boraas} v. \textit{Village of Belle Terre}, 476 F.2d 806, 814 (2d Cir. 1973).} Left unclear were the reasons why the court thought such an approach appropriate to zoning ordinances defining "family." Apparently the "important"\footnote{65 \textit{Id.} at 813.} nature of the plaintiff's rights weighed heavily in the decision to invoke the "sliding-scale," as well as the type of discrimination involved, since the court noted that the "means-evaluation" test "is particularly appropriate in cases of the present
type, where individual human rights of groups as opposed to business regulations are involved.\textsuperscript{66}

In dissent, Judge Timbers contended that a court should not apply such a test to “traditional ‘hands-off’ areas of legislative activity” such as zoning.\textsuperscript{67} Although Judge Timbers did not develop his position in detail, the argument in support of it is a strong one.

In \textit{Village of Euclid v. Ambler Realty Co.}\textsuperscript{68} the Supreme Court in 1926 gave wide latitude to local legislatures in enacting zoning ordinances, approving their constitutionality unless “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”\textsuperscript{69} The Court did note that it would invalidate an ordinance if in concrete application to particular premises, it proved arbitrary or unreasonable.\textsuperscript{70} In fact, two years later, in \textit{Nectow v. City of Cambridge},\textsuperscript{71} the Court struck down a zoning ordinance under just such a test. The possibility that the Court would closely police zoning regulations soon faded; since 1928 the Supreme Court has not reviewed a zoning case, allowing determinations of the constitutional principle of reasonableness to devolve upon the states.\textsuperscript{72} This 45-year silence of the Supreme Court on the issue should have led the \textit{Boraas} court to exercise a less vigorous scrutiny of the ordinance.

Moreover, among the state courts themselves zoning ordinances have traditionally enjoyed an extremely strong presumption of constitutional validity:\textsuperscript{73}

Notwithstanding the differences in language used to describe the kind and degree of proof needed to upset a zoning ordinance, it seems clear that in nearly all of the states the burden of proof can properly be described as an “extraordinary” one.\textsuperscript{74}

Court decisions on zoning display “an expanding judicial concept of the public welfare and a consequent enlargement of the police power.”\textsuperscript{75} The decision in \textit{Boraas}, then, represents an abrupt departure from this \textit{laissez-faire} judicial attitude.

Furthermore, the dangers inherent in stricter judicial review of zoning ordinances suggest that the degree of scrutiny applied by the \textit{Boraas} court was inordinate. Although there has been an increased call for heightened intervention in zoning cases,\textsuperscript{76} new judicial techniques for attacking zoning ordinances come

\begin{itemize}
\item \textsuperscript{66} Id. at 815.
\item \textsuperscript{67} Id. at 822.
\item \textsuperscript{68} 272 U.S. 365 (1926).
\item \textsuperscript{69} Id. at 395.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} 277 U.S. 183 (1928).
\item \textsuperscript{72} A. Casner and W. Leach, \textit{Cases and Text on Property} 1207 (2d ed. 1969).
\item \textsuperscript{73} I R. Anderson, \textit{American Law of Zoning} § 2.14 at 67 (1968). A host of cases supports this presumptive validity. \textit{Id.} at n.20.
\item \textsuperscript{74} \textit{Id.} § 2.15 at 72.
\item \textsuperscript{75} Id. § 7.03 at 493.
dangerously close to the discredited theory of substantive due process.\textsuperscript{77} Such intense scrutiny emasculates conventional planning techniques since any community plan would become subject to a plethora of constitutional attacks.\textsuperscript{78} Further, such an approach ignores the "majority will which is supposedly represented in legislative and administrative determinations implementing zoning ordinances."\textsuperscript{79} Applying "strict scrutiny" to zoning entails other hazardous consequences:

Were a court to find the Shapiro doctrine applicable in such a case, and hold that an inferred right of any group to live wherever it chooses might not be abridged without some compelling state interest, the law of zoning could be literally turned upside down: presumptions of validity would become presumptions of invalidity and traditional police powers of a state would be severely circumscribed by new and vague notions of substantive equal protection.\textsuperscript{80}

These considerations demonstrate that the Boraas decision represents an abrupt, not to say radical, break with the prevailing attitude towards zoning ordinances of the last 45 years. It is clear, therefore, that the applicability of "sliding-scale" analysis in this area must rest on a more adequately developed doctrinal basis than the adumbrated rationale offered by the court of appeals.\textsuperscript{81}

\textit{B. The Test as Applied}

1. Zoning for the traditional family

Assuming "means-evaluation" to be applicable in a Boraas-type situation, the question remains as to how such an analysis should be conducted. The majority in Boraas first considered the statute as a means of furthering the state's interest in preserving and maintaining the traditional family pattern.

The state's "legally protectable affirmative interest" in the traditional family provided the sole grounds on which the district court upheld the ordinance.\textsuperscript{82} That court stated that the interest of such families in maintaining uses of the same character in their community was a "proper zoning consideration."\textsuperscript{83} Judge Dooling then characterized the ordinance as

simply another of the countless statutes of bounty and protection with which the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children, reaching from family court laws, through laws of inheritance to tax laws.\textsuperscript{84}

\textit{and} Dandridge, 81 \textit{Yale L.J.} 61 (1971). Most of the discussion has centered on the economically discriminatory effect of exclusionary zoning.


\textsuperscript{78} Id. at 206.

\textsuperscript{79} Id.


\textsuperscript{81} See text accompanying notes 65-66 supra.

\textsuperscript{82} Boraas v. Village of Belle Terre, 476 F.2d 806, 810 (2d Cir. 1973).

\textsuperscript{83} Id.

\textsuperscript{84} Id.
The court of appeals quickly disposed of this contention by declaring that the protection and maintenance of traditional families “fails to fall within the proper exercise of the police power.” In compelling all members of the community to conform to the “prevailing ideas of lifestyle,” the ordinance enacted a social preference having “no relevance to public health, safety, or welfare.”

Zoning ordinances, stated the court, may not mask such social preferences.

In dissent, Judge Timbers noted that the majority had again blithely skirted some difficult questions. In his view, Belle Terre had enacted the ordinance “for the purpose of zoning for a particular neighborhood character in a community that had always been of that character.” The ordinance thus represented and reinforced the sum of many individual choices expressed over a period of time. Moreover, in light of the fact that the Brookhaven area, of which Belle Terre was a part, encompassed a wide variety of uses and activities, Judge Timbers thought the ordinance a “proper use of the general welfare power to establish one segment of a beneficial larger scheme.”

Here, too, precedent supports Judge Timbers’ position. Preservation of the essential character of a neighborhood has traditionally been considered a legitimate zoning objective: “Zoning regulations which preserve neighborhood characteristics stabilize the value of property, promote the permanency of desirable home surroundings and add to the happiness and comfort of citizens.” The Supreme Court of Iowa has declared that “preservation of the character of the neighborhood is a valid reason for zoning regulations,” and a wealth of cases supports this stand. The Boraas majority thus again appears to have moved rather precipitously in totally disallowing the legitimacy of zoning for the preservation and maintenance of the traditional family.

2. Other Zoning Objectives

The court of appeals then examined whether the “family” ordinance could survive “means-evaluation” analysis in view of its relationship to three admittedly legitimate zoning goals: (1) the control of population density, (2) the

NOTES

85 Id. at 815.
86 Id.
87 Id. at 816.
88 Id. at 822.
89 Id. at 823.
90 8 E. McQuillen, Municipal Corporations § 25.24 at 64 (3rd ed. 1965); R. Anderson, supra note 73, § 7.25 at 540:

The courts recognize, as falling within the scope of “general welfare” as that term is used in statements of the police power, the interest of the community in preserving the character of single-family residential neighborhoods.... Preservation of the character of neighborhoods is recognized in the more recent decisions as a proper and even a primary purpose of zoning regulations.

prevention of rent inflation, and (3) the alleviation of traffic, noise, and parking problems.\textsuperscript{93}

With regard to population control, the majority maintained that any theorization on their part concerning the proper number of unrelated occupants per dwelling would be “rank speculation.”\textsuperscript{94} The court further pointed out that the Belle Terre limitation to two unrelated persons per one-family dwelling was smaller than the size of the average family.\textsuperscript{95} Finally, the court noted the existence of alternative means to achieve a control of population density “more rationally and without discrimination against unrelated groups.”\textsuperscript{96} These included regulation of the number of bedrooms per dwelling structure, restrictions on the ratio of persons to bedrooms, or most simply, imposition of a “single housekeeping unit” restriction upon occupancy.\textsuperscript{97}

The remaining two zoning objectives received equally short shrift. Were the village desirous of preventing rent inflation, the court noted, “the simple remedy would be adoption of rent controls.”\textsuperscript{98} Furthermore, “a wide variety of local legislative enactments” would suffice, in the court’s opinion, to curb parking, noise, and traffic problems. The village could, for example, restrict the number of cars per dwelling unit. Public and private nuisance laws might also be utilized.\textsuperscript{99}

Judge Timbers again took strong issue with each of these assertions. He noted that the ordinance was reasonably related to population density because of the self-limiting tendency of the traditional family. Moreover, the tendency of unrelated groups to have several unrelated sources of income could easily force traditional families (generally limited to a single breadwinner) out of an area through rent inflation. Finally, he considered the presence of more automobiles, with the attendant traffic and parking problems, to be an undeniable concomitant of the occupation of one-family dwellings by large groups of unrelated persons.\textsuperscript{100}

Detailed statistical analysis of the population density and inflationary rental issues lies beyond the scope of this article. These issues, while not unimportant, are definitely secondary for present purposes. More fundamental problems pervade the \textit{Boraas} decision.

First, the village has received no opportunity to meet the new standard of equal protection demanded by the majority. A remand would have had the merit of allowing Belle Terre an opportunity to demonstrate the rationality of the ordinance under the more exacting requirements of “sliding-scale” analysis.

More importantly, however, the court of appeals has articulated no clear standards governing the manner in which a court should carry out a “means-evaluation” test. The brusque dismissal of the validity of zoning for the traditional family and the characterization of the village’s rationale in support

\textsuperscript{93} 476 F.2d at 816.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 817.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 823-24.
of the ordinance as "rank speculation" smack of ipse dixit. The ready seizure upon alternative means at the state's disposal suggests a willingness to act as a judicial "super-zoner," requiring legislative obeisance to judicial omniscience.

Finally, the nature of the justificatory burden borne by the state under "sliding-scale" analysis remains vague. Is an "in fact" substantial relationship between the classification and its object dispositive of this burden? Or will the court go on to consider the merits of that object itself as balanced against the rights upon which the classification impinges? When and to what extent is the existence of alternative means at the state's disposal relevant to the burden of justification it must sustain? The Boraas decision clarifies none of these questions; instead, the majority promulgates a standard of permissive judicial review closely akin to the discredited theory of substantive due process. An analysis at once so opaque and so productive of untoward consequences suggests a need for more refined articulation.

V. Possibilities on Appeal

On July 27, 1973, the defendants in Boraas filed an appeal with the United States Supreme Court. The Court has several alternatives. It could, of course, avoid detailed resolution of the difficult issues involved in this case by dismissing the appeal, or by its affirmance without opinion. Two grave flaws, however, mar such an approach. First, it bestows an imprimatur upon the appalling confusion that now exists with regard to the situations that properly call for "sliding-scale" analysis. Concurrently, it would establish no guidelines to aid the lower federal courts in the actual execution of such "means-evaluation." The Second Circuit alone has displayed uncertainty concerning the apparently "expanded judicial review" under the equal protection clause foreshadowed in recent Supreme Court opinions. The need for constitutional clarification by the Supreme Court is pressing.

Second, because such zoning ordinances are widely used and variously interpreted, their validity merits a decision by the Supreme Court. In one recent study, 99.5% of all residential land in the four northeastern New Jersey counties of Morris, Somerset, Middlesex, and Monmouth was zoned "single-family." Single-family zoning ordinances have been described as "the most
formidable obstacle limiting access of unrelated persons to suburbia." If Boraas signals a nationwide volte-face of the validity of restrictive zoning definitions of "family," the decision should come from the nation's highest court.

If the Supreme Court decides to resolve the important issues involved in Boraas, they have several possibilities before them. The Court could (1) affirm and merely reiterate the less than coherent reasoning of the court of appeals; (2) find "means-evaluation" analysis inapplicable to a Boraas-type situation, and reverse under an application of the "minimal scrutiny" test; or (3) apply "sliding-scale" analysis in a clear and articulate manner, either affirming on the grounds that the ordinance cannot withstand such analysis, or reversing because the ordinance remains valid even under a "means-evaluation" test. The third alternative is the soundest as it alone provides an opportunity to establish definite and uniform standards governing "means-evaluation" analysis. To that end, a possible formulation of such criteria is offered below. The relevant issues are the (1) applicability and (2) methodology of the "sliding-scale."

VI. Proposed Criteria

A. Applicability

Prior to any considerations of methodology, one must delineate which situations call for the "means-evaluation" test. Here a comparison of San Antonio Independent School District v. Rodriguez106 with United States Department of Agriculture v. Moreno107 will provide a useful distinction.

In Rodriguez the plaintiffs attacked primarily commercial or economic legislation, specifically, the Texas system of financing public education and its heavy reliance on local property taxes. Moreover, the invidious discrimination allegedly imposed by that system had a predominantly economic character: disparities in per-pupil expenditures among school districts were alleged to violate equal protection. The spectre of acting as economic "levellers" in matters of local fiscal policy caused the Court to shy away from any readjustment of the Texas system:

We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause. . . . We stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.109

In Moreno the challenged legislation was again economic in character: the

106  Note, supra note 104, at 161.
109  411 U.S. at 40-41.
Food Stamp Act of 1964. More specifically, plaintiffs attacked a 1971 amendment to the definition of "household" contained in the act. That amendment defined household so as to include only groups of related individuals, with several relatively unimportant exceptions. Unlike Rodriguez, however, the invidious discrimination fostered by the classification had a purely personal and not economic or commercial character. The Court noted that the legislative history indicated an intent to prevent "hippies" and "hippie communes" from participation in the food stamp program. Faced with discrimination of such a strictly personal and noneconomic nature, the Court did not hesitate to employ a "means-evaluation" test. While admitting that the government had a legitimate interest in the prevention of fraud in the program, the opinion noted that the act itself contained other provisions "aimed specifically at the problems of fraud and of the voluntary poor." Even assuming the rationality of the legislative classification between related and unrelated households, the Court did not think that "the denial of federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns."

Unlike both Rodriguez and Moreno, the classification in Boraas was neither part of a complex local fiscal policy structure nor detailed commercial and economic legislation such as the Food Stamp Act. Moreover, the ordinance in question was "directed squarely against the personal right of individuals to associate and live together . . . ." The classification thus did not work the solely economic discrimination involved in Rodriguez.

Under this analysis, three situations emerge:

(1) economic or commercial legislation creating economic discrimination (Rodriguez);

(2) economic or commercial legislation creating noneconomic or personal discrimination (Moreno);

(3) noneconomic legislation creating personal discrimination (Boraas).

The danger inherent upon the application of "means-evaluation" in the first situation should be obvious. Close scrutiny in an attempt to insure precise mathematical economic equality would involve the Court in matters totally inappropriate for judicial resolution. The second and third situations, however, properly invoke some sort of "sliding-scale" test. The Court need involve itself in no redistribution of wealth, nor need it obtrude its judgment in areas where lack of judicial expertise prompts deference to the legislative will. Instead, in

112 Participation in the food stamp program is on a household rather than an individual basis.
113 413 U.S.—, 93 S. Ct. at 2826.
114 Id.
115 Boraas v. Village of Belle Terre, 476 F.2d 806, 828 (2d Cir. 1973) (Mansfield, J., replying to Timbers, J., dissenting from denial of rehearing en banc).
thus protecting individual and personal rights, the Court would act in the role for which a long-standing tradition has abundantly fitted it.  

B. Methodology

Assuming the applicability of “means-evaluation” to the situation in Boraas, it remains but to sketch the contours of such an analysis. This necessitates a two-step approach.

First, upon a demonstration of personal as opposed to economic discrimination, the burden of going forward should rest with the state to establish a substantial factual nexus between the classification and the governmental interest it allegedly furthers. The “any state of facts reasonably conceived” criterion of McGowan v. Maryland thus becomes entirely inapposite; the state must demonstrate an actual, not a hypothetical, justification for its infringement upon personal rights. The availability of alternative means, however, has no relevance at this point in the analysis. The state need not prove the necessity of its chosen means, nor must it establish the classification as the best of all possible alternatives. An actual, substantial connection will suffice. The standard of substantiability is chosen to provide some definiteness while allowing sufficient leeway for the development of precedent. Failure to establish the required nexus calls for the invalidation of the classification.

Given the establishment of this factual connection, the second element of the “means-evaluation” test comes into play. The burden of going forward shifts to the party attacking the legislative classification to demonstrate that the rights upon which the statute infringes outweigh the legitimate interests the state seeks to further. This, of course, is the true “sliding-scale” balance for as the rights approach the plateau of “fundamentality” and the extent of their infringement increases, the proffered state interest must correspondingly rise in importance in order to uphold the challenged legislation.

Here the existence of alternative means at the state’s disposal becomes pertinent. Dean Milk Co. v. City of Madison provides a useful criterion. There the court invalidated as an unjustifiable burden on interstate commerce a city ordinance which required pasteurization of milk at a plant within five miles of the city as a prerequisite to sale within the city. The court assumed the validity of regulation in this area in the interest of the health, safety, and well-being of local communities, but held that “reasonable and adequate alternatives” were available.

A similar standard should prevail here. Were a party attacking the classification to demonstrate the existence of such “reasonable and adequate alternatives” to further the legitimate interest proposed by the state, that showing should

116 The cases summarized in notes 35-42 supra, when compared with those in note 43 supra, suggest a division along the lines of this classification.
substantially lessen the importance attached to the state interest in weighing it against the rights burdened by the classification.

An application of this test to the facts of the Boraas case is beyond the scope of this article, which seeks only to establish a viable framework for precedential development in equal protection analysis. Too many important issues require further inquiry to attempt a definitive judgment at this stage. The village ought to be afforded an opportunity to demonstrate the factual connection between the definition of "family" in the ordinance and the legitimate governmental objectives it pursues by that ordinance. The pertinence and adequacy of alternative means require more refined analysis than that accorded by the court of appeals. To these issues the Supreme Court should turn its attention.

VII. Conclusion

Grave uncertainty at present shrouds the perimeters of the equal protection clause. The recent gropings towards a more flexible and equitable standard thus far attempted by the Supreme Court stand greatly in need of fuller articulation. Boraas v. Village of Belle Terre offers the Court an opportunity to achieve just that.

An alternative to the rigidities of "two-tier" analysis must be found. Attempts to prove the "fundamental" nature of various rights place a heavy strain on the language of the Constitution, while the lax "minimal scrutiny" standard fosters judicial myopia in the face of serious discrimination against individual rights. Some sort of "means-evaluation" or "sliding-scale" test provides a workable via media, one in which courts are asked to do what courts are historically suited to do—apply the law to factual contexts rather than accept one hypothetical legislative justification to the exclusion of others that represent the true rationale of the classification. This more realistic judicial scrutiny in cases in which the compelling state interest test is not invoked serves to render the Equal Protection Clause effective rather [than] to permit all but egregious inequalities to go unchecked.121

A disposition of Boraas along the lines suggested herein would go far to replace the existing confusion in this area with a stable, clear, and rational standard—one consonant with the high mandate of equal protection of the laws.

Thaddeus Marciniak

120 The suggested approach, however, does allow the Court to uphold the legitimacy of zoning for the preservation and maintenance of the traditional family without necessarily reversing the Boraas decision. Although the State may be able to show a substantial factual nexus between the ordinance and this state interest, the Court may nonetheless find that interest outweighed by the importance of the rights affected and the extent of their infringement. 121 Boraas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973).