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New Standard Used for Equal Protection: *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973)

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Casenote

New Standard Used For Equal Protection

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

EDITOR'S NOTE—After this casenote was set in type, the United States Supreme Court in *Village of Belle Terre v. Boraas*, 42 U.S.L.W. 4475 (U.S. April 2, 1974), reversed the second circuit's holding which this article suggests had posited an unduly liberal interpretation of a strengthened rational basis test for equal protection. The primary basis for the Supreme Court's decision, however, was that the single-family dwelling ordinance in controversy was a proper legislative device for regulation of land use. This analysis was facilitated by the fact that the tenants whose rights were at issue had quit the premises and only the denial of the lessor's rights to equal protection of the laws remained at issue—more clearly a commercial interest subject to the traditional rational basis test of equal protection. In a dissenting opinion, Justice Brennan stated that he felt the case was moot.

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The United States Court of Appeals for the Second Circuit in *Boraas v. Village of Belle Terre*[1] sanctioned a new standard to govern the application of the equal protection clause of the fourteenth amendment.[2] Faced with an exclusionary zoning ordinance,[3] the court abandoned the rigid two-tiered equal protection approach in favor of a test directed toward determining whether the legislative classification was *in fact* substantially related to the ordinance's objective. As a result of applying this interpretation, the court found the zoning ordinance unconstitutional. This note will

1. 476 F.2d 806 (2d Cir. 1973).
2. U.S. CONST. amend. XIV, § 1. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."
3. An exclusionary zone operates to exclude certain persons and land uses from a particular neighborhood or municipality. Methods employed to reach this result include zoning and subdivision regulations to make development prohibitively expensive; regulations designed to prohibit certain land uses; and regulations to limit the number of persons which may occupy a dwelling. For commentary on such devices, see generally Bingham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Note, *Exclusionary Zoning & Equal Protection*, 84 HARV. L. REV. 1645 (1971).

examine whether the court's test was correct in light of recent United States Supreme Court decisions construing the equal protection clause.

Owners of a residential dwelling and three of six students who leased it brought the action in *Boraas* in federal district court under section 1983 of the Civil Rights Act of 1871.[4] The students, although unrelated, were organized and functioned as a single housekeeping unit, sharing rental expenses. The defendant Village of Belle Terre ("Village") is a small suburban municipality zoned exclusively for one-family residential dwellings. Plaintiffs contended that the Village zoning regulation,[5] which prohibited groups of more than two unrelated persons from occupying a single-family residence, denied them equal protection of the laws and violated their rights of association, privacy and travel. Therefore, they sought preliminary and permanent injunctive relief and a declaratory judgment invalidating the ordinance.

The lower court[6] denied plaintiffs' motion for injunctive relief and upheld the validity of the zoning ordinance as a rationally-based exercise of the Village's interest in protecting the nuclear family.[7] In reaching this decision, the lower court considered the smallness of the Village, the absence of similar exclusionary zones in nearby communities and the existence of student dormitory accommodations as factors sufficient to sustain the ordinance.

On appeal to the second circuit the litigants keyed their arguments to the two-tiered standard of equal protection. The two-tiered approach, as established by the United States Supreme Court, contemplates two standards for review of legislative classifications challenged on equal protection grounds. The first tier, a minimal scrutiny, rational basis test, has been applied tradition-

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4. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
   42 U.S.C. § 1983 (1970).
5. BELLE TERRE, N.Y., BLDG. ZONE ORDINANCE art. I, sec. D 1.35a (1970).
6. Boraas v. Village of Belle Terre, No. 72C-1030 Memorandum Incorporating Findings of Fact and Order (E.D.N.Y. 1972).
7. Such zoning is 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. *Id.* at 31.

ally in the fields of economic and social legislation.[8] The Village asserted that this level of analysis was appropriate in this case. Under this test, legislative bodies are presumed to have acted within their constitutional power if any state of facts may be reasonably conceived to justify the classification.[9] The Village asserted that since such facts existed, a rational basis for the contested ordinance was established and equal protection was not denied. Conversely, the plaintiffs contended that the Village ordinance should be evaluated on the basis of the second level of the two-tiered test. This tier requires that, to be sustained as constitutional, the challenged legislative classification must be strictly scrutinized, the court requiring the legislative body to demonstrate a compelling interest in the continued existence of its legislation. This level of the two-tiered approach has been sanctioned by the Supreme Court as appropriate if the classification is based on criteria recognized as suspect,[10] or if the statutory regulation affects a fundamental right.[11] Plaintiffs alleged that the Village ordinance impinged on their fundamental rights of privacy, association and travel and as such should have been strictly scrutinized. Thus, the second circuit was presented clear-cut alternative arguments on which to base its decision. This rigid either-or choice associated with the two-tiered test, however, posed a dilemma for the court.

The court found[12] that, despite incidental effects, the zoning

8. *See* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).
9. The principal cases cited in support of the rational basis test for equal protection are: McGowan v. Maryland, 366 U.S. 420 (1961) ("A statutory discrimination will not be set aside if *any* state of facts reasonably may be conceived to justify it." *Id.* at 426 (emphasis added)), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) ("A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* at 78).
10. Classifications recognized as suspect have been those determined by accident of birth, such as: sex, Frontiero v. Richardson, 411 U.S. 677 (1973) (Brennan, J., writing for a plurality, joined by Douglas, Marshall & White, JJ.); alienage, Graham v. Richardson, 403 U.S. 365 (1971); race, McLaughlin v. Florida, 379 U.S. 184 (1964); national origin, Korematsu v. United States, 323 U.S. 214 (1944).
11. Fundamental rights recognized by the Court include: marriage, Loving v. Virginia, 388 U.S. 1 (1967); right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); right to vote, Reynolds v. Sims, 377 U.S. 533 (1964); criminal appeals, Griffin v. Illinois, 351 U.S. 12 (1956); procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942).
12. 476 F.2d at 813-14.

ordinance neither denied fundamental rights[13] nor created a suspect classification.[14] Furthermore, the court recognized that the two-tiered test had become very rigid in its application. If the interest affected by a particular legislative classification did not reach the fundamental right or suspect classification levels, the individual interest would yield to the legislation. The court, however, indicated that the rights claimed by the homeowner and students were more personal and basic than the commercial interests traditionally associated with the minimal scrutiny standard.[15] Thus, the court seemed prepared to require that the Village demonstrate a greater interest than mere rationality to sustain its ordinance.

Apparently unable to invalidate the ordinance within the framework of the Supreme Court's two-tiered criteria, the second circuit noted similar exclusionary zoning ordinances were not uncommon and referred to regulations subject to prior litigation in other courts.[16] The court especially noted similarity between the municipalities' arguments in *Boraas* and *Palo Alto Tenants Union v. Morgan*.[17] The *Morgan* court listed the municipality's interest in preserving the integrity of the biological-legal family, the greater impact of unrelated groups of persons on neighborhoods, and the adverse economic impact of such groups pooling resources to pay higher rentals thus driving rentals upward as ample reasons to sustain a single-family dwelling ordinance.[18] The ma-

13. Commentators, however, have argued that the fundamental rights characterization should be extended to include exclusionary zoning. *See generally* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971).
14. A commentator has persuasively written in support of extending the status of suspect classification to legislative regulations differentiating between communal "family groups" and the traditional socio-legal family. *See* Comment, *All in the "Family:" Legal Problems of Communes*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 393 (1972).
15. 476 F.2d at 813-14.
16. *See* Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962); Gabe Collins Realty, Inc. v. Margate City, 112 N.J. Super. 341, 271 A.2d 430 (1970).
17. 321 F. Supp. 908 (N.D. Cal. 1970).
18. Findings of unconstitutionality in cases involving zoning ordinances are less than commonplace. Since nearly every local zoning ordinance represents a restriction upon rights to use of land, some party will invariably claim denial of a constitutional right. This characteristic of zoning may have prompted the courts, led by the Supreme Court in Nectow v. City of Cambridge, 277 U.S. 183 (1928), to historically allow municipalities broad discretion in enacting zoning ordinances. Nearly the only requirement placed upon a zoning regula-

jority of the second circuit, however, found these same reasons unpersuasive.[19] Yet, the court still seemed to lack a means to invalidate the ordinance within the two-tiered test.

The means by which the second circuit resolved this problem and ultimately found the zoning ordinance unconstitutional were embodied in the following language.

> Fortunately we do not have to decide whether there has been an infringement of the right of privacy or travel because we believe that we are no longer limited to the either-or choice between the compelling state interest test and the minimal scrutiny permitted by the *Lindsley-McGowan* formula. Faced recently with the issue under similar circumstances the Supreme Court appears to have moved from this rigid dichotomy . . . toward a more flexible and equitable approach . . . .[20]

In this shifting analysis by the Supreme Court of equal protection cases, the majority of the second circuit perceived an intermediate ground to the mere rationality or strict scrutiny review of the two-tiered approach. The majority stated its equal protection test as requiring

> 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. Under this approach the test . . . is whether the legislative classification is *in fact* substantially related to the object of the statute.[21]

The majority-formulation of the applicable test for equal protection in *Boraas* was attacked by Judge Timbers in a strong dissenting opinion. Timbers wrote that he felt that the majority was applying a "sliding scale" test for equal protection——the more valuable the right, the stricter the scrutiny.[22] Timbers feared the "sliding scale" approach would confer excessive discretion upon a judge to overturn challenged legislation.[23] He interpreted recent

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tion is that it bear a "substantial relation" to the public health, safety, morals or general welfare. See also Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Zahn v. Board of Public Works, 274 U.S. 325 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

19. 476 F.2d at 816-17 (2d Cir. 1973). The court seemed to favor the reasoning of City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966). In *Trottner*, which concerned limitation of population density and traffic control by excluding groups of unrelated persons, the court stated that "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." *Id.* at 437, 216 N.E.2d at 119.
20. 476 F.2d at 814.
21. *Id.* (emphasis original).
22. *Id.* at 821.
23. Such a "sliding scale" test would present to the court "the impossi-

Supreme Court cases which seemed to depart from a strict two-tiered test as indicative of the Court's desire to eliminate the ability of the state to sustain legislation on the basis of rationalizations created by judicial hypothesis. Timbers felt that in the place of the mere rationality test, the Supreme Court had substituted the requirement that legislative means must have a fair and substantial relation to the object of the legislation.[24] Based on such a formulation and his acceptance of the Village's contention that the zoning ordinance bore a fair and substantial relationship to the maintenance of the traditional family character of the Village, Judge Timbers would have sustained the Belle Terre zoning ordinance.[25]

The Supreme Court's shifting interpretation of the two-tiered equal protection test, to which the second circuit refers, originated during the 1971-72 term. Instead of showing satisfaction with the traditional "mere rationality" test of the first tier, the Supreme Court seemed to be pointing toward a "rationality-plus" or "means-scrutiny" test.[26] The Court indicated that a legislative body, to sustain its regulation, would have to show greater evidence of the rationality of a classification, especially when the regulation affected personal rights. The Court insisted that the classification and the unequal treatment of groups must rest on some ground rationally explained and having a significant, fair or substantial relationship to the purpose or object of the statute.[27] Exemplary of the Burger Court's support for a streng-

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ble task of first assessing the precise value of a right or interest and then increasing or decreasing the intensity of its scrutiny accordingly." *Id.*

24. *Id.* at 821-22.
25. The split within the second circuit in deciding *Boraas* is reflected in that upon the majority reaching its decision, one of the second circuit Judges requested a poll for rehearing en banc. This resulted in a 4-4 tie. Judge Timbers again filed a dissenting opinion based on his apprehension that the court had misconstrued the Supreme Court's decisions.
26. *See* Gunther, *The Supreme Court 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972). Professor Gunther may have supplied the *Boraas* court with its rationale to escape the two-tiered dilemma. In any case, the article may be the source of emerging discussion regarding a new doctrine of equal protection. Gunther defines his "means-scrutiny" model as follows, "that the legislative means must substantially further legislative ends." *Id.* at 20.
27. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) ("The question for our determination in this case is whether there is *some* ground of difference that rationally explains the different treatment . . . ." *Id.* at 447); James v. Strange, 407 U.S. 128 (1972) ("[T]he equal protection clause 'imposes a requirement of *some* rationality in the nature

thened rationality test is *Reed v. Reed*[28] which concerned the validity of an Idaho statute giving preference to male over female administrators of an intestate's estate:

> A 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."[29]

This formulation is only a departure in degree from the traditional rational basis standard of the first tier of the two-tiered test, but it led the second circuit to considerable speculation regarding the emergence of a strengthened rational basis test for equal protection.

To ascertain whether the second circuit correctly perceived the dimensions of any shift in the Supreme Court's application of the equal protection clause, Court opinions subsequent to *Boraas* should be examined. Although the number of equal protection decisions issued during the 1972-73 term was smaller than the prior term, a prominent feature of the cases was the Court's retention of the rhetoric of the two-tiered standard. Justice Powell, in the leading equal protection case of the term,[30] set forth the analytical framework for the Court's evaluation of the Texas system for public school finance as follows:

> We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.[31]

Failing to find a clearly defined suspect class disadvantaged by the finance system and also finding education not among those fundamental rights guaranteed by the Constitution, the Court found no reason to apply the strict scrutiny test of the second tier. Rather, the Court proceeded to subject the legislative plan

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of the class singled out.'" *Id.* at 140, *quoting* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966)); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) ("The inferior classification of dependent unacknowledged illegitimates bears . . . no *significant* relationship to those recognized purposes . . . ." *Id.* at 175); Reed v. Reed, 404 U.S. 71 (1971) ("A 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 . . . ." *Id.* at 76) (in each quotation emphasis added).

28. 404 U.S. 71 (1971).
29. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (emphasis added).
30. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
31. *Id.* at 17.

to an equal protection test closely resembling the traditional standard of first-tier rational basis.

> [T]he Texas scheme must still be examined to determine whether it rationally furthers some *legitimate, articulated* state purpose and therefore does not constitute an invidious discrimination.[32]

While the Court upheld the validity of the Texas system, it is clear that it did not do so based on a rational justification established by judicial hypothesis. Rather, the Court assessed the rationality of the finance plan in terms of legislative purposes having substantial basis in actuality.

The Court, earlier in the term speaking again through Justice Powell in evaluating New York's system of granting good time credit for pre-trial incarceration to certain prisoners while denying it to others, had expressed in the exact words as quoted above a strengthened formulation of the traditional standard for equal protection.

> We do not wish to inhibit state experimental classifications in a practical and troublesome area [corrections], but inquire only whether the challenged distinction rationally furthers some *legitimate, articulated* state purpose . . . . We have supplied no imaginary basis or purpose for this statutory scheme, but we likewise refuse to discard a clear and legitimate purpose . . . .[33]

These two cases tend to demonstrate that the Court, even in sustaining legislative classifications by its strengthened rational basis test, will not do so based on judicial hypothesis but must ascertain clearly stated existing purposes for the continued existence of legislation.

A notable exception to the Court's tendency during the past-term to uphold legislative classifications challenged on equal protection grounds, which further illustrates a strengthened rationality test, is *United States Department of Agriculture v. Moreno*.[34] In this case, the Court rejected the government's contention that the contested legislative classification might have been intended to prevent fraud, when the legislative history showed the purpose was to prevent "hippie communes" from participating in the food stamp program. Thus, in *Moreno* a hypothetical rational basis for the classification, which fraud could have been, did not satisfy the first-tier rational basis test. Because the articulated purpose re-

32. *Id.* (emphasis added).
33. McGinnis v. Royster, 410 U.S. 263, 270-77 (1973).
34. 413 U.S. 528 (1973), involving a Congressional classification denying food stamp benefits to non-related individuals residing together, but granting such benefits to related individuals living in groups.

vealed by the legislative history was not legitimate, the Court invalidated the legislation.

These three cases, among the more notable equal protection decisions of the past term, do tend to support the argument that the traditional mere rationality test of the first tier now means more than routine validation of challenged legislation by rationalizations based on judicial hypothesis. This subtle shift, however, does not mean a majority of the Court is willing to abandon the two-tiered analysis.

During the 1972-73 term, only Justices Marshall and Douglas[35] and possibly Justice White[36] were prepared to accept a "sliding scale" approach regarding equal protection, that is, exercising stricter scrutiny as the societal and constitutional importance of the interest affected increased. The remainder of the Court seemed eager to avoid the charge of ad hoc jurisprudence so widely heard in the days of substantive due process and associated with a "sliding scale" approach.

If these observations regarding the current status of the equal protection "tests" acceptable to the Supreme Court are correct, all of the members of the second circuit have correctly noted a shift in the application of the equal protection clause. The majority in *Boraas*, however, may have applied too broad an interpretation of this movement in holding the Village ordinance invalid. The asserted purpose for the ordinance, preservation of the traditional family character of the Village, should satisfy the strengthened rationality test as a classification furthering some legitimate articulated state purpose. As such, the *Boraas* decision is likely to be reversed by the United States Supreme Court.

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35. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall & Douglas, JJ., dissenting).
36. *See* Vlandis v. Kline, 412 U.S. 441, 456 (1973) (White, J., concurring).