MONOGAMY ZONING: SINGLE-FAMILY ZONING AND THE EXCLUSION OF POLYAMOROUS RELATIONSHIP GROUPS

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Polyamory is a form of consensual nonmonogamy in which a person may have multiple committed romantic relationships simultaneously with the knowledge and agreement of all participants. Some polyamorous relationship groups consider themselves families, cohabitate, and raise children together. Despite a growing legal trend towards acknowledgment of such relationship and family structures, people in polyamorous relationships still face much discrimination and numerous legal obstacles. Among the most concerning of legal obstacles are those that make it difficult to find a place to call home.

Zoning laws limit what kinds of structures can be built in particular zones and to what uses they can be put. One common zoning classification that applies to the majority of residential real estate in the United States is single-family zoning. Single-family zoning criteria limit each property to housing one family and define families along lines of blood, marriage, or financial and housekeeping structures.

The Supreme Court has decided two major cases on definitions of family in zoning ordinances, Village of Belle Terre v. Boraas *and* Moore v. City of East Cleveland*. In* Village of Belle Terre*, the Court held that a zoning ordinance excluding a group of unrelated student roommates from its definition of family did not implicate fundamental rights and did not violate the Constitution. In* Moore*, the Court held that a zoning ordinance excluding a multigenerational extended family from its definition of family did implicate fundamental rights and could not survive strict scrutiny. Between these two holdings is a gray area. Where do zoning laws defining family in ways which exclude polyamorous relationship groups fall?*

This Note analyzes this question and concludes that fundamental rights of polyamorous people are implicated by restrictive single-family zoning criteria, necessitating the application of a strict scrutiny standard of review that underinclusive and overinclusive zoning ordinances cannot survive. This Note therefore urges local governments to adopt antidiscrimination measures that would prevent the discriminatory application of single-family zoning ordinances against polyamorous relationship groups.

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I. INTRODUCTION

Imagine a loving couple, Jennifer and David. They have been together for years and have a son together. Jennifer and David are not just a couple though—Jennifer also has a romantic relationship with Kathryn, of which David is aware and approving. Kathryn also has a wife, Elizabeth, as well as a daughter from a previous relationship. These four adults all consent to the relationship dynamic, spend much of their time socializing together, and all contribute to the coparenting of their own and each other's children. They consider themselves a family, bonded by their committed polyamorous relationship. But what happens if they decide to cohabitate but find the property they wish to make their residence is in an area zoned for single-family housing only? Could they be in violation of the law simply by living in the same house? Under most single-family zoning ordinances, they could.[1] This Note explores the connection between single-family

1. *See infra* notes 182–87 and accompanying text.

zoning and normative monogamy and articulates the exclusionary effect these ordinances have on polyamorous families.

Polyamory is a form of consensual nonmonogamy in which people experience romantic or sexual attraction to multiple individuals, pursuing concurrent relationships openly with multiple partners.[2] Relationships like the one described above are far from unheard of—estimates of the number of people in the United States who engage or have previously engaged in such relationships of three or more individuals range from 500,000 into the millions.[3]

Although the law is trending towards acceptance and recognition of rights for polyamorous people in recent years,[4] most zoning ordinances do not address polyamorous families directly.[5] Supreme Court precedent on single-family zoning has left a gray area between households of unrelated roommates[6] on one end of the spectrum and extended families related by blood on the other.[7] Currently, no clear authority exists for how localities must treat polyamorous relationship groups in the context of zoning and housing rights. Determining where polyamorous relationship groups fall on this spectrum is important because approximately 70% of all residential zoning in the U.S. is single-family.[8] This suggests that the majority of U.S. residential real estate is unavailable to polyamorists despite the constitutional protections to which they may be entitled.[9] Housing discrimination such as this is a persistent concern for polyamorists.[10]

This Note argues that polyamorous relationship groups should be considered single families for the purposes of zoning and should be afforded protections against housing discrimination based on relationship structure. Part II reviews the basis of single-family zoning restrictions and criticisms of such.[11] Part II also provides brief background on the nature of polyamorous relationships, their place in modern U.S. society, and their legal status.[12] Part III provides an analysis of the constitutionality of restrictive definitions of "family" by reviewing Supreme Court precedent on the matter and applying the Court's reasoning to

2. Casey E. Faucon, *Third Parties with Benefits*, 17 STAN. J.C.R. & C.L. 185, 196–97 (2021); Sally F. Goldfarb, *Legal Recognition of Plural Unions: Is a Nonmarital Relationship Status the Answer to the Dilemma?*, 58 FAM. CT. REV. 157, 160 (2020).

3. Faucon, *supra* note 2, at 188; Goldfarb, *supra* note 2, at 161; ELISABETH SHEFF, THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES 3 (2014).

4. *See infra* Subsection II.B.3.

5. *See* Joanna L. Grossman & Lawrence M. Friedman, *The Chosen Few: Polyamory and the Law*, JUSTIA (Apr. 6, 2021), https://verdict.justia.com/2021/04/06/the-chosen-few-polyamory-and-the-law [https://perma.cc/CEJ3-C8ZJ].

6. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 2–3, 7–10 (1974).

7. *See* Moore v. City of East Cleveland, 431 U.S. 494, 496–97, 506 (1977).

8. Tim Frank, *End to Single-Family Zoning in Berkeley Forces Us to Reflect on Our Past*, SIERRA CLUB: S.F. BAY (June 7, 2021), https://www.sierraclub.org/san-francisco-bay/blog/2021/06/end-single-family-zoning-berkeley-forces-us-reflect-our-past [https://perma.cc/6SB7-NLCN].

9. *See infra* Section III.C.

10. *See* Elisabeth A. Sheff, *Polyactivism*, PSYCH. TODAY (Aug. 24, 2017), https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201708/polyactivism [https://perma.cc/76XQ-7NBH]; *Frequently Asked Questions (FAQs)*, POLYAMORY LEGAL ADVOC. COAL., https://gopher-orca-jrn3.squarespace.com/faqs (last visited Sept. 30, 2022) [https://perma.cc/86V6-M25D].

11. *See infra* Section II.A.

12. *See infra* Section II.B.

polyamorous relationship groups.[13] Part IV recommends that because excluding polyamorous relationship groups from single-family zoned housing is likely unconstitutional, housing antidiscrimination protections should be expanded to include relationship structure.[14]

II. BACKGROUND

A. Single-Family Zoning

Zoning is presumptively constitutional.[15] This places the burden on those challenging zoning ordinances to prove otherwise.[16] Municipalities have been granted sweeping authority to regulate zoning through enabling legislation passed by states adopting the Standard State Zoning Enabling Act, a model law.[17] In traditional forms of zoning, municipalities divide their jurisdictions into zoning districts represented on official zoning maps.[18] Further, for each district, there are restrictions and guidelines allowing or banning particular uses, such as residential or commercial, as well as dictating the allowed lot configurations and characteristics of structures, such as the height of buildings.[19] For example, the ordinance at issue in *Village of Euclid v. Ambler Realty Co.* divided the village into "six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive."[20] Such zoning ordinances constrain in which districts business, industry, multifamily housing, and single-family housing may be located.[21]

The purported benefit to dividing the map into such districts is to promote general welfare through the regulation of property rights.[22] Zoning ostensibly benefits the existing group of property owners within a zone by protecting and even raising the value of their properties.[23] But, controversy surrounds the true effects of zoning, as "[o]ne person's protection is another person's exclusion."[24]

1. Origins of Single-Family Zoning

Zoning certain neighborhoods for single-family dwellings, excluding all other types of dwellings and prohibiting other land uses, began a little over a

13. *See infra* Part III.
14. *See infra* Part IV.
15. Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 24 (2020).
16. *Id.*
17. Sara C. Bronin, *Zoning by a Thousand Cuts*, CORNELL J.L. & PUB. POL'Y (forthcoming 2022) (manuscript at 8) (on file with author).
18. *Id.* (manuscript at 9).
19. *Id.* (manuscript at 9, 12).
20. 272 U.S. 365, 380 (1926).
21. Bronin, *supra* note 17 (manuscript at 9).
22. *See id.* (manuscript at 8).
23. CONOR DOUGHERTY, GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA 9 (2020).
24. *Id.*

century ago.[25] One of the earliest known examples of a city implementing such a scheme is a 1916 ordinance in Berkeley, California.[26] The Berkeley ordinance was established following the efforts of real estate developer Duncan McDuffie, who sought to "enhance the value of his subdivisions."[27] McDuffie argued that such restrictions could work to "'absolutely . . . determine in advance the development and character of an entire residence tract,' and thus avoid 'the evils of uncontrolled development.'"[28]

In 1926, shortly after single-family zoning emerged, the Supreme Court considered in *Village of Euclid v. Amber Realty Co.* whether zoning which excluded certain uses, such as the construction and operation of apartment houses in particular residential districts, violated the Constitution.[29] A landowner challenged Euclid's zoning ordinance which had segmented the owner's land across multiple zones and prevented the use of the land for industrial purposes.[30] The owner alleged that this drastically reduced the economic value of the land in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[31] The Court looked to "the police power, asserted for the public welfare" to determine the validity of the ordinance and analogized from the common law of nuisance.[32] The Court ultimately determined that the ordinance in question did not violate the Constitution, noting the perceived negative impact of apartment houses on single-family neighborhoods, disdainfully declaring that "in such sections very often the apartment house is a mere parasite."[33]

2. The U.S. Supreme Court and Definitions of "Family" in Zoning Ordinances

In *Village of Belle Terre v. Boraas*, the Supreme Court considered a challenge to a single-family zoning ordinance in a New York village.[34] The ordinance narrowly defined "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants."[35] Additional language in the ordinance facilitated cohabitation by monogamous couples in the village, stating, "[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."[36] When six unrelated students renting a house in the village

25. *Id.*
26. *Id.*
27. Frank, *supra* note 8.
28. Marc A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, 3 BERKELEY PLAN. J. 7, 13 (1986).
29. 272 U.S. 365, 390 (1926).
30. *Id.* at 379–83.
31. *Id.* at 384–85.
32. *Id.* at 387–88.
33. *Id.* at 394–95.
34. 416 U.S. 1, 2–3 (1974).
35. *Id.* at 2.
36. *Id.*

were found to be in violation of the ordinance, the homeowners and several of the student tenants challenged the constitutionality of the ordinance.[37]

Although the homeowners and tenants argued that "if two unmarried people can constitute a 'family,' there is no reason why three or four may not," the Supreme Court declined to require Belle Terre to adopt this more permissive definition of "family."[38] The Court reiterated that zoning ordinances such as the Village's were a valid method to advance goals like limiting noise, automobiles, and pollution to promote clean air and "family values."[39] The single-family zoning ordinance was ultimately upheld by the Court as constitutional.[40]

Three years later, the Court once again heard a challenge to a restrictive single-family zoning ordinance in *Moore v. City of East Cleveland*.[41] In *Moore*, a woman named Inez Moore was living with her son and two grandsons, one of whom was the child of her son and the other that child's cousin.[42] The local zoning ordinance criminalized and prevented a family group of this nature from living together.[43] Consequently, the city defined the cousin as an "illegal occupant" and directed Mrs. Moore to remove the child from her home.[44] She did not comply and was subsequently criminally charged and convicted for the violation.[45]

The plurality distinguished this case from *Village of Belle Terre*, noting that the restriction in *Village of Belle Terre* was upheld because "it promoted 'family needs' and 'family values.'"[46] The plurality described the East Cleveland restriction as contrarily "slicing deeply into the family itself."[47] The Court clarified that "[w]hen a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs."[48] Rather, because fundamental rights of personal choice in family life protected under the Due Process Clause of the Fourteenth Amendment were implicated, the ordinance was subject to strict scrutiny.[49]

The Court held the East Cleveland zoning ordinance unconstitutional.[50] Ultimately, the reason the ordinance could not survive strict scrutiny was because it was not narrowly tailored but rather overinclusive and underinclusive, allowing potentially large and disruptive immediate families while disallowing small extended families who posed no threat to the neighborhood.[51] Justice Stevens concurred, stating that the ordinance interfered with the fundamental right "of an

37. *Id.* at 2–3.
38. *Id.* at 8–10.
39. *Id.* at 9.
40. *Id.* at 7–10.
41. *See generally* 431 U.S. 494 (1977).
42. *Id.* at 496–97.
43. *Id.* at 495–96.
44. *Id.* at 497.
45. *Id.*
46. *Id.* at 498 (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)).
47. *Id.*
48. *Id.* at 499.
49. *See id.*
50. *Id.* at 506.
51. *Id.* at 499–500.

owner to decide who may reside on his or her property."[52] Justice Stevens indicated that zoning ordinances which "regulate[] the identity, as opposed to the number, of persons who may compose a household" must be appropriately targeted at preventing transiency in order to survive scrutiny, which the East Cleveland ordinance was not.[53]

The differing results between the unconstitutional ordinance of *Moore* and the constitutional ordinance of *Village of Belle Terre* left some uncertainty in their wake as to how factual circumstances which fall between those at issue in the two cases should be interpreted.[54]

3. Zoning as Segregation

The *Euclid* decision effectively validated the use of zoning ordinances to segregate low-income people from existing homeowners.[55] Localities favored this stratification because it protected the financial interests of developers and high-income homeowners[56] and benefited municipal revenues through property taxes.[57] This therefore precipitated a proliferation of like ordinances across the country.[58] Ordinances mandating large lot sizes serve a similar function, ensuring that only more prosperous buyers can afford to purchase new housing in neighborhoods subject to such zoning.[59]

Underlying this desire to keep low-income families out of certain neighborhoods was also substantial racial animus.[60] The pioneering Berkeley ordinance, for example, was designed to "assure[] that only people who could afford a mortgage would live in the neighborhood. In 1916, that effectively excluded almost all people of color."[61] Its champion, McDuffie, commonly employed racial covenants in his developments forbidding occupancy by anyone "who wasn't of 'pure Caucasian blood.'"[62]

The Supreme Court held that zoning ordinances which explicitly discriminated on the basis of race, preventing a Black person from moving into a white neighborhood, violated the Fourteenth Amendment.[63] Despite this, zoning ordinances that limit multifamily housing and make purchasing property more expensive often serve as de facto racial segregation, allowing primarily affluent white people to move to neighborhoods where those without their economic

52. *Id.* at 520–21 (Stevens, J., concurring).
53. *See id.* at 519–21; *see also* Bronin, *supra* note 15, at 17.
54. *See* Bronin, *supra* note 15, at 19 ("Since th[e *Village of Belle Terre* and *Moore*] decisions, state courts have continued to grapple with the extent to which local governments should be allowed to regulate household composition through zoning.").
55. *See* Bronin, *supra* note 17 (manuscript at 10).
56. *See* Weiss, *supra* note 28, at 9.
57. *See* DOUGHERTY, *supra* note 23, at 109.
58. *See* Bronin, *supra* note 17 (manuscript at 10).
59. DOUGHERTY, *supra* note 23, at 85.
60. *See* Daniel Thomas Mollenkamp, *Single-Family Zoning: This Housing Restriction Can Lead to High Rates of Segregation*, INVESTOPEDIA (Aug. 26, 2021), https://www.investopedia.com/single-family-zoning-5192299 [https://perma.cc/UXA9-2PV8]; Frank, *supra* note 8.
61. Frank, *supra* note 8.
62. Mollenkamp, *supra* note 60.
63. *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917).

advantages cannot afford to follow.[64] The Berkeley single-family zoning ordinance became a template for zoning ordinances across the country because of its ability to withstand constitutional scrutiny by avoiding explicit reference to race while still achieving the desired objective of racial segregation.[65]

4. Benefits and Drawbacks of Zoning

Proponents of single-family zoning have proffered multiple justifications, typically purporting that restrictions will safeguard families and improve their well-being.[66] One common justification for single-family zoning is to prevent overcrowding.[67] Localities instituting single-family zoning ordinances argue that limiting population density helps keep neighborhoods quieter, cleaner, and safer than they would otherwise be.[68] Single-family zoning also prevents facilities such as fraternities, sororities, and boarding houses from being established in family-oriented neighborhoods, theoretically creating a safe zone for "family values."[69] Some proponents of single-family zoning further argue that it maintains incentives for the upkeep, maintenance, and improvement of property.[70] They hypothesize that incentives to improve one's own property are reduced when other households in the same neighborhood receive the same community services at a cheaper per capita rate.[71]

Zoned neighborhoods may offer prospective homeowners with the means to afford the houses therein an assortment of choices related to available amenities, such as the caliber of local schools or the presence of public parks.[72] Such amenities are not free and are indeed made more possible by restricting lower-income families from moving in, thus avoiding the need for local governments to spend on social support services for them and allowing those local governments to reap the benefits of higher property tax revenue.[73] This is a significant factor in local governments' fight to maintain local control over zoning.[74] Municipalities contract out many services but almost never do so with zoning planning since maintaining control over zoning and the ability to exclude the impoverished relates strongly to city revenues.[75]

64. *See* DOUGHERTY, *supra* note 23, at 109.
65. Frank, *supra* note 8.
66. *See infra* notes 67–71 and accompanying text.
67. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Moore v. City of East Cleveland, 431 U.S. 494, 506–07 (1977) (Brennan, J., concurring).
68. *See Village of Belle Terre*, 416 U.S. at 9; *Moore*, 431 U.S. at 506–07 (Brennan, J., concurring) ("[A] municipality may constitutionally zone to alleviate noise and traffic congestion and to prevent overcrowded and unsafe living conditions . . . .").
69. *See Village of Belle Terre*, 416 U.S. at 9.
70. *See* David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1333–34 (2021).
71. *Id.* at 1334.
72. *See* DOUGHERTY, *supra* note 23, at 109.
73. *See id.*
74. *See id.* at 109–10.
75. *See id.*

Nevertheless, debate continues about the efficacy and negative impacts of single-family zoning.[76] Single-family zoning has historically been used to limit the construction of affordable housing as a discrimination tactic to prevent minority groups from settling in middle-class neighborhoods.[77] Critics of single-family zoning "point[] to research showing that single-family zoning drives up development costs, degrades the environment, and makes communities too homogenous."[78]

Furthermore, many of the proposed goals of zoning regimes are either inapplicable artifacts of history or benefits that never materialized.[79] Concerns over health, cleanliness, and safety that led municipalities to separate businesses from residential areas have been significantly ameliorated via other means, and much work is now done from residences regardless.[80] Additionally, numerous studies have failed to support the notion that single-family zoning leads to a decrease in criminal activity or traffic collisions.[81] To the contrary, by separating residences from businesses, these zoning ordinances have necessitated more commuting and resulted in an increase of traffic congestion and its drawbacks, including accidents and fatalities.[82] Although localities often justify zoning ordinances in part as a protection of public health, the history of these ordinances evinces a disregard for the health of low-income communities amid a prioritization of both high-income residences and industrial development over low-income residences.[83] These facts call into question whether single-family zoning is really a beneficial means of supporting families.

B. Polyamory

1. Polyamorous Relationships

Consensual nonmonogamy can take many forms, such as open relationships, swinging, and polyamory.[84] What differentiates polyamory from consensual nonmonogamous relationships in general is the focus on building deeper emotional connections with multiple partners rather than being romantically monogamous but sexually nonmonogamous.[85] Consequently, polyamorous

76. *See generally* Bronin, *supra* note 17.

77. *See* Richard Rothstein, *The Making of Ferguson*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 165, 171–91 (2015); Elisabeth A. Sheff, *The Five Most Common Legal Issues Facing Polyamorists*, PSYCH. TODAY (Jan. 18, 2014), https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201401/the-five-most-common-legal-issues-facing-polyamorists [https://perma.cc/E3X6-UFWJ].

78. Bronin, *supra* note 17 (manuscript at 3–4).

79. *See* SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 180–83 (2014).

80. *Id.* at 181.

81. *Id.* at 181–83.

82. *See id.* at 182–83.

83. *See id.* at 153–54.

84. *See* MARK A. MICHAELS & PATRICIA JOHNSON, DESIGNER RELATIONSHIPS: A GUIDE TO HAPPY MONOGAMY, POSITIVE POLYAMORY, AND OPTIMISTIC OPEN RELATIONSHIPS 9–16 (2015).

85. *See id.*

relationships implicate matters of cohabitation, family formation, and childrearing in ways that other consensual nonmonogamous relationships may not.[86]

Polyamorous relationships vary in size and structure.[87] Such multipartner relationships can run the gamut in membership from as few as three people to as many as twenty or more.[88] Among the most common forms of polyamorous relationships are those with an individual couple at the core who often cohabitate, each being free to carry on romances with other partners outside of the household.[89] Sometimes in such relationships only one partner is polyamorous, but the monogamous partner is monogamous by choice rather than necessity and consents to their polyamorous partner having other relationships.[90] Other common forms include "vee" relationships, where two individuals share a common partner, and "triads," where three individuals are all involved with each other.[91]

People in polyamorous relationships may have both partners and "metamours," people who they are not in a romantic or sexual relationship with but with whom they share a mutual partner.[92] For example, in the hypothetical relationship group from the introduction,[93] David and Kathryn would be each other's metamour. Depending on the individuals involved in a given relationship and their approach to polyamory, metamours may be strangers to each other, cohabitants who think of each other as family, or anywhere in between.[94]

Not all polyamorous relationship groups cohabitate, and those that do may include everyone involved in the relationship group or just some of them.[95] Some polyamorists differentiate between partners they live with, sometimes called "nesting partners," from partners who do not live with them.[96] This terminology can distinguish between cohabitating and non-cohabitating partners without entailing hierarchical concepts like denoting a "primary" partner or partners versus "secondary" or even "tertiary" partners.[97]

In traditional scholarship, polyamory is frequently considered alongside polygyny, a practice in which one man has multiple wives who themselves do not have other relationships.[98] Polygyny in the United States often exists in a systemic context supported by religious frameworks, such as fundamentalist

86. *See infra* Section III.C.
87. SHEFF, *supra* note 3, at 5–17.
88. *Id.*
89. *See id.* at 6–12.
90. *See id.*
91. *See id.* at 12–13.
92. *See* Rachael Hope, *Managing Metamours in Polyamorous Relationships*, MEDIUM (Nov. 20, 2019), https://medium.com/polyamory-today/managing-metamours-in-polyamorous-relationships-d4a4201169b0 [https://perma.cc/3PDG-NTDK].
93. *See supra* Part I.
94. *See* Hope, *supra* note 92; Elisabeth Sheff, *Metamour Day February 28*, SHEFF CONSULTING (Feb. 27, 2022), https://elisabethsheff.com/2022/02/27/metamour-day-february-28/ [https://perma.cc/V9QX-RN5R].
95. *See* SHEFF, *supra* note 3, at 5–20.
96. *Id.* at 18–20.
97. *Id.* at 18.
98. *See, e.g.*, Goldfarb, *supra* note 2, at 159–61; Andrew Solomon, *How Polyamorists and Polygamists Are Challenging Family Norms*, NEW YORKER (Mar. 15, 2021), https://www.newyorker.com/magazine/2021/03/22/how-polyamorists-and-polygamists-are-challenging-family-norms [https://perma.cc/E8M7-7X7Q].

Mormonism.[99] While polygyny and polyamory are alike in that both involve multiparty relationships historically not recognized by the law, systemic polygyny has been associated with high-profile instances of exploitation, child abuse, and misogyny.[100] For these reasons, polyamorists often wish to distinguish polyamory from polygyny and highlight polyamory's emphasis on autonomy and empowerment of individuals.[101] Scholars have likewise drawn distinctions and argued for varying legal treatment.[102] This Note will focus on polyamory alone as distinct from systemic polygyny.

Polyamory is considered by some to be a sexual orientation.[103] Proponents of this view note the apparent immutability of polyamory for some polyamorists as well as the lack of desire for or inability to maintain a monogamous relationship.[104] The tension between polyamory as a lifestyle choice and polyamory as an identity is reminiscent of early questions surrounding the categorization of same-sex attraction and relationships.[105] The suggestion that polyamory could be viewed this way has led to debate, but it remains unclear whether polyamory should be recognized as a sexual orientation and its participants afforded legal protection on that basis.[106]

Nonetheless, the Supreme Court has, thus far, been consistent in expanding recognition of the rights of sexual minorities since *Romer v. Evans* under the Equal Protection and Due Process Clauses.[107] The Court has since held that sexual minorities have a right to engage in private sexual conduct[108] and a right to marriage and its associated benefits.[109] These holdings were consistent with the Court's reiteration in cases such as *Griswold v. Connecticut* that there exists a "private realm of family life which the state cannot enter."[110] While it remains unclear whether polyamory should be treated as a sexual orientation, the possibility raises questions about the constitutionality of restrictions on polyamorists.

99. *See* Goldfarb, *supra* note 2, at 159–60; Solomon, *supra* note 98.

100. *See* Goldfarb, *supra* note 2, at 159–60; Solomon, *supra* note 98.

101. *See* Goldfarb, *supra* note 2, at 160; Solomon, *supra* note 98.

102. *See, e.g.*, Goldfarb, *supra* note 2, at 161–66.

103. *See* Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1514 (2011); Elizabeth Cannon Lesher, Comment, *Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous*, 22 TUL. J.L. & SEXUALITY 127, 135–40 (2013); Sheff, *supra* note 10.

104. *See* Tweedy, *supra* note 103, at 1469; Lesher, *supra* note 103, at 137; Sheff, *supra* note 10.

105. Multiamory, *125–Researching Non-Monogamous Relationships (with Researcher Ryan Witherspoon)*, MULTIAMORY, at 11:46 (June 27, 2017), https://www.multiamory.com/podcast/125-researching-non-monogamous-relationships-with-researcher-ryan-witherspoon [https://perma.cc/G36N-EZJH].

106. *See* Tweedy, *supra* note 103, at 1499; Lesher, *supra* note 103, at 138; Sheff, *supra* note 10.

107. *See* 517 U.S. 620, 635–36 (1996); *see also* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

108. *Lawrence*, 539 U.S. at 578–79.

109. *See* United States v. Windsor, 570 U.S. 744, 774–75 (2013); Obergefell v. Hodges, 576 U.S. 644, 681 (2015); Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017).

110. 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

2. Discrimination and Legal Obstacles

Committed relationships with multiple partners in the form of bigamy and extramarital relationships have long been culturally and legally disfavored in the United States.[111] Laws against bigamy date back centuries, and in some states violation of these laws is a felony.[112] People in polyamorous relationships are frequently stereotyped as hypersexual, and their practices are deemed "barbaric" by those who object to deviations from traditional monogamous marriage.[113] Stigma against polyamorous relationship groups is a strong social force and a source of concern for many polyamorous people.[114]

This concern is warranted, as being known to be polyamorous "can still result in alienation from family and friends, physical attack or harassment, loss of a job or custody of a child, public degradation, and incarceration."[115] In one study, approximately 60% of nonmonogamous respondents reported experiencing at least one form of discrimination, harassment, or violence as a result of being nonmonogamous.[116] Over 25% reported experiencing three or more forms, including being targets of stalking and sexual assault.[117]

Even in the absence of such extreme consequences, polyamorous people may experience increased stress levels as a result of microaggressions such as being "asked intrusive questions" or being the target of "off-color jokes" and "negative assumptions."[118] These stressors can compound over time.[119] Stigma against polyamorous people and their relationships can affect even polyamorous people who keep their relationships secret.[120] Studies show that most polyamorous individuals fall into this category.[121] The psychological toll of concealing being polyamorous and trying to pass as monogamous can be a significant stressor itself.[122]

Despite the recognition of a right to marriage for same-sex couples,[123] people in polyamorous relationship groups of three or more still lack recognition of such a right, effectively disenfranchising them and "[e]ncoding second-class citizenship into marital laws."[124] Pairs of two within a polyamorous relationship group may marry, creating some legal rights and benefits among the relationship group, but this creates unequal legal distinctions within such relationships and may project a stratification of the importance of partners within the relationship

111. *See* Solomon, *supra* note 98.
112. *See id.*
113. Faucon, *supra* note 2, at 216.
114. SHEFF, *supra* note 3, at 218.
115. *Id.*
116. *125–Researching Non-Monogamous Relationships (with Researcher Ryan Witherspoon)*, *supra* note 105, at 10:25.
117. *Id.* at 10:45.
118. *Id.* at 09:27.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).
124. *See* SHEFF, *supra* note 3, at 284; Deborah Zalesne & Adam Dexter, *From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life*, 66 BUFF. L. REV. 909, 922 (2018).

which does not accurately represent the nature of the commitments among the individuals.[125] Because "[b]eing related always includes relationships based on . . . marriage" and "[z]oning codes almost always define the family to include any number of people who are 'related' to each other," allowing polyamorous marriages would enable married relationship groups to find housing in single-family zoned areas that they may be excluded from in the absence of a marital relationship.[126]

Parents in polyamorous relationships have lost custody of their own legal and biological children despite a lack of abuse or tangible harm to the children simply because others believe that polyamory is immoral.[127] Such was the case for April Divilbliss, whose child was taken away at the behest of the child's paternal grandmother after the grandmother discovered Divilbliss was in a polyamorous relationship when Divilbliss appeared on a reality television program.[128] The grandmother won custody even after Divilbliss moved out from the home she had shared with her partners and began living alone with her child.[129]

Loss of custody can also have a profound impact on partners of biological parents who have served a parental role for their partners' children.[130] In some jurisdictions, a former partner who acted as a nonbiological parental figure may be able to preserve their parental rights only if they have had a parent-like relationship with the child, including a requirement of prior cohabitation with the child.[131] An inability to cohabitate due to zoning exclusion could therefore prevent a polyamorous person who has otherwise served as a parental figure to a nonbiological child from pursuing parental rights.[132]

Attitudes disfavoring multiple-partner relationships sometimes evince racist origins, deeming the practice uncivilized because of its rarity in the West but commonality in other cultures.[133] These attitudes proliferated in the nineteenth century as Western ideals of monogamy were exported and reinforced around the world through colonialism.[134] They sometimes continue to reflect xenophobic fears of the age, such as an Islamophobic twenty-first-century conspiracy theory espoused by WorldNetDaily's founder that polygamist Muslims were working

125. *See* SHEFF, *supra* note 3, at 172–77.

126. *See* Bronin, *supra* note 15, at 5.

127. *See* Goldfarb, *supra* note 2, at 160–61; Elisabeth A. Sheff, *Child Custody Issues for Polyamorous Families*, PSYCH. TODAY (May 22, 2017), https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201705/child-custody-issues-polyamorous-families [https://perma.cc/6WSH-7JEG].

128. Multiamory, *171–Polyamory, Family, and Children (with Dr. Eli Sheff)*, MULTIAMORY, at 18:05 (May 15, 2018), https://www.multiamory.com/podcast/171-family-children-eli-sheff [https://perma.cc/9292-K75J]; SHEFF, *supra* note 3, at 59.

129. SHEFF, *supra* note 3, at 59.

130. *See, e.g.*, Jessica Burde, *The Child I Cannot Claim*, *in* STORIES FROM THE POLYCULE: REAL LIFE IN POLYAMOROUS FAMILIES 174, 174–75 (Elisabeth Sheff ed., 2015).

131. Multiamory, *167–Polyamory and the Law*, MULTIAMORY, at 39:32 (Apr. 17, 2018), https://www.multiamory.com/podcast/167-polyamory-and-the-law [https://perma.cc/NUV6-KZFX].

132. *Cf. id.* (explaining that cohabitation is a prerequisite for de facto parental rights in some jurisdictions).

133. JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT 65 (2019); Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

134. RICHARD BERNSTEIN, THE EAST, THE WEST, AND SEX: A HISTORY OF EROTIC ENCOUNTERS 183 (2009).

with same-sex couples to undermine the institution of marriage.[135] Given the racist and xenophobic motivations behind the enactment of much single-family zoning,[136] the association of negative stereotypes of polyamory and polygamy with people of color is pertinent to the discriminatory application of zoning against polyamorists.

Obstacles to polyamorous relationships themselves can be compounded by racial oppression.[137] Structural inequalities put people of color at a disadvantage when it comes to securing housing generally.[138] The fact that people of color are frequently subjected to higher levels of state surveillance than white people increases the chances that polyamorous relationships among them may be discovered and result in negative consequences.[139] Polyamorous people of color thus face extra challenges achieving housing security where racial discrimination intersects with discrimination against polyamorists.[140] Because people of color are commonly stereotyped as hypersexual, they may be reluctant to engage in polyamorous relationships in the first place to avoid reinforcing such stereotypes.[141]

For polyamorous partners seeking to immigrate to the United States, legal obstacles to cohabitation can begin at the national border. Being in a polyamorous relationship can impact the ability of a person to legally immigrate to the United States, remain in the United States, or assist a spouse in obtaining citizenship.[142] People practicing either bigamy or polygamy are prohibited from becoming naturalized citizens.[143] These prohibitions stem from concerns about the moral character of people engaged in such practices.[144] Similarly, a legal permanent resident practicing polygamy or convicted of bigamy can be deported as a consequence.[145]

In the case of a polyamorous relationship where one has multiple partners but is not married to multiple people, the relationship itself is not an automatic bar to immigration.[146] A United States citizen attempting to help a spouse immigrate, however, must undergo a probe into the legitimacy of the relationship, and the existence of other partners beyond the spouse may raise questions about whether the marriage is an additional legitimate relationship or a mere attempt to circumvent immigration policy.[147] This increased scrutiny on the marriage of

135. MICHAELS & JOHNSON, *supra* note 84, at 56.

136. *See supra* Subsection II.A.3.

137. *See* JANET W. HARDY & DOSSIE EASTON, THE ETHICAL SLUT: A PRACTICAL GUIDE TO POLYAMORY, OPEN RELATIONSHIPS AND OTHER FREEDOMS IN SEX AND LOVE 45–46 (3d ed. 2017).

138. *See* Dima Williams, *A Look at Housing Inequality and Racism in the U.S.*, FORBES (June 3, 2020, 11:17 AM), https://www.forbes.com/sites/dimawilliams/2020/06/03/in-light-of-george-floyd-protests-a-look-at-housing-inequality/?sh=694c136739ef [https://perma.cc/4CB3-LL46].

139. SHEFF, *supra* note 3, at 31–36.

140. *Id.*

141. *Id.*

142. Ilona Bray, *Will You Be Denied U.S. Citizenship Based on Polygamy, Bigamy, or Multiple Marriages?*, NOLO, https://www.nolo.com/legal-encyclopedia/will-you-be-denied-us-citizenship-based-polygamy-bigamy-multiple-marriages.html (last visited Sept. 30, 2022) [https://perma.cc/Q265-F3QE].

143. *Id.*; *167–Polyamory and the Law*, *supra* note 131, at 05:22.

144. *167–Polyamory and the Law*, *supra* note 131, at 05:50.

145. Bray, *supra* note 142.

146. *167–Polyamory and the Law*, *supra* note 131, at 07:17.

147. *Id.* at 07:52.

the prospective immigrant encourages an extra layer of discretion on behalf of polyamorous individuals to avoid public acknowledgment of their other partners.[148] A polyamorous citizen who is already married may have to divorce a present spouse in order to marry a foreign partner to allow them to immigrate.[149]

There are currently no state or federal employment protections and a dearth of local protections based on polyamorous relationship status.[150] This leaves polyamorous people vulnerable to being legally fired if their relationships are discovered by their employers.[151] In some cases, even casually mentioning having multiple partners to a coworker has been characterized as sexual harassment to justify dismissal.[152] Many employment contracts contain morality clauses which may allow an employer to fire an otherwise contractually protected employee if the employee's polyamorous relationship is deemed to be immoral in violation of such a clause.[153]

3. Legal Protections for Polyamorous Relationship Groups

Despite the legal obstacles people in polyamorous relationships face, there is an emerging trend in the law towards legitimization of their relationships and recognition of their rights.[154] In 2020, Utah amended its statute on polygamous marriage, also known as bigamy,[155] to reduce the practice from a felony offense to an infraction.[156] Infractions are treated as significantly less serious and do not carry the potential for imprisonment or the stigma of misdemeanors or felonies.[157] The amended statute instead makes the inducement of bigamy by fraud or coercion a third-degree felony.[158] The statute also makes bigamy a second-degree felony when a person engaged in bigamy commits certain other felonies or misdemeanors in furtherance of bigamy, such as criminal homicide, kidnapping, child abuse, or sexual battery.[159] Proponents of these changes argued that treating bigamy itself as a felony only served to empower bigamous abusers while disincentivizing victims in bigamous marriages from reporting abuse for fear of facing prosecutions themselves.[160]

148. *See id.* at 09:29.
149. *Id.* at 21:14.
150. *See id.* at 31:48.
151. *See* Elaine McArdle, *Polyamory and the Law*, HARV. L. TODAY (Aug. 6, 2021), https://clinics.law.harvard.edu/blog/2021/08/polyamory-and-the-law/ [https://perma.cc/S5U5-RTYN].
152. *171–Polyamory, Family, and Children (with Dr. Eli Sheff)*, *supra* note 128, at 37:24.
153. *Id.* at 39:35.
154. *See infra* notes 155–76 and accompanying text.
155. *See Bigamy*, BLACK'S LAW DICTIONARY (11th ed. 2019).
156. Joseph Wilkinson, *Polygamy Now Officially Decriminalized in Utah*, N.Y. DAILY NEWS (May 12, 2020, 9:35 PM), https://www.nydailynews.com/news/national/ny-polygamy-utah-decriminalized-20200513-64vq5ptw4bf6bi2fkijpfrpchu-story.html [https://perma.cc/W6LL-NRL5]; S.B. 102, 63d Leg., Gen. Sess., 2020 Utah Laws Ch. 260 (Utah 2020).
157. Common examples of infractions include traffic offenses. *See* Paul Bergman, *Felonies, Misdemeanors, and Infractions: Classifying Crimes*, NOLO, https://www.nolo.com/legal-encyclopedia/crimes-felonies-misdemeanors-infractions-classification-33814.html (last visited Sept. 30, 2022) [https://perma.cc/FF93-BDJ7].
158. UTAH CODE ANN. § 76-7-101(3) (West 2022).
159. UTAH CODE ANN. § 76-7-101(4) (West 2022).
160. *See* Solomon, *supra* note 98.

Beginning in 2020, some U.S. cities have passed ordinances to allow domestic partnerships between three or more people, facilitating a local degree of legal recognition for polyamorous relationship groups.[161] A domestic partnership is a legal relationship between committed but unmarried persons.[162] Establishing a domestic partnership was a popular method for same-sex couples to secure some of the rights and benefits associated with marriage and family in the years before the right of same-sex couples to marry was recognized.[163]

Since a right to marriage for groups of three or more people has not yet been recognized in any state in the United States, domestic partnerships can fulfill a similar function for polyamorous relationship groups as they did for same-sex couples, opening the door not only for tangible rights and benefits but also the reduced stigma that accompanies legal recognition.[164] Greater availability of domestic partnerships would foster the ability of polyamorous relationship groups to cohabitate in some single-family zoned areas since "[s]ome cities exempt residents in state-registered domestic partnerships from counting towards unrelated occupancy limits . . . ."[165]

In recent years, some states no longer restrict legal parenthood exclusively to two parents.[166] This can occur in situations where a nonbiologically associated adult is deemed a "de facto" parent based upon their relationship with a child, position in the household, and performance of parenting duties.[167] Other situations involving legal recognition of more than two parents have occurred in circumstances such as where a married lesbian couple conceives a child with the aid of a sperm donor and the donor retains legal parental rights in addition to those of both members of the couple.[168] So far, these developments have not resulted in recognition of legal parental rights for more than three parents of any child.[169] Such extensions of parental rights were not developed with respect to polyamorous parents in particular and may have limited applicability to such parents in their current form, but nonetheless represent a step towards recognition

161. Audrey McNamara, *Massachusetts City Officially Recognizes Polyamorous Relationships*, CBS NEWS (July 3, 2020, 12:06 PM), https://www.cbsnews.com/news/somerville-massachusetts-recognizes-polyamorous-relationships/ [https://perma.cc/VFS8-6GTL]; Press Release, Polyamory Legal Advoc. Coal., Cambridge Becomes 2nd US City to Legalize Polyamorous Domestic Partnerships, (Mar. 9, 2021), https://static1.squarespace.com/static/602abeb0ede5cc16ae72cc3a/t/604747971135b1744e8a4002/1615284120965/2021-03-08+PLAC+Press+Release.pdf?fbclid=IwAR2sMn9Cdcwr-Es7_cwlLtLJrzkyZKZCpd_lr-zz_v1G2MTS2yPpMbwpxhE [https://perma.cc/RJ7U-BMR4].

162. Melissa Heinig, *Domestic Partnerships*, NOLO, https://www.nolo.com/legal-encyclopedia/domestic-partnership-benefits-29916.html (last visited Sept. 30, 2022) [https://perma.cc/VTN6-PU6A].

163. *See id.*

164. *See* McNamara, *supra* note 161; Press Release, Polyamory Legal Advoc. Coal., *supra* note 161.

165. *See* Nisma Gabobe, *Living Together: It's Time for Zoning Codes to Stop Regulating Family Type*, SIGHTLINE INST., https://www.sightline.org/2020/02/26/living-together-its-time-for-zoning-codes-to-stop-regulating-family-type/ (Feb. 28, 2020) [https://perma.cc/VQM3-UMSF].

166. *See infra* notes 167–70 and accompanying text.

167. Gerard Virga, *What Are De Facto Parental Rights?*, VIRGA L. FIRM (June 13, 2020), https://www.thevirgalawfirm.com/blog/2020/june/what-are-de-facto-parental-rights-/ [https://perma.cc/MA4M-WDZA] ("In . . . states such as Maryland, the court has recognized de facto parents in certain situations and allowed them to seek custody or visitation rights with a child.").

168. Multiamory, *134–Legal Protections for Polyamorous Families (with Lawyer Diana Adams)*, MULTIAMORY, at 09:04 (Aug. 29, 2017), https://www.multiamory.com/podcast/134-legal-protections-for-polyamorous-families-with-lawyer-diana-adams [https://perma.cc/5PGN-VFYY].

169. *Id.* at 08:48.

of more than two legal parents which gives hope to polyamorous parents of gradual change in favor of their legal parental rights.[170]

As for marriage, a constitutional right to marry multiple partners has not been recognized, but the precedent set by the Supreme Court in *Obergefell v. Hodges* may support it.[171] In his dissent in *Obergefell*, Chief Justice Roberts drew parallels between same-sex couples and people in polyamorous relationships.[172] He argued that the qualities which the majority identified in same-sex couples and their families apply equally to those in polyamorous relationships and their families and suggested that if sex was an arbitrary barrier to marriage, so too was number.[173] While a majority-conservative Supreme Court[174] may be unlikely to extend marriage rights in this fashion, polyamorists are nonetheless encouraged by *Obergefell*.[175]

In the absence of legally recognized marriage, many participants in polyamorous relationships use other legal instruments such as Limited Liability Companies ("LLCs"), trusts, wills, and guardianship agreements to manage the rights of multiple partners in property, parenting, and inheritance.[176] These legal maneuvers can be used to protect the interests of partners in circumstances such as the dissolution of the relationship or the death of one or more of the other partners involved.[177] LLCs, however, are rarely a cost-effective and efficient solution for polyamorous relationship groups that do not have a high net worth.[178] Similarly, because most of these alternatives require complex legal planning and documentation,[179] they may be inaccessible to those who lack the financial resources to fund such preparation of legal instruments, leaving less affluent polyamorous relationship groups without such protections.[180] Lawyers who specialize in helping polyamorous people formulate and formalize such arrangements are few and far between to begin with.[181]

170. *Id.* at 09:18; Solomon, *supra* note 98.

171. *See* 576 U.S. 644, 704–05 (2015) (Roberts, C.J., dissenting); Grossman & Friedman, *supra* note 5.

172. *Obergefell*, 576 U.S. at 704–05 (Roberts, C.J., dissenting).

173. *Id.*

174. *See* Ariane de Vogue, *The Year Supreme Court Conservatives Made Their Mark*, CNN (Dec. 28, 2021, 10:03 AM), https://www.cnn.com/2021/12/28/politics/the-year-supreme-court-conservatives-made-their-mark/index.html [https://perma.cc/N4WQ-9GBM].

175. *See* Solomon, *supra* note 98; Grossman & Friedman, *supra* note 5.

176. *See* Solomon, *supra* note 98; Steve Friess, *Marriage, Deconstructed: The Next Battle for Marriage Equality Could Mean the End of Marriage*, MIC (June 4, 2018), https://www.mic.com/articles/189531/marriage-deconstructed-the-next-battle-for-marriage-equality-could-mean-the-end-of-marriage [https://perma.cc/Z6Q9-X8UV]; RAVEN KALDERA, PAGAN POLYAMORY: BECOMING A TRIBE OF HEARTS 134–35 (2005).

177. SHEFF, *supra* note 3, at 172–73.

178. *134–Legal Protections for Polyamorous Families (with Lawyer Diana Adams)*, *supra* note 168, at 12:03.

179. SHEFF, *supra* note 3, at 173.

180. *Id.*

181. *167–Polyamory and the Law*, *supra* note 131, at 03:30.

III. ANALYSIS

A. Single-Family Zoning Impacts on Polyamorous Relationship Groups

Some single-family zoning laws effectively prohibit the ability of polyamorous relationship groups to cohabitate or limit the number involved who may.[182] Such zoning restrictions limit the total number of individuals living together who are unrelated by blood or marriage to two, which allows for unmarried couples but prevents polyamorous relationship groups of as few as three people from sharing a home in the area.[183] Some localities limit the number of unrelated individuals to three, four, or other numbers, which could allow for polyamorous relationship groups of some sizes but not others to live together in the area.[184]

Other zoning restrictions allow for more numerous groups of individuals unrelated by blood or marriage to cohabitate, but place restrictions on how those individuals must operate together, such as dictating that they maintain "a single household budget" and "[p]repare food and eat together regularly."[185] These kinds of restrictions are not imposed on those who cohabitate with spouses and blood relatives, who are free to maintain separate finances and eat separately without violating the restrictions.[186] Polyamorous relationship groups could therefore cohabitate under such restrictions but only if their lifestyle met requirements that those related by blood and marriage are exempt from.[187]

Single-family zoning restrictions such as these have been selectively enforced to force polyamorous households out of single-family neighborhoods.[188] Housing discrimination of this sort is one of "the primary forms of discrimination that affect polyamorous people."[189] Fears surrounding the discriminatory application of single-family zoning restrictions were stoked by the headline-grabbing case[190] of the so-called "Scarborough 11."[191] The Scarborough 11 do not identify as polyamorous,[192] but they gained attention from academics concerned with the impacts of zoning on polyamorous groups[193] when their household of eight

182. *See* Bronin, *supra* note 15, at 7–9.
183. *Id.* at 9.
184. *See id.*
185. *Id.* at 10.
186. *See id.* at 9–12.
187. *See id.*
188. Sheff, *supra* note 10.
189. *171–Polyamory, Family, and Children (with Dr. Eli Sheff)*, *supra* note 128, at 32:28.
190. *See* Susan Campbell, *Scarborough 11 Keeps Family at the Center*, HARTFORD COURANT (Apr. 9, 2015, 10:09 AM), https://www.courant.com/opinion/op-ed/hc-op-campbell-scarborough-hartford-family-0512-20150408-column.html [https://perma.cc/HR49-V2PT]; Jim McKeever, *City of Hartford Drops Home-Sharing Suit Against 'Scarborough 11,'* FOX 61, https://www.fox61.com/article/news/local/outreach/awareness-months/city-of-hartford-drops-home-sharing-suit-against-scarborough-11/520-2d6681eb-bc9d-45ee-a3e7-ebf6772c597b (Oct. 28, 2016, 12:52 PM) [https://perma.cc/3ZGD-XEZJ].
191. *See* Grossman & Friedman, *supra* note 5; Sheff, *supra* note 10.
192. Sheff, *supra* note 10.
193. *See id.*; Grossman & Friedman, *supra* note 5.

adults and three children who together formed a "functional family" received a cease-and-desist letter ordering them to vacate their home.[194]

The emphasis in zoning ordinances on defining familial and household groups makes the issue "particularly salient" for polyamorous people.[195] The increased difficulty of finding housing with partners due to single-family zoning ordinances can be a source of trauma and stress for those in polyamorous relationships.[196] As a lack of affordable housing drives more people towards cohabitation, some localities are tightening restrictions further and—if one "unrelated" person resides with them—classifying as "unrelated" whole groups of people who would have otherwise qualified as related.[197]

B. Fundamental Rights: Contrasting Scrutiny in Village of Belle Terre *and* Moore

In *Village of Belle Terre*, the Court noted that while three or more unrelated people "might well have been included" in a definition of "family," such line-drawing was ultimately a matter of legislative discretion.[198] The Court based that conclusion in part upon the absence of an implicated fundamental right in *Village of Belle Terre*, which the Court contrasted with cases implicating voting rights, the right of association, and rights of privacy.[199]

Justice Marshall dissented, arguing that rights of privacy, association, and household formation were implicated by the restriction.[200] As explained in his dissenting opinion, laws which impinge on fundamental rights "can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest."[201] This places "the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn . . . upon the party seeking to justify the burden."[202]

194. *See* Kate Redburn, *Why Are Zonings Laws Defining What Constitutes a Family?*, BLOOMBERG CITYLAB (June 17, 2019, 7:47 AM), https://www.bloomberg.com/news/articles/2019-06-17/zoning-law-shouldn-t-define-what-makes-a-family [https://perma.cc/NR5F-CSF9]; Bronin, *supra* note 15, at 1–2. The city eventually dropped the suit against the Scarborough 11 "citing costs." Redburn, *supra*.

195. Grossman & Friedman, *supra* note 5.

196. *See* JESSICA FERN, POLYSECURE: ATTACHMENT, TRAUMA AND CONSENSUAL NONMONOGAMY 153 (2020).

197. *See, e.g.*, Katie Balevic, *A Kansas City Voted Unanimously to Ban Co-Living Rentals, Effectively Making Roommates Illegal in Some Zoning Districts*, BUS. INSIDER (May 1, 2022, 8:34 AM), https://www.businessinsider.com/kansas-city-unanimously-ban-co-living-rental-units-roommates-illegal-2022-5 [https://perma.cc/7A49-D5T7]; Betsy Webster & Nathan Vickers, *City of Shawnee Bans Co-Living Rentals*, KCTV5, https://www.kctv5.com/2022/04/26/city-shawnee-bans-co-living-rentals/ (Apr. 28, 2022, 7:14 AM) [https://perma.cc/C98L-ABJ6].

198. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

199. *Id.* at 7–8 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

200. *Id.* at 15 (Marshall, J., dissenting).

201. *Id.* at 18 (citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).

202. *Id.* (citing Mem'l Hosp. v. Maricopa County, 415 U.S. 250 (1974); Speiser v. Randall, 357 U.S. 513, 525–26 (1958)).

Justice Marshall reasoned that Belle Terre could not justify the zoning ordinance under that standard because the ordinance was both underinclusive and overinclusive.[203] He noted that despite the ostensible objective of the restriction to limit population density and related issues of safety and traffic, a household of twenty blood relatives could live together in a single dwelling.[204] The lack of any absolute cap upon the number of blood-related individuals who could live together or upon the number of income earners or automobiles a household could have were underinclusive aspects of the ordinance because the ordinance lacked a method to fulfil its purposes with respect to such factors.[205]

Justice Marshall saw the ordinance as likewise overinclusive because it would apply to households which would not frustrate the ordinance's purposes, such as a household of three unrelated retirees with no vehicles.[206] He believed these flaws in the ordinance should render it unconstitutional since such an overinclusive and underinclusive ordinance is not narrowly tailored to its justifiable goals.[207] While the majority was not persuaded a fundamental right was implicated in *Village of Belle Terre*, a similar argument to Justice Marshall's found purchase a few years later when the Court addressed *Moore v. City of East Cleveland*.[208]

In *Moore*, the plurality applied strict scrutiny because fundamental rights were implicated by the ordinance which did not allow for multigenerational extended families like Moore's to live together.[209] The plurality recited a long history of cases expounding the fundamental liberties of family formation and family life to highlight the impropriety of such an invasion into an extended family.[210] The plurality called limiting substantive due process rights to nuclear families "arbitrary."[211]

In identifying extended family cohabitation as rooted in the traditions of the nation, the plurality pointed out that millions of citizens have grown up in such households.[212] The plurality quoted Justice Harlan to reiterate that "tradition is a living thing," that "decision[s] which build[] on what has survived [are]

203. *Id.*
204. *Id.* at 16.
205. *See id.* at 18–19.
206. *Id.* at 19.
207. *Id.* at 19–20.
208. *Compare id.* at 15–20, *with* Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977).
209. *Moore*, 431 U.S. at 498–500.
210. *Id.* at 499 (citing Cleveland Bd. of Educ. V. LaFleur, 414 U.S. 632, 639–40 (1974); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Roe v. Wade, 410 U.S. 113, 152–53 (1973); Wisconsin v. Yoder, 406 U.S. 205, 231–33 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Griswold v. Connecticut, 381 U.S. 479 (1965); *id.* at 495–96 (Goldberg, J., concurring); *id.* at 502–03 (White, J., concurring); Poe v. Ullman, 367 U.S. 497, 542–44, 549–53 (1961) (Harlan, J., dissenting); Loving v. Virginia, 388 U.S. 1, 12 (1967); May v. Anderson, 345 U.S. 528, 533 (1953); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)). Although *Roe v. Wade*, which was later overruled in *Dobbs v. Jackson Women's Health Organization*, was among the many cases cited by the *Moore* Court, the *Dobbs* Court "emphasize[d] that [the *Dobbs*] decision concern[ed] the constitutional right to abortion and no other right" and that "[n]othing in [the *Dobbs*] opinion should be understood to cast doubt on precedents that do not concern abortion." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 (2022).
211. *Moore*, 431 U.S. at 502–03.
212. *Id.* at 504–05.

likely to be sound," and that the liberty of substantive due process "is a rational continuum."[213]

Mirroring the reasoning of Justice Marshall's *Village of Belle Terre* dissent, the plurality pointed out that the ordinance was both overinclusive and underinclusive, since it barred this four-person household but would not bar an immediate family of much greater size.[214] The plurality therefore held that the restriction was not narrowly tailored to the valid objectives of preventing overcrowding sufficiently to justify invading the sphere of family life by defining who could count and who could not.[215]

Given that both the Belle Terre and East Cleveland ordinances had underinclusive and overinclusive aspects,[216] the difference in outcomes is best explained by the differing levels of scrutiny applied.[217] The key to applying these cases to other conflicts involving single-family zoning ordinances thus lies in determining whether the ordinances implicate fundamental rights such that the higher degree of scrutiny is triggered.[218]

C. Polyamorous Relationship Groups in the Constitutional Framework

Polyamorous relationship groups do not directly mirror either the student housemates of *Village of Belle Terre* or the blood-related extended family of *Moore*. They do have similarities and differences to each, however.[219] Although the Supreme Court has recognized that a definition of family in a zoning ordinance need not be as broad and inclusive as is possible in order to survive judicial scrutiny,[220] the Court has also clarified that "the usual judicial deference to the legislature is inappropriate" when a zoning ordinance cuts into the deeply personal arena of family life.[221] While no rights specific to polyamorous relationships per se are deeply rooted in the history of the nation, many deeply rooted rights are necessarily implicated by polyamorous relationships, such as rights related to romantic and sexual relationships, childrearing, and family formation.[222]

213. *Id.* at 501–02 (quoting *Poe*, 367 U.S. at 542–43 (Harlan, J., dissenting)).
214. *Id.* at 499–500.
215. *Id.* at 506–07.
216. *Id.* at 499–500; Village of Belle Terre v. Boraas, 416 U.S. 1, 16–19 (1974) (Marshall, J., dissenting).
217. *Compare Village of Belle Terre*, 416 U.S. at 7–8, *with Moore*, 431 U.S. at 498–500.
218. *See Village of Belle Terre*, 416 U.S. at 7–8; *Moore*, 431 U.S. at 498–500.
219. *See infra* Subsections III.C.1, III.C.2, III.C.3.
220. *Village of Belle Terre*, 416 U.S. at 8 ("[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.").
221. *Moore*, 431 U.S. at 499.
222. *See infra* Subsections III.C.1, III.C.2, III.C.3.

1. Romantic and Sexual Relationships

Like the housemates in *Village of Belle Terre*, polyamorous partners are not related by blood.[223] But they do share intimate associations, which the housemates in *Village of Belle Terre* did not.[224] These intimate relationships typically entail sexual intercourse and deep emotional bonds.[225] Rights to form and nurture these kinds of attachments have been deemed fundamental and protected by the courts many times over.[226] Regardless of the marital rights of polyamorous relationship groups, "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[227]

The Supreme Court stated in *Lawrence v. Texas* that laws which have the consequence of "touching upon the most private human conduct, sexual behavior, and in the most private of places, the home," infringe on this fundamental liberty.[228] The Court's holding "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[229] Zoning ordinances that define family boundaries according to a cultural preference for monogamy run afoul of this very rule.[230]

In striking down prohibitions on same-sex sexual intercourse in *Lawrence* as unconstitutional, the Court found that arguments supporting such prohibitions based on historical criminalization were undermined by "a pattern of nonenforcement."[231] Similarly, while opponents of polyamorous rights may point to the historic criminalization of extramarital and polygamous relations, these offenses are often left unprosecuted unless accompanied by other criminal activity.[232] The *Lawrence* Court also noted the gradual decriminalization of same-sex sexual intercourse among the states as evidence of the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[233] Moves toward the decriminalization of polygamy[234] likewise provide evidence that liberty gives protection to nonmonogamous persons in conducting their private lives.

223. *See Village of Belle Terre*, 416 U.S. at 2–3 ("These six are students at nearby State University at Stony Brook and none is related to the other by blood, adoption, or marriage."); Goldfarb, *supra* note 2, at 165–66 ("[P]olyamorists typically emphasize concrete concerns, like . . . housing problems caused by limits on the number of unrelated residents living together.").

224. Lesher, *supra* note 103, at 144 ("[T]here are protections against discrimination toward unmarried couples generally, which the Court in *Belle Terre* did not deal with directly because there was no sexual or romantic relationship between the roommates involved.").

225. *See generally* SHEFF, *supra* note 3, at 1–43.

226. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003); Obergefell v. Hodges, 576 U.S. 644, 680 (2015).

227. *Lawrence*, 539 U.S. at 565.

228. *Id.* at 567.

229. *Id.*

230. *See* Bronin, *supra* note 15, at 8.

231. *Lawrence*, 539 U.S. at 573.

232. *See, e.g.*, Harmeet Kaur, *Bigamy Is No Longer a Felony in Utah*, CNN (May 12, 2020, 5:03 PM), https://www.cnn.com/2020/05/12/us/bigamy-decriminalized-utah-trnd/index.html [https://perma.cc/6KFA-ET2N].

233. *Lawrence*, 539 U.S. at 572.

234. *See* Wilkinson, *supra* note 156.

2. Childrearing

Many polyamorists also assist in the parenting of the children of partners, sometimes even creating legal custody arrangements to ensure they remain involved in coparenting their nonbiological children even if they separate from their partners or the biological parent dies.[235] Childrearing has likewise long been a protected fundamental right.[236] In *Meyer v. Nebraska*, the Supreme Court recognized that the freedom to "establish a home and bring up children" was among the freedoms inherent in the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment.[237] The Court struck down the statute at issue because the activity it prohibited was not "so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed."[238] In *Pierce v. Society of Sisters*, the Court reiterated the fundamental nature of "the liberty of parents and guardians to direct the upbringing . . . of children under their control."[239]

Because single-family zoning ordinances may restrict the ability of polyamorous partners to cohabitate and therefore to coparent, such ordinances unconstitutionally interfere with a fundamental right if they cannot be supported as nonarbitrary or reasonable.[240] Unless evidence can be offered that a parent is unfit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[241] These fundamental decisions include determinations as to which individuals other than a child's biological or legal parents or guardians should be allowed to be involved in the raising of the child.[242] These were precisely the type of liberties threatened by the ordinance in *Moore* which led the Court to hold that the ordinance was unconstitutional.[243]

Like the millions living in extended-family households described in *Moore*, estimates show that between half a million and several million people in the United States are or have been in polyamorous relationships.[244] Just as an extended family provides extra support for childrearing, so too may polyamorous households mean more adults are partaking in childcare responsibilities, supervising, spending quality time with children, and serving as role models and sources of advice and assistance.[245] The open communication required to maintain a polyamorous relationship also fosters households in which children are

235. *See* SHEFF, *supra* note 3, at 166–71; Solomon, *supra* note 98.
236. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
237. 262 U.S. 390, 399 (1923).
238. *Id.* at 403.
239. 268 U.S. at 534–35.
240. *See Meyer*, 262 U.S. at 399–403; *see also* Bronin, *supra* note 15, at 21.
241. Troxel v. Granville, 530 U.S. 57, 68–69 (2000).
242. *See id.* at 68–75.
243. *See* Moore v. City of East Cleveland, 431 U.S. 494, 498–01 (1977).
244. Faucon, *supra* note 2, at 188; Goldfarb, *supra* note 2, at 161; SHEFF, *supra* note 3, at 3.
245. Zalesne & Dexter, *supra* note 124, at 954–55.

instilled with a greater understanding of "emotional intimacy and communication skills."[246]

While concerns persist that children of polyamorous families will face stigma,[247] the possibility of such discrimination from third parties is not itself a sufficient justification for infringing on the fundamental liberties associated with parenthood.[248] As noted by sociologist and polyamory researcher Dr. Elisabeth "Eli" Sheff, when young adults who were raised in polyamorous families during their childhoods are asked whether they would have rather had a different family, they routinely answer that they would not.[249] Research suggests children in multiparent households experience comparable outcomes regardless of whether their parents are monogamous or polyamorous.[250]

3. Defining Family

While polyamorous relationship groups cannot presently legally marry, courts have long recognized that formal marriage or adoption is not necessary to make unrelated individuals a family.[251] The Supreme Court has stated that "[t]he integrity of the family unit has found protection in the Due Process Clause [and] Equal Protection Clause of the Fourteenth Amendment [as well as in] the Ninth Amendment"[252] and that "the law [has not] refused to recognize those family relationships unlegitimized by a marriage ceremony."[253] The Court has likewise recognized the precariousness of the task of imposing a single definition of family in the modern age, noting that "[t]he demographic changes of the past century make it difficult to speak of an average American family."[254]

The rising popularity of polyamorous relationships is just another step in the continuing demographic changes among American families from the nuclear families of the past to families of many legally recognized forms including extended families, families headed by single parents, families which have been reconstituted through divorce, and families headed by same-sex couples.[255] Both proponents and detractors alike view recognition of polyamorous relationships as a logical extension of the reasoning that recognized the rights of same-sex

246. Press Release, Polyamory Legal Advoc. Coal., *supra* note 161.

247. SHEFF, *supra* note 3, at 218.

248. *Cf.* Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984) (The Court refused to deny a mother custody of her child based on the stigma the child would suffer from remaining in an interracial household, stating: "The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.").

249. *171–Polyamory, Family, and Children (with Dr. Eli Sheff)*, *supra* note 128, at 10:19.

250. MICHAELS & JOHNSON, *supra* note 84, at 71.

251. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53–54 (N.Y. 1989).

252. *Stanley*, 405 U.S. at 651 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)).

253. *Id.*

254. Troxel v. Granville, 530 U.S. 57, 63 (2000).

255. SHEFF, *supra* note 3, at 284 ("As numerous divorce studies illustrate, for at the least 40 percent to 50 percent of all marriages that experience a 'disruption,' one size no longer fits all, and blended, serial monogamous, same-sex, and polyamorous families are here to stay.").

couples to marry and form families in accordance with their values.[256] The "average American family" remains an elusive concept, but in a day and age where a greater proportion of Americans are presently in consensual nonmonogamous relationships in the United States than have red hair,[257] polyamorous families are not extreme outliers.

The trend in the law towards extending various legal rights and providing recognition for polyamorous households[258] further supports the argument that these households should be defined as families. In *Obergefell*, the Court noted that legal recognition of parental rights by states "provide[d] powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[259] Similar reasoning could suggest that the recognition of de facto parents and the applicability of legal parenthood for more than two parents provide confirmation that polyamorous relationship groups too can constitute families.[260]

The advent of domestic partnerships for more than two partners provides additional evidence from the law about who can be considered family.[261] When Somerville, Massachusetts legalized polyamorous domestic partnerships, Councilor Lance Davis stated "when society and government tries to define what is or is not a family, we've historically done a very poor job of doing so" as a justification for allowing polyamorists to define family for themselves.[262] Under some estimates, polyamory is as common as being LGBTQ+,[263] as those whose families were recognized in *Obergefell* were.[264]

This line of reasoning was recently embraced by a New York court in *West 49th Street, LLC v. O'Neill*, a dispute over whether a cohabitant who alleged he had been in a polyamorous relationship with a deceased lessee had a right to a renewal lease.[265] The court analogized the case to *Braschi v. Stahl Associates Company*, a 1989 case in which "[t]he New York State Court of Appeals became the first American appellate court to recognize that a nontraditional, two-person, same-sex, committed, family-like relationship is entitled to legal recognition, and that the nontraditional family member is entitled to receive noneviction protections," predating state and federal legalization of same-sex marriages by well over a decade.[266] The court in *O'Neill* questioned why polyamorous relationships

256. *See, e.g.*, Solomon, *supra* note 98; Obergefell v. Hodges, 576 U.S. 644, 704–05 (2015) (Roberts, C.J., dissenting).

257. *125–Researching Non-Monogamous Relationships (with Researcher Ryan Witherspoon)*, *supra* note 105, at 05:25.

258. *See supra* Subsection II.B.3.

259. *Obergefell*, 576 U.S. at 668.

260. *See supra* notes 167–68 and accompanying text; *see also 167–Polyamory and the Law*, *supra* note 131, at 40:53.

261. *See* McNamara, *supra* note 161.

262. *Id.*

263. *Id.*

264. *See generally Obergefell*, 576 U.S. 644.

265. *See generally* W. 49th St., LLC v. O'Neill, No. 301352/2022, 2022 WL 4392993 (N.Y. Civ. Ct. Sept. 23, 2022); Greg Owen, *New York Judge Rules in Favor of Polyamorous Relationships*, LGBTQ NATION (Oct. 2, 2022), https://www.lgbtqnation.com/2022/10/new-york-judge-rules-favor-polyamorous-relationships/ [https://perma.cc/G79Z-CNS8].

266. *O'Neill*, 2022 WL 4392993, at *3.

should be analyzed differently, "except for the very real possibility of implicit majoritarian animus."[267] The court denied summary judgment and held that "[t]he existence of a triad should not automatically dismiss respondent's claim to noneviction protections."[268] In support of this holding, the court noted changes in modern family structure, the trend towards downgrading the criminality of bigamy, the advent of polyamorous domestic partnerships in some cities, and the logic of Chief Justice Roberts's *Obergefell* dissent in questioning the legal distinction between same-sex and polyamorous relationships.[269]

IV. RECOMMENDATION

Under existing precedent, polyamorous relationship groups are likely to be considered families with liberties protected by substantive due process under the Fourteenth Amendment for zoning purposes[270] and therefore cannot be excluded from single-family housing zones. Exclusion of polyamorous relationship groups infringes on their fundamental rights to form intimate associations, raise children, and make choices concerning their familial bonds.[271] This discriminatory exclusion limiting the housing options available to polyamorous relationship groups is particularly troubling in light of the affordable housing crisis affecting much of the United States.[272]

To avoid unconstitutional discrimination and provide clear guidelines for all involved parties, existing housing antidiscrimination protections should be expanded to include relationship structure, preventing people from being denied housing on the basis of the number of partners in their relationship.[273] This allows localities to continue to pursue legitimate zoning objectives while preventing its discriminatory application against polyamorous relationship groups. Polyamorous advocacy organizations have encouraged localities to add relationship structure protections to existing antidiscrimination legislation.[274] Such protections are unlikely to take hold at the state level in the near future, but localities can lead the way with protective ordinances in the interim.[275]

One potential objection to enacting such protections is that efforts to prevent overcrowding and maintain clean, quiet neighborhoods for families may be thwarted by accommodating larger polyamorous relationship groups. This is

267. *Id.* at *5.
268. *Id.* at *8–9.
269. *Id.* at *6–7.
270. *See supra* Section III.C.
271. *See supra* Section III.C.
272. *171–Polyamory, Family, and Children (with Dr. Eli Sheff)*, *supra* note 128, at 34:40.
273. *See, e.g.*, Matthew S. Bajko, *Political Notebook: SF Sex-Positive Community Courts City Hall*, BAY AREA REP. (May 9, 2018), https://www.ebar.com/news/news/259706 [https://perma.cc/A4FK-566N].
274. *See, e.g.*, Zoe Duff, *District of Columbia's Right to Family Amendment Act of 2021 Initiative*, CANADIAN POLYAMORY ADVOC. ASS'N (Feb. 1, 2021), https://polyadvocacy.ca/district-of-columbias-right-to-family-amendment-act-of-2021-initiative/ [https://perma.cc/NMN5-FTBF] (encouraging support of proposed legislation to amend the DC Human Rights Act of 1977 to include "relationship structure" as a protected class). The DC Human Rights Act of 1977 contains prohibitions against housing discrimination. D.C. CODE § 2-1402.21 (2021).
275. *167–Polyamory and the Law*, *supra* note 131, at 32:03.

unlikely to pose a significant problem since such networks of partners numbering in the tens and twenties "do not generally cohabitate as a [single] unit" and generally do not consider themselves families like smaller relationship groups often do.[276]

In the uncommon instances in which such sizable groups consider themselves families and cohabitate as a single unit, the permissible zoning objectives are not better served by excluding such families while allowing families of the same size that are linked by blood and marriage.[277] Recognizing that limiting the number of unrelated people who may live together is an overinclusive and underinclusive means of accomplishing the constitutionally valid objectives of zoning, the high courts of California, Michigan, New Jersey, and New York have struck down zoning ordinances that restricted families based upon blood and legal relationships.[278]

One might argue that making allowances for the cohabitation of polyamorous relationship groups undermines the legitimate objective of reducing transiency since more partners may come and go. This is, however, another example of an objective that is pursued in an overinclusive and underinclusive fashion by the use of single-family zoning ordinances against the polyamorous.[279] Polyamorous relationships can be stable, long-term arrangements posing a minimal risk of transiency.[280] Nor are monogamous people immune to transiency, as many engage in "serial monogamy," the practice of having many relationships though in succession rather than at once.[281] Individuals and families not excluded by single-family restrictions may also move frequently.[282] Studies show significant relocation among American families, with half of families changing

276. SHEFF, *supra* note 3, at 15–16.

277. Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting) ("[The zoning ordinance at issue] permit[ted] any number of persons related by blood or marriage, be it two *or twenty*, to live in a single household . . . ." (emphasis added)).

278. *See* City of Santa Barbara v. Adamson, 610 P.2d 436, 440–42 (Cal. 1980) ("[A]t best, density control is achieved quite indirectly, if at all, by regulating only the size of unrelated households."); Charter Twp. of Delta v. Dinolfo, 351 N.W.2d 831, 840–43 (Mich. 1984) ("Under the instant ordinance, twenty male cousins could live together, motorcycles, noise, and all, while three unrelated clerics could not. A greater example of over- and under-inclusiveness we cannot imagine."); State v. Baker, 405 A.2d 368, 371–75 (N.J. 1979) ("[S]uch classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal."); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1243 (N.Y. 1985) ("Manifestly, restricting occupancy of single-family housing based generally on the biological or legal relationships between its inhabitants bears no reasonable relationship to the goals of reducing parking and traffic problems, controlling population density and preventing noise and disturbance . . . .").

279. *See infra* notes 280–83 and accompanying text.

280. *See* Michael Castleman, *Why Many Long-Term Polyamorous Couples Thrive*, PSYCH. TODAY (Oct. 16, 2021), https://www.psychologytoday.com/us/blog/all-about-sex/202110/why-many-long-term-polyamorous-couples-thrive [https://perma.cc/MX9P-LYYS]; Joe Duncan, *Long-Term Polyamory Success*, MEDIUM (Dec. 11, 2019), https://medium.com/moments-of-passion/long-term-polyamory-success-14eee3660ba5 [https://perma.cc/8F3N-GB4H].

281. *See* Katherine Woodward Thomas, *Why Serial Monogamy Is the New Marriage*, GLAMOUR (May 21, 2015), https://www.glamour.com/story/serial-monogamy-marriage-conscious-uncoupling [https://perma.cc/2YUM-E92G]; Sian Ferguson, *Are You a Serial Monogamist? Signs, Causes, and Breaking the Cycle*, PSYCH CENT. (Nov. 9, 2021), https://psychcentral.com/health/serial-monogamist [https://perma.cc/LAB8-4L32].

282. *See* Riordan Frost, *Who Is Moving and Why? Seven Questions About Residential Mobility*, JOINT CTR. FOR HOUS. STUD. HARV. UNIV. (May 4, 2020), https://www.jchs.harvard.edu/blog/who-is-moving-and-why-seven-questions-about-residential-mobility [https://perma.cc/9T3T-EWVC].

residence every five years and an average of 11.7 moves per person over a lifetime.[283]

Objections to excepting polyamorous relationship groups are further weakened by the fact that numerous exceptions exist to allow an unrestricted number of unrelated servants to live with a family in a single home.[284] Exceptions to the blood-or-legal-relationship requirement for domestic servants are not uncommon in single-family zoning ordinances.[285] This unequal treatment between servants and other groups of unrelated individuals such as polyamorous relationship groups "appear[s] to present equal protection questions"[286] which could be avoided in the polyamorist context with antidiscrimination protections. As summarized by Dr. Sheff, "The laws have got to change to support society as it is, unless that's not why we have laws and policies. If we want our laws and policies to harass people and make poor people's lives difficult, then we should absolutely keep those housing laws as they are."[287] These protections would eliminate this classist double standard.

Such protections would remain important where polyamorous domestic partnerships have become legally recognized and even if polyamorous marriage may someday be legalized, contrary to the supposition that such developments may render protections redundant.[288] Polyamorous families may not wish to be bound by such legal relationships for any number of personal reasons while otherwise continuing to operate as a family.[289] Some consider marriage itself to be an inherently flawed institution that reinforces patriarchal norms,[290] and others consider it an imposition of government's preferred arrangement of domesticity.[291] For those polyamorous relationship groups who would embrace marriage, these antidiscrimination measures would add another layer of protection against their legally recognized families otherwise being victims of housing discrimination on the basis of being polyamorous notwithstanding their legal legitimacy.

One could argue that adding protections based on relationship structure may be inadvisable because government may intend to promote policies favoring

283. *See id.*; DAVID BRUNORI, LOCAL TAX POLICY: A FEDERALIST PERSPECTIVE 19 (2003); *Calculating Migration Expectancy Using ACS Data*, U.S. CENSUS BUREAU (Dec. 3, 2021), https://www.census.gov/topics/population/migration/guidance/calculating-migration-expectancy.html [https://perma.cc/P4VG-NSZQ].

284. *See 171–Polyamory, Family, and Children (with Dr. Eli Sheff)*, *supra* note 128, at 32:37.

285. *See id.*; *see also, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 2 (1974); City of Santa Barbara v. Adamson, 610 P.2d 436, 438–39 (Cal. 1980).

286. *Adamson*, 610 P.2d at 439. The Supreme Court of California noted the distinction disapprovingly, adding, "Where then, according to the ordinance, might they reside together? Apparently . . . if any five or less of them were acceptable as masters, perhaps the others then could sign on as servants." *Id.* at 438–39.

287. *171–Polyamory, Family, and Children (with Dr. Eli Sheff)*, *supra* note 128, at 35:32.

288. *See infra* notes 289–91 and accompanying text.

289. *See* Friess, *supra* note 176.

290. SHEFF, *supra* note 3, at 89 ("[H]e had been clear from the beginning about his disdain for marriage as a patriarchal institution designed to give men ownership over women and the ability to hand property down to male children the men are certain that they fathered.").

291. *See* HARDY & EASTON, *supra* note 137, at 223; Adrienne Maree Brown, *On Nonmonogamy*, *in* PLEASURE ACTIVISM: THE POLITICS OF FEELING GOOD 409, 412 (Adrienne Maree Brown ed., 2019).

monogamy since certain studies indicate monogamy is beneficial for families.[292] This begs the question: if polyamory is allowed among consenting adults,[293] what is the benefit to their families of making housing difficult to obtain? Furthermore, relationship structure protections would not be endorsements of nor favoritism towards polyamory. Antidiscrimination provisions are not special rights or favoritism; they "are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[294]

The elimination of single-family zoning in its entirety would also prevent polyamorous relationship groups from being excluded from neighborhoods because the structure of their relationships as the determination of what constitutes one "family" would be rendered moot. Backlash against single-family zoning has led to elimination of that class of zoning in certain parts of the United States, including, for example, the State of Oregon.[295] Nevertheless, the constitutional validity of single-family zoning in general persists,[296] as the issue has not been reexamined by the Supreme Court. A detailed discussion of the potential benefits and drawbacks of eliminating single-family zoning entirely is worthwhile but beyond the scope of this Note.[297]

V. CONCLUSION

Single-family zoning is not in and of itself violative of the Constitution. But, when zoning ordinances infringe on fundamental constitutional liberties and are not narrowly tailored to their purposes, they are invalid.[298] Polyamorous relationship groups share many of the qualities of more traditionally recognized families, and several fundamental liberties are implicated, such as the right to form intimate associations, the right to structure one's family as one sees fit, and the right to raise children in accordance with one's beliefs.[299] Therefore, zoning ordinances which exclude polyamorous relationship groups from single-family neighborhoods are likely unconstitutional. To prevent unconstitutional violations, localities should pass legal protections for polyamorous relationship groups prohibiting housing discrimination, including the discriminatory application of zoning.

292. *See, e.g.*, Joseph Henrich, Robert Boyd & Peter J. Richerson, *The Puzzle of Monogamous Marriage*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y B 657 (2012).

293. *See supra* Subsection II.B.3.

294. *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

295. DOUGHERTY, *supra* note 23, at 228.

296. *See generally* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

297. For discussions of zoning deregulation and the elimination of single-family zoning and similar zoning restrictions, see generally Bronin, *supra* note 17; Schleicher, *supra* note 70.

298. *See Moore*, 431 U.S. at 499–506.

299. *See generally Village of Belle Terre*, 416 U.S. 1; *Moore*, 431 U.S. 494; *Romer*, 517 U.S. 620.