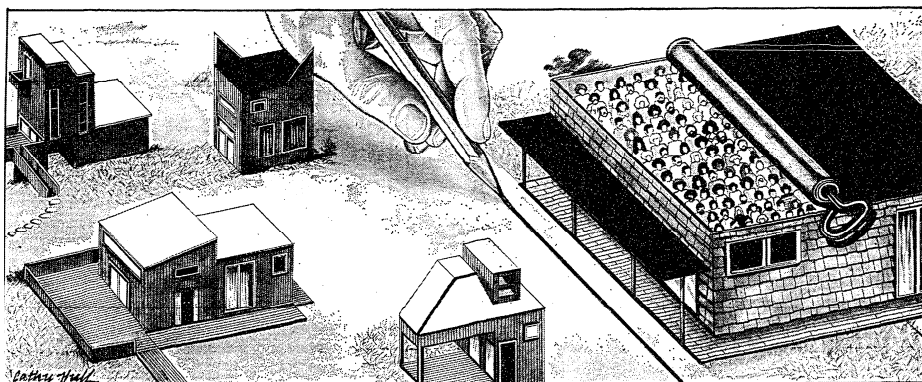


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KATE REDBURN

## Zoned Out: How Zoning Law Undermines Family Law's Functional Turn



**Note.** Cathy Hull, Illustration, N.Y. TIMES, Aug. 31, 1975, § 8 (Real Estate), at 1. Reprinted with permission of the artist.

**ABSTRACT.** A fatal conflict in the legal definition of family lurks at the intersection of family law and zoning law. Family law doctrines have increasingly embraced the claims of “functional families”—those whose bonds can be traced to cohabitation and shared domestic life. At the same time, zoning laws have narrowed to recognize only formal families, effectively restricting residency to individuals related by blood, marriage, or adoption. As a result, family law’s “functional turn” remains vulnerable in at least thirty-one states. Using original legal analysis and historical research, this Note illuminates that contradiction, explains how it arose, and argues that it must be resolved to protect diverse family forms. This Note surveys the “functional turn” in state family law and develops a novel historical account of the shifting definition of family in zoning law, documenting its “formal turn.” It then offers normative and practical reasons why the definition of family should be loosened, offering recommendations for legislative and judicial reform.



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## INTRODUCTION

Olivia Shelltrack and Fondray Loving had recently relocated their family of five to Black Jack, a middle-class suburb of St. Louis, Missouri, when they received some unexpected news.<sup>1</sup> The town had denied their occupancy permit because their family comprised more than three unrelated people living together, in violation of the local zoning code.<sup>2</sup> In addition to their two biological children, Shelltrack and Loving were raising Shelltrack's child from a previous relationship. The family "knew something was wrong when the housing inspector asked for the children's birth certificates."<sup>3</sup>

The couple sought reprieve from local officials, first requesting an exemption from paying five hundred dollars per day in fines.<sup>4</sup> But they were denied the exemption, so they turned to the city council with a request to broaden the definition of "family" in the zoning code. By a vote of five to three, the council declined. Shelltrack was dismayed: "Are you serious?" she thought. "What do you mean I don't fit your definition of a family? . . . We've put everything into this house, and now, oh, my God, what are we going to do?"<sup>5</sup>

Shelltrack and Loving eventually received support from the ACLU, which uncovered evidence that at least four other families had been ejected from Black Jack for similar reasons.<sup>6</sup> In a letter to another aggrieved household, Mayor Norman McCourt wrote that Black Jack residents "do not believe that an unmarried couple having children residing in our community is an appropriate standard that they wish to approve."<sup>7</sup> Shelltrack recognized the inherent prejudice of that message, remarking that city leadership "clearly sends a mes-

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1. See Nancy Larson, *Gay Families, Keep Out!*, *ADVOCATE*, July 18, 2006, at 34, 35; Martha T. Moore, *Parents, Kids Not Necessarily 'Family' Everywhere*, *USA TODAY* (May 16, 2006, 4:48 AM ET), [https://usatoday30.usatoday.com/news/nation/2006-05-15-unmarried-family\\_x.htm](https://usatoday30.usatoday.com/news/nation/2006-05-15-unmarried-family_x.htm) [<https://perma.cc/W3BZ-Y5KZ>].
  2. Moore, *supra* note 1.
  3. *We Don't Like Your "I've Been in a Loving, Committed Relationship for Thirteen Years with Three Kids" Kind Around Here*, *ROLLING STONE*, Dec. 28, 2006-Jan. 11, 2007, at 84 (quoting Shelltrack).
  4. Brief for Petitioner at 8-9, *Loving v. City of Black Jack*, No. 4:06-CV-01430 (E.D. Mo. Sept. 29, 2006); *Missouri City Bans Family from Home*, *COLO. SPRINGS GAZETTE*, May 18, 2006, at A3.
  5. Larson, *supra* note 1, at 35.
  6. P.J. Huffstutter, *Housing Code Defines What Makes a Family*, *L.A. TIMES* (May 21, 2006), <https://articles.latimes.com/2006/may/21/nation/na-family21> [<https://perma.cc/78UF-XL9D>].
  7. Larson, *supra* note 1, at 35.

sage . . . : Don't be gay, don't be unmarried, don't have children out of wedlock, and don't be a foster parent.”<sup>8</sup>

Black Jack's restrictive zoning policy cut to the core of what it means to be a family. But regulations like Black Jack's are not only common, they're legal. Under the 1974 Supreme Court decision in *Village of Belle Terre v. Boraas*, zoning ordinances that restrict cohabitation by unrelated parties—defined as individuals who are not relatives by blood, marriage, or adoption—do not violate the Fourteenth Amendment's Due Process Clause.<sup>9</sup> As this Note will demonstrate, the Court's decision contradicted decades of zoning jurisprudence that recognized a variety of living arrangements as permissible in single-family zones—amounting to a forgotten jurisprudence of “functional family” in zoning law.

*Belle Terre's* consequences extend far beyond eviction. Consider if Shelltrack and Loving were forced to break up their family to remain in town. What would happen if their romantic relationship ended? Missouri family law has taken a functional turn, imputing certain marital rights and obligations to unmarried cohabitants. But in Missouri—and many other states with functional-family doctrines—the doctrinal inquiry is predicated on cohabitation or treats cohabitation as a necessary condition within a multifactor test.<sup>10</sup> Family law is thus tied to zoning law through cohabitation requirements, with potentially dire consequences. For Shelltrack and Loving, it could have impeded Loving's ability to gain child custody or visitation rights over his nonbiological child, and the two could face barriers to equitably distributing assets acquired during their relationship.

The Shelltrack-Loving family's ordeal illustrates a legal bind that affects families across the country. Today, fewer and fewer Americans engage in married coupledness and biological parentage. According to a 2012 Census Bureau report, 6.1% of Americans live with a householder to whom they are not related: 5.2 million people live in equitable arrangements with roommates (“doubling up”), and 7.7 million Americans reside as unmarried couples.<sup>11</sup> Unmar-

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8. *Id.* Shelltrack, Loving, and their children ultimately settled with the city and were able to stay in their home. See Brian Flinchpaugh, *City Settles Lawsuit with Black Jack Couple*, ST. LOUIS POST-DISPATCH (Feb. 28, 2007), [https://www.stltoday.com/suburban-journals/city-settles-lawsuit-with-black-jack-couple/article\\_9356fc40-d4a5-5e45-87cb-0c82933bb9af.html](https://www.stltoday.com/suburban-journals/city-settles-lawsuit-with-black-jack-couple/article_9356fc40-d4a5-5e45-87cb-0c82933bb9af.html) [https://perma.cc/SN5M-VQMG].

9. 416 U.S. 1, 2-4, 8 (1974); see U.S. CONST. amend. XIV.

10. See, e.g., *Hudson v. DeLonjay*, 732 S.W.2d 922, 927 (Mo. Ct. App. 1987).

11. See Daphne Lofquist et al., *Households and Families: 2010*, U.S. CENSUS BUREAU 2-5 (Apr. 2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> [https://perma.cc/J6A9-JN2J].

ried partner cohabitation rose 41% in just ten years, between 2000 and 2010, having already increased fourfold from 1977-1997.<sup>12</sup> Even more recent data show that nearly half of American adults are unmarried, and unmarried people represent 47% of all households.<sup>13</sup> Among unmarried, heterosexual cohabitating couples, nearly 40% were raising at least one biological child of either partner.<sup>14</sup> Family law and zoning law have responded to these trends in divergent and contradictory ways, and today formal-family zoning threatens to undermine functional-family doctrine in at least thirty-one states.<sup>15</sup>

How did we get here? Family law historically embraced a “formal” approach to defining the family – prioritizing marital partnerships and biological motherhood. Starting in the 1970s, and propelled by the gay rights movement of the 1980s, some state courts began replacing strict formal definitions of family with more flexible multifactor tests for partnership and parentage.<sup>16</sup> Today, the term “functional family” extends beyond people related by blood, marriage, or adoption to those who have formed intimate interpersonal connections that echo the archetypal nuclear family. The law typically recognizes their connections through traditionally domestic spaces and tasks. They are committed to long-term, mutual emotional and material support.<sup>17</sup> This family law defini-

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12. *Id.* at 3; Lynne M. Casper et al., *How Does POSSLQ Measure Up? Historical Measurements of Cohabitation* (Population Div., U.S. Census Bureau, Working Paper No. 36, May 1999), <https://www.census.gov/population/www/documentation/twps0036/twps0036.html> [<https://perma.cc/CW6F-5J6G>].
  13. Casper et al., *supra* note 12; *Unmarried and Single Americans Week Sept. 20-26, 2015*, U.S. CENSUS BUREAU: NEWSROOM (Sept. 15, 2015), <https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff19.html> [<https://perma.cc/P24E-3YN5>] [hereinafter *Unmarried and Single Americans*].
  14. *Unmarried and Single Americans*, *supra* note 13.
  15. See *infra* note 252 (discussing the eight states where zoning and functional-family law conflict in state supreme court law, as well as Missouri and Pennsylvania, where zoning and functional-family law conflict in state supreme court and intermediate appellate court law); *infra* note 254 (discussing the twenty-one states where the constitutionality of formal-family zoning is unclear and functional-family laws are on the books).
  16. See *infra* Part I. The extent of the “functional turn” is uneven, and debate continues within family law scholarship as to whether functional analysis has been the best way to recognize diverse family forms.
  17. See, for example, the definitions of “functional family” in Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275 (1992) [hereinafter Minow, *All in the Family*]; Martha Minow, *Redefining Families: Who’s In and Who’s Out?*, 62 U. COLO. L. REV. 269 (1991) [hereinafter Minow, *Redefining Families*]; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1989); and Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

tion can include unmarried straight or gay couples living with or without children, adoptive families, foster families, and in rare instances, groups of three or more coparenting adults.<sup>18</sup>

But family law has a *Belle Terre* problem. In the process of making the definition of family more inclusive, state courts made cohabitation essential to functional parentage and partnership analyses.<sup>19</sup> Over the same period, however, local jurisdictions began revising occupancy provisions in zoning laws to confine the definition of family to relations of “blood, marriage, or adoption.”<sup>20</sup> Despite this incongruity, the Supreme Court has not revisited the intersection of family and zoning law since 1977.<sup>21</sup> As a result, family law’s move to recognize diverse families is compromised by a reciprocal formal turn in zoning. This reality should surprise both the family and zoning law communities: family law scholars and practitioners should be alarmed that functional-family doctrines can be undermined by local zoning laws. In turn, zoning law scholars and practitioners should lament the erasure of zoning’s longstanding functional-family tradition.

In this Note, I show that both zoning and family law doctrines have blurred the line between family and household, treating them as equivalent while ignoring the extent to which their legal definitions conflict. To reconcile this incongruity, I argue first that the terms “family” and “household” should be legally distinct, and second that zoning law should embrace diverse family forms for normative and practical reasons. At the most basic level, residential zoning should embrace the panoply of social arrangements that people choose.<sup>22</sup> Formal-family zoning ignores the lived reality of millions of Americans and signals contempt for family forms and living arrangements that differ from marital nuclear families. The dignitary and material consequences of such discrimination have no place in local government law. On a practical level, my proposal shows that it is possible to preserve the historical purposes of both family and zoning

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18. For coverage of one such “throuple” case in New York, see Christina Cauterucci, *New York Court Affirms Poly Parenthood with Three-Way Custody Ruling*, SLATE (Mar. 13, 2017), [http://www.slate.com/blogs/xx\\_factor/2017/03/13/new\\_york\\_court\\_affirms\\_poly\\_parenthood\\_with\\_three\\_way\\_custody\\_ruling.html](http://www.slate.com/blogs/xx_factor/2017/03/13/new_york_court_affirms_poly_parenthood_with_three_way_custody_ruling.html) [<https://perma.cc/WP92-EERX>]; and Julia Marsh, *Historic Ruling Grants ‘Tri-Custody’ to Trio Who Had Threesome*, N.Y. POST (Mar. 10, 2017, 9:53 PM), <https://nypost.com/2017/03/10/historic-ruling-grants-custody-to-dad-and-mom-and-mom> [<https://perma.cc/Z8RL-QMJY>].

19. See *infra* Sections I.B, .C.

20. See *infra* Part II.

21. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that zoning ordinances could not prevent blood relatives from living together).

22. See *infra* Part III.

law while eliminating social discrimination. While family law endeavors to distribute the benefits and obligations of long-term familial connections, residential zoning law aims to ensure the health, safety, and wellness of residential communities. Judges need not dwell on family form to fulfill the primary objectives of zoning regimes.

Instead, I argue that judges should avoid intrusive inquiries into relationships between cohabiters altogether and instead limit their functional-family inquiry to whether or not the number of cohabitants poses a health or safety risk. As long as those who cohabit can do so safely, they satisfy the purposes of zoning and should be able to live together legally. Under this definition, permissible cohabiting groups include, but are not limited to, foster families, communes, students, seniors, friends, people with disabilities, formerly incarcerated people, people recovering from substance abuse, fraternities, and sororities. Zoning law's definition of a family should not be linked to definitions in family law at all.

For example, while family law may limit which groups of cohabitants can claim parental rights over children in the home based on an analysis of their bonds of mutual support and obligation, zoning law need not be so restrictive. There is no health, safety, or wellness justification for prohibiting a group of four unrelated adults and one child from living together in a three-bedroom house, even if the house is zoned only for families related by blood, marriage, or adoption. This proposal decouples the legal definitions of household and family, validating greater residential freedom without interrupting the functional turn in family law.<sup>23</sup>

Critics may suggest that same-sex marriage legalization in *Obergefell v. Hodges*<sup>24</sup> solved the problem by ending zoning discrimination against functional families. Following the Court's 2015 decision in *Obergefell*, a wave of popular literature by journalists and attorneys declared victory for family diversity.<sup>25</sup>

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23. The proposal thus accounts for separate inquiries in the family and zoning contexts. To be clear, it does not suggest that a functional family for the purposes of family law should be considered a functional family in zoning. See *infra* Part III.

24. 135 S. Ct. 2584 (2015).

25. See, e.g., DEBBIE CENZIPER & JAMES OBERGEFELL, *LOVE WINS: THE LOVERS AND LAWYERS WHO FOUGHT THE LANDMARK CASE FOR MARRIAGE EQUALITY* (2016); NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* (2017). Popular media frequently made this argument in the run-up to *Obergefell*. See, e.g., JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* (2014); DAVID BOIES & THEODORE B. OLSON, *REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY* (2014); LINDA R. HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* (2012).



But *Obergefell* did not foreclose discrimination on the basis of family form;<sup>26</sup> it did not confer legal recognition to unmarried couples, but rather reinforced marital primacy while opening the institution of marriage to same-sex couples.<sup>27</sup> In the famous final passage of Justice Kennedy's majority opinion, he wrote, "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."<sup>28</sup> Justice Kennedy also explicitly directed the ruling toward same-sex couples seeking marriage, not other family forms, when he wrote that "[i]t would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves."<sup>29</sup> In his view, individuals outside of marriage are "condemned to live in loneliness,"<sup>30</sup> a far cry from the enduring bonds of mutual support and obligation between Shelltrack and Loving. So while *Obergefell* expanded the rights of same-sex married couples, it provided no constitutional protection for functional families in general. Indeed, in the zoning context, diverse families are vulnerable in the forty-five states where formal-family zoning laws have been held constitutional or left unaddressed by state high courts.<sup>31</sup>

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26. Many legal scholars have argued that the campaign for same-sex marriage reinforced marital supremacy. See Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2701 (2008); Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 31 (2015); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 *CALIF. L. REV.* 1207, 1239 (2016); Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 *FORDHAM L. REV.* 69, 69-70 (2015). Serena Mayeri has warned that the shape of marriage equality relies on devaluing nonmarriage. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 *CALIF. L. REV.* 1277, 1283 (2015) ("In a world in which marriage is both a privileged status and a status of the privileged, marriage equality that rests upon non-marriage's ignominy risks reinforcing the many other status inequalities that taint the legacy of marital supremacy."). But see Courtney G. Joslin, *Discrimination in and out of Marriage*, 98 *B.U. L. REV.* 1 (2018) (arguing that the history of marital-status protection grew out of feminist critiques of the legal obstacles for married women, not a desire to reinforce marital supremacy); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 *CALIF. L. REV.* 87, 91 (2014) (arguing that "by appealing to marital norms to gain nonmarital support, LGBT advocates contributed to an ascendant model of marriage capable of including same-sex relationships").

27. See *Obergefell*, 135 S. Ct. at 2608.

28. *Id.*

29. *Id.*

30. *Id.*

31. Adam Lubow, ". . . Not Related by Blood, Marriage, or Adoption": A History of the Definition of "Family" in Zoning Law, 16 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 144, 162 app. (2007).

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In fact, enforcement actions against functional families and new formal-family ordinances proceeded undeterred in several states where gay marriage was legal before *Obergefell*.<sup>32</sup> In Hartford, Connecticut, officials attempted to evict a functional family that had purchased a house four years after the state legalized gay marriage.<sup>33</sup> Municipalities as diverse as Memphis, Tennessee; Longview, Texas; Roswell, New Mexico; and Middletown, Pennsylvania have proposed new formal-family ordinances within the last two years.<sup>34</sup> In 2015, the intermediate Commonwealth Court of Pennsylvania not only upheld the constitutionality of Philadelphia’s formal-family zoning, but it relied on *Obergefell* to do so. The court took *Obergefell* as evidence that “[t]he Constitution continues to be interpreted to privilege relationships grounded in marriage,

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32. See Christopher Caldwell, *A Family or a Crowd?*, N.Y. TIMES MAG. (Feb. 26, 2006), <https://www.nytimes.com/2006/02/26/magazine/a-family-or-a-crowd.html> [https://perma.cc/8J3A-3K5D]; Stephanie McCrummen, *Va. City Suspends “Family” Rule*, WASH. POST (Jan. 5, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/01/04/AR2006010401986.html> [https://perma.cc/JW33-4GJ3].
  33. Vanessa de la Torre, *Legal Battle Possible over Unconventional Family in City Mansion*, HARTFORD COURANT (Feb. 18, 2015, 8:09 PM), <https://www.courant.com/community/hartford/hc-hartford-scarborough-st-0219-20150218-story.html> [https://perma.cc/3YFG-QY4P].
  34. Many of these ordinances were introduced explicitly to address overcrowding problems related to students at nearby universities, but they used the language of formal family and have consequences beyond college-student cohabitation. See, e.g., Tom Bailey, *University District Fights Boardinghouses in Memphis*, COM. APPEAL (Memphis, Tenn.) (May 11, 2017, 4:01 PM CT), <https://www.commercialappeal.com/story/money/business/development/2017/05/11/university-district-fights-boarding-houses-memphis/316741001> [https://perma.cc/R23J-NEKP]; Jimmy Daniell Isaac, *Proposed Longview Rules Target Apartments in Homes Zoned as Single Family*, LONGVIEW NEWS-J. (May 19, 2017), [https://www.news-journal.com/news/local/proposed-longview-rules-target-apartments-in-homes-zoned-as-single/article\\_72181e3d-9a34-5c71-9317-4da51e50e635.html](https://www.news-journal.com/news/local/proposed-longview-rules-target-apartments-in-homes-zoned-as-single/article_72181e3d-9a34-5c71-9317-4da51e50e635.html) [https://perma.cc/4Q3U-W4UJ]; Dan Miller, *One Middletown Council Member Files Complaint Against Another over Rentals, Zoning*, PRESS & J. (Middletown, Pa.) (Feb. 28, 2018, 3:31 PM), <http://www.pressandjournal.com/stories/one-councilor-files-complaint-against-another-over-rentals-zoning.28499> [https://perma.cc/L8YD-LW9G]; Randal Seyler, *Planning, Zoning Committee Discusses Ordinance Changes*, ROSWELL DAILY REC., Jan. 6, 2015, at A1, A3; see also Adam Benson, *Grace Street Fire Might Prompt Changes to City Housing Code*, INDEX-J. (Greenwood, S.C.) (Mar. 6, 2018), [http://www.indexjournal.com/news/grace-street-fire-might-prompt-changes-to-city-housing-code/article\\_75726a4a-25db-5b4e-bfca-a590c26aea29.html](http://www.indexjournal.com/news/grace-street-fire-might-prompt-changes-to-city-housing-code/article_75726a4a-25db-5b4e-bfca-a590c26aea29.html) [https://perma.cc/4HS3-454D] (reporting on a South Carolina city’s decision to limit the number of unrelated family members allowed to live together in a house in response to a fire that destroyed a historic home with multiple occupants); Caitlin Clark, *Bryan Seeks Public Input on “Stealth Dorms,”* EAGLE (Bryan, Tex.) (Sept. 18, 2017), [http://www.theeagle.com/news/local/bryan-seeks-public-input-on-stealth-dorms/article\\_46d83oad-479a-5885-b54c-82727de817b9.html](http://www.theeagle.com/news/local/bryan-seeks-public-input-on-stealth-dorms/article_46d83oad-479a-5885-b54c-82727de817b9.html) [https://perma.cc/28S8-D6XZ] (outlining a municipality’s response to illegal bedroom rentals).

adoption, and biology.”<sup>35</sup> The road to *Obergefell* certainly opened parentage and partnership law to more diverse family forms,<sup>36</sup> but functional families remain vulnerable to discrimination under zoning law.<sup>37</sup>

This Note maps how legal conflict over the definition of family in postwar America emerged simultaneously at the state and local levels and ultimately culminated in contradictory results. Part I surveys the development of the functional approach in family law, emphasizing the prominent role that cohabitation has come to play in functional doctrines of relationship dissolution and parental recognition. It provides crucial background for grasping the stakes of the problem posed by formal-family doctrines in zoning. Part II recounts the century-long history of family definitions in zoning jurisprudence, showing the prevalence of functional analysis before the 1960s, how and why things changed in the 1970s, and the ultimate triumph of the formal family. Part III makes the case that the functional-family canon should triumph over the formal-family canon because it (1) best serves the purposes of both family and zoning law; (2) is most practically effective; and (3) is most normatively desirable. Finally, Part IV lays out some prescriptive legislative and doctrinal recommendations to disentangle the legal family from the legal household.

## I. COHABITATION IN FAMILY LAW’S FUNCTIONAL TURN

In many states, parentage and partnership doctrines have taken a “functional turn” over the past forty years. For much of the twentieth century, state judges denied the benefits and obligations of family law to relationships not grounded in blood, marriage, or adoption. Bolstered by a constellation of social and cultural changes in sexual and family life during the 1960s, unwed fathers and nonbiological parents began to demand the same protections and obligations for their relationships as other families. In the 1980s, gays and lesbians spearheaded the fight for progressive definitions of the family in state courts.<sup>38</sup> By the mid-1970s, judges in some states had begun to replace presumptions in favor of marital and biological relationships with inquiries into whether the litigants functioned as a family.

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35. *Schwartz v. Phila. Zoning Bd. of Adjustment*, 126 A.3d 1032, 1039 n.10 (Pa. Commw. Ct. 2015).

36. See *supra* note 26 for discussion of the scholarly debate over *Obergefell*’s effect on functional families. See also Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187 (2015).

37. See discussion *infra* Section II.C.2.

38. See NeJaime, *supra* note 36, at 1188-89.

The extent of the functional turn remains uneven and contested, but to the extent that it has taken hold, it can be attributed to the confluence of social groups pushing for legal recognition and protection for their intimate associations. A full evaluation of whether the functional turn was the best means to achieve recognition for family diversity is outside the scope of this Note.<sup>39</sup> It remains one of the primary vehicles for recognizing diverse families within family law, however, and it is thus crucial to identify the extent to which functional-family doctrines understand cohabitation to be constitutive of family. By linking the recognition of family diversity to cohabitation through functional-family doctrines, advocates linked family law to the zoning definition of family in unforeseen ways.

#### A. *The Functional Turn in Family Law*

Postwar changes in heterosexual sexual and family life laid crucial groundwork for the functional turn in family law. Baby boomers engaged in more premarital sex, waited longer to get married, had fewer children, and divorced more than did their parents' generation.<sup>40</sup> With the advent of the birth-control

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39. Scholars have long debated whether functional tests are the best way to achieve legal recognition for family diversity. Melissa Murray, for example, has argued that functional tests actually further enshrine heteronormative family ideals in law and reinforce the privatization of dependency, see Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985 (2015), a claim also endorsed by Serena Mayeri in Response, *The Functions of Family Law*, 163 U. PA. L. REV. ONLINE 331 (2015). See also Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991) (arguing that functional tests enable intrusive inquiries into the personal arrangements of nontraditional families). Other scholars argue that functional tests are underinclusive, leaving out committed long-term partnerships that do not share a primary residence, including the phenomenon of "living apart together." See, e.g., Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J.L. & FAM. STUD. 289 (2011); Sofie Ghazanfareon Karlsson & Klas Borell, *Intimacy and Autonomy, Gender and Ageing: Living Apart Together*, 27 AGEING INT'L 11 (2002); Irene Levin & Jan Trost, *Living Apart Together*, 2 COMMUNITY, WORK & FAM. 279 (1999); Rosenbury, *supra* note 17. For further discussion of how privatizing dependency through the institution of the family advances legal neoliberalism, see MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* (2017); and Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25 (2014). For foundational arguments about how family law should incorporate family diversity, see NANCY D. POLIKOFF, *BEYOND STRAIGHT AND GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); and Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

40. ARLENE S. SKOLNICK, *EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY* 129 (1991).

pill, young people decoupled sex from pregnancy and marriage, giving women more control over their reproductive choices and liberalizing sexual mores.<sup>41</sup> Heterosexual cohabitation—that is, straight unmarried couples living together—rose dramatically during this period, as did public approval of cohabitation. According to political scientist Cynthia Bowman, 33% of women and 46.9% of men looked favorably on cohabitation in 1977.<sup>42</sup> Those figures jumped to 59.1% of women and 66.9% of men by 1998.<sup>43</sup> The rising tide of unmarried couples demanded equal access to the benefits afforded by state family law regimes. At the same time, many more children were born to unmarried parents, giving rise to new constitutional protections for these “illegitimate” children as well as new parental rights for unwed fathers.<sup>44</sup> These social and demographic developments drove more unmarried couples and parents into courts.

Over the course of the 1970s, as advocates pushed courts to recognize family diversity, some courts responded by replacing the formal-family default with functional tests. Those courts began to recognize the parental rights of non-married biological parents and married nonbiological parents.<sup>45</sup> Courts and legislatures began to define fatherhood by when a man “receives the child into his home and openly holds out the child as his natural child,”<sup>46</sup> rather than by biological connection.<sup>47</sup> As Douglas NeJaime has shown, both lesbian and gay couples and unmarried parents used these developments as a foundation for asserting their rights.<sup>48</sup> Their initial efforts were unsuccessful, as courts still tended to reinforce biological and marital ties in parentage determinations. But by the turn of the twenty-first century, advocates had cause for optimism. In lesbian parentage cases in particular, courts began to extend the notion of “functional” and “intentional” parentage to same-sex couples.<sup>49</sup>

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41. ELIZABETH H. PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION 10 (2012); SKOLNICK, *supra* note 40, at 129.

42. See NeJaime, *supra* note 36, at 1188-89.

43. CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 98 (2010) (citing Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009, 1023-25 (2001)).

44. See Mayeri, *supra* note 26, 1285; NeJaime, *supra* note 36, at 1194.

45. NeJaime, *supra* note 36, at 1196.

46. *Id.* at 1195 (quoting UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM’N 1973)).

47. *Id.* at 1194-96.

48. *Id.* at 1197.

49. See *id.* at 1197 & n.56.

One effect of the functional turn, however, was that cohabitation became necessary to merit legal protection for diverse families.<sup>50</sup> Cohabitation was not always a prong of early functional-family tests, but litigants had usually lived together, so it was often introduced into the record as evidence to support other determinative factors, like duration and seriousness of the relationship.<sup>51</sup> As the functional approach developed, however, cohabitation grew in salience, eventually becoming a heavily weighted factor in a multifactor test—or even a precondition for initiating the test at all.<sup>52</sup> For our purposes, it is important to emphasize that the shift tightened the link between functional-family law doctrines and formal zoning regulations, inadvertently linking determinations of partnership and parentage to another system of regulation.

### B. Cohabitation in Functional Partnership

Cohabitation was crucial to family law’s functional turn from the start. In the 1976 case *Marvin v. Marvin*,<sup>53</sup> the California Supreme Court endorsed broader recognition of claims by unmarried couples. Michelle Triola and Lee Marvin had lived together in an unmarried relationship for seven years. When they broke up, Triola sued Marvin to enforce their oral contract that they would split any assets acquired while they were together. The court held that express contracts between unmarried couples who lived together were enforceable as long as the contract did not rest on “meretricious sexual services,” and opened the door for enforcing implied contracts between unmarried cohabitating couples as well.<sup>54</sup> Although the legal legacy of the case was limited, it took on outsize public meaning, as it seemed to grant unmarried couples some incidents of legal divorce, including support payments or “palimony.”<sup>55</sup>

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50. See, e.g., Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1485 (2014) (noting that “[d]omicile remains the gatekeeper of family law and family life”); J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL’Y 521, 540-46 (2011); Mayeri, *supra* note 39, at 378-79; Murray, *supra* note 39, at 2000-15.

51. See, e.g., *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 54 (N.Y. 1989).

52. See discussion *supra* note 39.

53. 557 P.2d 106 (Cal. 1976).

54. *Id.* at 112.

55. Scholars generally agree that the case is more famous than legally potent. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 134 (2011) (suggesting that states that have followed *Marvin*’s embrace of implied contracts between cohabitants “have not given up on the idea that a strong public policy favors marriage”); PLECK, *supra* note 41, at 160 (arguing that *Marvin* had little long-term legal impact for straight cohabiters, even in California); Ann Laquer Estin, *Ordinary*

The *Marvin* decision relied heavily on cohabitation. In fact, it was so obvious to the court that nonmarried partners live together that the decision itself used “cohabitation” and “nonmarital relationship” interchangeably.<sup>56</sup> State courts facing subsequent *Marvin* claims thus were tasked with articulating the precise weight of cohabitation.<sup>57</sup> In 1993, an intermediate California court ruled that *Marvin* “requires a showing of a stable and significant relationship arising out of cohabitation.”<sup>58</sup> Ever fearful that consideration for nonmarital agreements might be meretricious (sexual), the court reasoned that “[c]ohabitation is necessary not in and of itself, but rather, because from cohabitation flows the rendition of domestic services, which services amount to lawful consideration for a contract between the parties.”<sup>59</sup>

The long campaign for inclusive family law by gay and lesbian litigants also reinforced the cohabitation prong of the doctrinal analysis. In 1989, the New York Court of Appeals decided *Braschi v. Stahl Associates Co.*,<sup>60</sup> often considered the genesis of the functional-family canon.<sup>61</sup> The case concerned the status of an apartment that a gay couple, Miguel Braschi and Leslie Blanchard, had shared for eleven years before Blanchard passed away. Because the lease was only in Blanchard’s name, the real estate company that owned the building attempted to evict Braschi, claiming that tenancy could not pass between unmarried, unrelated people.<sup>62</sup> AIDS activists mounted a defense of Braschi’s rights as Blanchard’s partner. They submitted amicus briefs, for example, that described rising rates of gay homelessness resulting from similar situations across the city.<sup>63</sup> In response, the court articulated a clear functional-family test, find-

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*Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1383 (2001) (“With all its celebrity, the *Marvin* decision stands more as a cultural icon than as a legal watershed.”).

56. The court states its fundamental ruling three times but interchanges “nonmarital relationship” with “a man and woman [who] live together” and “adults who voluntarily live together and engage in sexual relations.” *Marvin*, 557 P.2d at 110, 113, 116.
57. The vast majority of states adopted *Marvin*, but “few ‘palimony’ plaintiffs receive significant recoveries from courts.” Berenson, *supra* note 39, at 297.
58. *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 77 (Ct. App. 1993).
59. *Id.*
60. 543 N.E.2d 49 (N.Y. 1989).
61. Efforts earlier in the decade to gain cohabitation rights for gay couples by having one man adopt the other man had seen a spark of possibility in 1982, *In re Adult Anonymous II*, 452 N.Y.S.2d 198 (App. Div. 1982), only to be dashed by the New York Court of Appeals in 1984, *In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984).
62. See PANEL ON MONITORING THE SOCIAL IMPACT OF THE AIDS EPIDEMIC, NAT’L RESEARCH COUNCIL, THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES 230-35 (Albert R. Jonsen & Jeff Stryker eds., 1993).
63. *Id.* at 233.

ing that the law was not limited to people related by “fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.”<sup>64</sup> Because *Braschi* and *Blanchard* had shared a home for over a decade, they were a family in the eyes of the court.

Two years later, the Minnesota Court of Appeals also applied the functional-family canon to a guardianship case involving a disabled lesbian woman.<sup>65</sup> The court granted Karen Thompson guardianship over her partner Sharon Kowalski, who had suffered a severe brain injury while they were living together.<sup>66</sup> After Kowalski’s family vigorously objected to Thompson’s application, the trial court granted guardianship to a friend of Kowalski’s father, despite overwhelming evidence of Thompson’s desire and ability to care for Kowalski. In reversing that order, the appellate court referenced cohabitation four separate times.<sup>67</sup> The court noted that the couple had lived together for four years before Kowalski’s accident and accepted that, following rehabilitative institutionalization, Kowalski herself expressed a desire to “return home” to Thompson.<sup>68</sup> This evidence was closely followed by the court’s assessment that “Thompson and Sharon are a family of affinity, which ought to be accorded respect.”<sup>69</sup> Like the *Braschi* court, the *Kowalski* court emphasized the duration, intensity, and interdependence of the relationship at issue, and both courts used evidence of cohabitation to find that the relationships in question produced functional families.

The American Law Institute (ALI) also foregrounded cohabitation when it defined domestic partnership in the 2002 *Principles of the Law of Family Dissolution*.<sup>70</sup> According to ALI’s recommendation, domestic partners should be defined as an unmarried couple “who for a significant period of time share a primary residence and a life together as a couple.”<sup>71</sup> “Significant period” is left to the individual states to define, but if a couple is adjudged to have lived together for too short a period to qualify, the *Principles* provide thirteen factors by which the couple may rebut the presumption that they do not qualify as domestic

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64. *Braschi*, 543 N.E.2d at 53.

65. *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991).

66. *Id.* at 797.

67. *Id.* at 791, 793, 794, 797.

68. *Id.* at 797.

69. *Id.*

70. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (AM. LAW INST. 2002).

71. *Id.* § 6.03(1).



partners.<sup>72</sup> The *Principles* thus propose that cohabitation be a sufficient, but not a necessary, precondition for legal recognition of nonmarital partnership rights at dissolution.

In sum, as fewer heterosexuals married, and as the gay and lesbian legal rights movement gained momentum, straight and gay couples demanded legal recognition for nonmarital families. To the extent that courts responded, they did so through functional-partnership doctrines that use cohabitation as a proxy for family formation.

### C. Cohabitation in Functional Parentage

In many states, parentage law also experienced a functional turn. Hints of change were detectable as early as the late 1960s, when courts began to recognize the rights of unmarried biological fathers, but it was the efforts of nonbiological parents that ultimately propelled some states to adopt functional parentage doctrines. Specifically, LGBT advocates leveraged growing recognition of biological parentage outside marriage and functional parentage inside marriage among heterosexuals to generate legal recognition for nonbiological and nonmarital parentage.<sup>73</sup>

Historically, parentage recognition was deeply connected to two key relationships: (1) the marital status of the mother; and (2) the biological connections between parents and children. In practice, this meant that the biological father of a child born to unmarried parents had difficulty asserting parentage and that the mother's marital husband was automatically recognized as the child's legal father. In the late 1960s, unmarried biological fathers began to assert their parental rights in court, arguing that biological connection to a child should bestow parental rights.<sup>74</sup> The issue eventually rose to the U.S. Supreme Court, which held that fatherhood was not a matter of simple biology but required fathers to "grasp[] the opportunity" by acting like fathers.<sup>75</sup> In an effort to align changed constitutional law with state family law, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Parent-

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72. These factors include the existence of express contracts between the parties, whether the members of the couple hold themselves out as a family, financial comingling and interdependence, public ceremonies, coparenting, and emotional or physical intimacy. *Id.* § 6.03(7).

73. See generally Minow, *All in the Family*, *supra* note 17; Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925; Minow, *Redefining Families*, *supra* note 17; NeJaime, *supra* note 36; Polikoff, *supra* note 17.

74. NeJaime, *supra* note 36, at 1193-94.

75. *Id.* at 1194-95 (alteration in original) (quoting *Lehr v. Robertson*, 463 U.S. 248, 262 (1983)).

age Act (UPA) of 1973, which attempted to balance nature and nurture by adding a presumption of paternity to the traditional marital presumption if, “while the child is under the age of majority, [the father] receives the child *into his home* and openly holds out the child as his natural child.”<sup>76</sup>

This “holding out” or residential presumption enabled nonbiological and unmarried fathers to establish legal fatherhood, but the doctrinal shift also linked legal fatherhood to cohabitation in a new, explicit way. In 2002, a new UPA was promulgated with an even stricter cohabitation rule, bestowing the residential presumption only if, “for the first two years of the child’s life, [the father] resided in the same household with the child and openly held out the child as his own.”<sup>77</sup> Building on this framework, the most recent UPA of 2017 updated the residential presumption to encompass nonbiological parents of all genders.<sup>78</sup> California, Washington, and Vermont have already adopted similar language, bringing the number of states with residential presumptions up to at least thirteen.<sup>79</sup>

Several jurisdictions have interpreted the UPA’s residential presumption to include nonbiological mothers, and others have developed novel doctrines of “de facto,” “psychological,” or “intentional” parentage to encompass unmarried and nonbiological parents. Typically, these cases concern unmarried same-sex couples who together raise the legal, biological child of only one partner. In these circumstances, the nonbiological partner has not legally adopted the child. Nevertheless, at dissolution, some states allow the nonlegal parent to use a functional parenthood test to establish standing for the purposes of child custody and visitation. For example, in *J.A.L. v. E.P.H.*, the Pennsylvania Superior Court reversed a lower court’s decision denying visitation to the nonbiological

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76. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM’N 1973) (emphasis added).

77. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM’N 2002).

78. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N 2017) (granting an individual the presumption of parentage if “the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual’s child”).

79. These states include Alabama, California, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Vermont, Washington, and Wyoming. *Parentage Act (2000)*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?communitykey=5d5c48d6-623f-4d01-9994-6933ca8af315&tab=groupdetails>. For examples of state courts interpreting these provisions, see *Inoue v. Inoue*, 185 P.3d 834 (Haw. Ct. App. 2008); *Larson v. Schmidt*, 400 N.W.2d 131 (Minn. Ct. App. 1987); *Friend v. Tesoro*, 167 P.3d 978 (Okla. Civ. App. 2007) (holding that a nonbiological father nevertheless had an un rebuttable presumption of fatherhood because he lived with the child for two years); and *In re Interest of Baby Boy R.*, 191 S.W.3d 916 (Tex. App. 2006) (discussing adoptive parents’ rights in a state without a residential presumption).

lesbian parent of a young child because “in both E.P.H.’s and J.A.L.’s minds, the child was to be a member of their nontraditional family, the child of both of them and not merely the offspring of E.P.H. as a single parent.”<sup>80</sup> In deference to the “wide spectrum of arrangements filling the role of the traditional nuclear family,” the court noted that the couple had cohabited when the child was intentionally conceived, that they had drafted custody documents to ensure that J.A.L. would have guardianship, and that both women had developed parental relationships with the child.<sup>81</sup>

Even in this brief snapshot, it is clear that the functional turn in parentage law also relies heavily on evidence of cohabitation to find that a family has formed. As the chosen vehicle for recognizing family diversity, however, functional tests in partnership and parentage suffer for this unexamined connection to the world of zoning regulation, where family is defined much more narrowly.

## II. REGULATING FAMILY THROUGH ZONING LAW

While the functional turn in family law may be familiar to family law scholars, this Part uncovers a parallel and opposite formal turn in zoning law. From the origins of American zoning in 1916 through the 1950s, state courts routinely took a functional approach to defining families in zoning ordinances, finding that religious adherents, sorority sisters, and even temporary roommates, could legally cohabit as families. This rule applied broadly, including in places where the ordinance explicitly limited family to those people related by blood, marriage, or adoption. But beginning in the 1960s, and accelerating in the 1970s, zoning jurisprudence took a formal turn, resulting in the kind of strict interpretation behind Black Jack’s enforcement action against the Shelltrack-Loving family. Thus, contrary to family law’s historical formalism, formal-family zoning doctrines are of surprisingly recent vintage.

As this Part demonstrates, zoning law took a formal turn in response to changing cultural attitudes toward communal living and interlocking demands from the first generation of mass homeowners and the rising New Right. Legal doctrines began to shift after World War II when the nuclear family became a strong cultural ideal. This formal turn in zoning accelerated in the 1970s

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80. 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996).

81. *Id.* at 1320; *see also* V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) (listing similar factors for a finding of a “psychological parent”); A.F. v. D.L.P., 771 A.2d 692, 696 (N.J. Super. Ct. App. Div. 2001) (same); Holtzman v. Knott (*In re* H.S.H.-K.), 533 N.W.2d 419, 435-36 (Wis. 1995) (same).

amidst widespread perceptions that the American family was in crisis.<sup>82</sup> As communal living became more common and more feared, claims by unrelated cohabitants fared much worse in courts than they had just a few decades earlier. Mounting rates of premarital cohabitation and communal living alarmed social conservatives who feared that increasingly visible and militant LGBT people, as well as their commune-dwelling and “hippie” cohorts, would damage the social fabric of communities built on heterosexual nuclear families.<sup>83</sup> At bottom, they perceived functional families to be threats to the nuclear family.<sup>84</sup>

The postwar years also witnessed dramatically different residential patterns, as federal policy, local-development boosters, and private investment facilitated a new generation of mass homeownership.<sup>85</sup> These new homeowners actively engaged in local politics, defending their property values and social preferences by pushing municipal policy toward lower property taxes and greater residential restrictions. In a political climate marked by fear of economic dislocation and family crisis, this coalition endorsed “blood, marriage, or adoption” definitions of family in local zoning ordinances nationwide and pushed courts to take a formal approach when defining the family in zoning litigation.<sup>86</sup>

This Part begins by uncovering the functional origins of family zoning jurisprudence in Section II.A. Subsequent Sections II.B.1 through II.B.3 then describe the clash between homeowner politics and communal living in the 1970s, demonstrating how each shifted the cultural meaning of the family in turn. Section II.B.4 focuses on the situation on Long Island, where battles over the definition of family in local zoning led to the landmark *Belle Terre* decision. Section II.C concludes by surveying the past forty-four years of enforcement since the *Belle Terre* decision, underscoring the extent to which formal-family zoning laws persist today.

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82. See *infra* Sections II.B.1, .2.

83. See generally ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* (2012) (providing an account of this historical narrative).

84. See PLECK, *supra* note 41, at 145.

85. See *infra* Section II.B.1.

86. See *infra* Section II.C.

A. *The Formal Family Comes to Zoning Law*

1. *The Functional Family in Zoning Jurisprudence*

American zoning is often dated to 1916, when New York City first passed ordinances regulating density, light, and sound,<sup>87</sup> but the practice began in earnest ten years later. In 1926, then-Secretary of Commerce Herbert Hoover promulgated one of the most successful model laws in U.S. history: the Standard State Zoning Enabling Act.<sup>88</sup> It recommended the creation of local zoning commissions across the country, which would divide municipal land into industrial, commercial, and residential uses. Within these categories, localities typically subdivided residential zones into areas for “single-family dwellings” and “multi-family dwellings,” such as apartment buildings. The Supreme Court ratified the zoning system that same year, holding in *Village of Euclid v. Ambler Realty*<sup>89</sup> that municipal zoning codes were an acceptable exercise of the municipal police power and did not violate liberty or property rights under due process or equal protection when they bore a reasonable relationship to legitimate governmental purposes like promoting the health, safety, and welfare of the community.

In early family zoning enforcement, courts had little statutory guidance about how to interpret the word “family”—should people who considered themselves a family unit and shared familial bonds constitute a family, or did housing law require biological or other legal ties? State courts generally chose the former, functional approach. Their reasoning often relied on one of two interrelated arguments. First, the word “family” had historically been interpreted as a broad and flexible legal category, and second, the absence of legislative clarity weighed in favor of an inclusive approach.

In the first wave of these cases, several courts relied on earlier precedents from common law marriage or benefit-distribution disputes to hold that “family” had always been a legally capacious category. In 1943, for example, the Supreme Court of Michigan affirmed its longstanding position that “[t]he word ‘family’ is one of great flexibility,” in *Boston-Edison Protective Ass’n v. Paulist Fa-*

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87. See SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 164 (2014); JULIE SZE, *NOXIOUS NEW YORK: THE RACIAL POLITICS OF URBAN HEALTH AND ENVIRONMENTAL JUSTICE* 41 (2007); SEYMOUR I. TOLL, *ZONED AMERICAN* (1969).

88. STANDARD STATE ZONING ENABLING ACT (U.S. DEP’T OF COMMERCE 1926).

89. 272 U.S. 365 (1926).

*thers, Inc.*<sup>90</sup> The court allowed members of the Paulist Fathers to purchase and occupy a residence restricted by covenant for use as a “single dwelling house” in a Detroit neighborhood “built up with residences of extremely high character and considerable value.”<sup>91</sup> Quoting an 1883 life insurance case, the court further elaborated that the word “family”

is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relatives, or *any group constituting a distinct domestic or social body*. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers.<sup>92</sup>

Clearly the *Boston-Edison* court had no problem with a broader, functional definition of family. It also found formal definitions unfair, suggesting that narrow interpretations of the ordinance would “cause injustice” by making it impossible for people to take in servants, “a refugee from foreign lands,” or a child “to be cared for.”<sup>93</sup>

State courts also looked to legislative intent to allow a variety of family forms to take root in single-family neighborhoods. The Supreme Court of Wisconsin did so in 1954 when it held that five clergymen could legally cohabit in Whitefish Bay.<sup>94</sup> In that case, the local ordinance defined family as “one or more individuals living, sleeping, cooking or eating on premises as a single housekeeping unit.”<sup>95</sup> Nevertheless, the town had attempted to evict the missionaries on the grounds that they were not related by blood or marriage.<sup>96</sup> The court treated the matter as a simple question of legislative intent. Since the local town council in Whitefish Bay had not qualified the meaning of family by “consanguinity or affinity,” the court found no reason to prohibit the chal-

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90. 10 N.W.2d 847, 849 (Mich. 1943).

91. *Id.* at 847-48.

92. *Id.* at 849 (emphasis added) (quoting *Carmichael v. Nw. Mut. Benefit Ass’n*, 16 N.W. 871, 872 (Mich. 1883)); *see also* *Robertson v. W. Baptist Hosp.*, 267 S.W.2d 395 (Ky. 1954) (defining a group of nurses living together as a family).

93. *Boston-Edison*, 10 N.W.2d at 848, 849.

94. *Missionaries of Our Lady of La Salette v. Village of Whitefish Bay*, 66 N.W.2d 627 (Wis. 1954).

95. *Id.* at 630.

96. *Id.*

lenged use.<sup>97</sup> As in *Boston-Edison*, the Wisconsin court also bolstered its argument by describing in dicta that the term “family” had historically encompassed many relationship structures.<sup>98</sup>

The functional approach was not limited to religious groups but also extended to other disfavored litigants, including sorority sisters. Take, for example, the 1924 case *City of Syracuse v. Snow*.<sup>99</sup> At the time, Syracuse University had a major housing shortage: the school could provide lodgings for just 350 of its 2,513 female students.<sup>100</sup> To make matters worse, the city planning commission had barred sorority houses from neighborhoods zoned for “single family dwelling[s],” defined as units “designated for or occupied by one family.”<sup>101</sup> Pursuant to these regulations, the commission enjoined a Theta Delta Phi chapter from purchasing a house in the single-family zone. However, the court threw out the regulation, reasoning that it was insufficiently related to the stated governmental interests in promoting public health, safety, and welfare, or city growth and prosperity.<sup>102</sup> In part, this result was possible because the zoning code defined family as “any group of persons living and cooking together as a single housekeeping unit.”<sup>103</sup> The court gave considerable weight to the fact that the sorority sisters shared meals, “stud[ied] and perform[ed] their several duties in living rooms together,” and maintained a treasury “for the general purpose of common support.”<sup>104</sup> In other words, they lived together as a family, so they were one for the purposes of zoning law.

These shared familial bonds made it impossible to justify discriminating against the sorority members for not being formally related. Indeed, the court

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97. *Whitefish Bay*, 66 N.W.2d at 630; see also *Carroll v. City of Miami Beach*, 198 So. 2d 643, 644 (Fla. Dist. Ct. App. 1967) (allowing a group of novices and their Mother Superior to cohabit under a similar ordinance); *In re Application of Laporte*, 152 N.Y.S.2d 916, 918 (App. Div. 1956) (finding that an ordinance did not restrict family to only those related by blood or marriage); *Stafford v. Village of Sands Point*, 102 N.Y.S.2d 910 (Sup. Ct. 1951) (finding that a separate second kitchen does not create a second family unit if all are living together as one).

98. *Whitefish Bay*, 66 N.W.2d at 630 (“[F]amily’ is derived from the Latin *familia*. Originally the word meant servant or slave, but now its accepted definition is ‘a collective body of persons living together in one house, under the same management and head subsisting in common, and directing their attention to a common object, the promotion of their mutual interests and social happiness.’”).

99. 205 N.Y.S. 785 (Sup. Ct. 1924).

100. *Id.* at 788.

101. *Id.* at 789.

102. *Id.*

103. *Id.* (emphasis omitted).

104. *Id.*

went as far as saying that “[a] college sorority is a family, a college family, perhaps, but nevertheless its membership not only live together, and cook together, but are bound together by fraternal ties—ties that, in many instances, are more binding and enduring than those of kinship.”<sup>105</sup> Here again, the court followed the majority approach of the period in endorsing an inclusive, functional approach to family.

## 2. *The First Signs of the Formal Approach*

Although functional-family zoning remained dominant, the formal approach began to appear as early as 1948, when an Illinois state court blocked the sale of a single-family zoned home to a chapter of the Gamma Phi Beta sorority in Peoria.<sup>106</sup> The family-composition ordinance at issue restricted occupancy to “one or more persons occupying a premises and living as a single housekeeping unit, as distinguished from a group occupying a boarding house, lodging house, or hotel, as herein defined.”<sup>107</sup> While recognizing *Snow’s* suggestion that “members of a college sorority or fraternity are bound together by enduring fraternal ties,” this court concluded that “they are not members of a family” and thus could not live together legally.<sup>108</sup> The court found the formal-family canon sufficiently self-evident to not merit further discussion.

Over time, courts began to use the formal approach more frequently. In 1961, a New Jersey court upheld zoning violation convictions against several people serving as foster parents, despite protestations by the New Jersey Board of Child Welfare.<sup>109</sup> The defendants argued the legislature could not have intended to prohibit Newark families from taking in foster children, and indeed, the state foster care law seemed to imply the opposite. But the court was unmoved. The judges coolly responded that the legislature would have included foster children among permissible housing relationships if it had so intended.<sup>110</sup> This case represents the outer limit of the formal-family approach, since such rigid enforcement of blood, marriage, or adoption provisions against foster families appears to have been relatively rare. But it does indicate just how

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<sup>105.</sup> *Id.*

<sup>106.</sup> *Cassidy v. Triebel*, 85 N.E.2d 461 (Ill. App. Ct. 1948).

<sup>107.</sup> *Id.* at 466.

<sup>108.</sup> *Id.*

<sup>109.</sup> *City of Newark v. Johnson*, 175 A.2d 500 (Essex Cty. Ct. 1961).

<sup>110.</sup> *Id.* at 502.



readily courts applied the new formal-family canon despite strong public-policy objections.<sup>111</sup>

The formal turn was not immediate, however, and despite the rising profile of the formal-family approach, it coexisted with the functional approach well into the late sixties. Two nearly identical cases from appellate courts in Florida and Missouri, both decided in 1967, illustrate how changing social norms filtered into judicial decisions.<sup>112</sup> In both cases, a group of nuns proposed to live in a house zoned for single-family use, and in both cases, the city had only vague definitions of family on the books.<sup>113</sup> Where the Florida court applied the functional-family canon, however, the Missouri court took the formal approach. “The question before us is not what the word ‘family’ means in common parlance,” explained the Florida court, “but what the City of Miami Beach zoning ordinance says it means.”<sup>114</sup> Since there was “no requirement that [occupants] be related by consanguinity or affinity,” the Florida court saw no reason to prevent the nuns from living together.<sup>115</sup>

The Missouri appellate court asked a different question. While acknowledging that the text could mean that eleven nuns could constitute a family, the court mused, “[W]ould most people describe the nuns that live there at a particular time as a ‘family’ or their residence as a ‘single family dwelling’? We think not.”<sup>116</sup> In stark contrast to the Florida court’s reasoning, the Missouri panel understood its task to be divining the ordinary meaning of “family.” The court surmised that residents of the local Sherwood Estates community would understand the regulation to mean “a building for occupancy by a group of people, all of whom are related to one another by blood or marriage.”<sup>117</sup>

Despite the rise of the formal canon, some states held fast to the functional family. Courts in Illinois, New Jersey, and California all struck down the new

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111. Note also the way courts shifted their interpretations of legislative ambiguity or silence. In the cases discussed in Part I, courts took silence to indicate a permissive definition of family; here, we observe courts interpreting similar language to reach the opposite conclusion.

112. *Carroll v. City of Miami Beach*, 198 So. 2d 643 (Fla. Dist. Ct. App. 1967); *Cash v. Catholic Diocese of Kan. City-St. Joseph*, 414 S.W.2d 346 (Mo. Ct. App. 1967).

113. *Carroll*, 198 So. 2d at 644; *Cash*, 414 S.W.2d at 347.

114. *Carroll*, 198 So. 2d at 644 (emphasis omitted).

115. *Id.*

116. *Cash*, 414 S.W.2d at 349 (quoting the trial judge’s reasons for decision).

117. *Id.* (quoting the trial judge’s reasoning). A New York state court also used the formal-family canon in a ruling against a religious group living in Rye, New York, in 1973. See *People v. Kalayjian*, 352 N.Y.S.2d 115 (App. Term 1973).

“blood, marriage, or adoption” laws using the functional-family approach.<sup>118</sup> In 1962, future California Supreme Court Justice Mathew Tobriner wrote a lengthy decision defending the functional-family canon while he served on California’s intermediate appellate court.<sup>119</sup> The lower court had ruled against an Atherton homeowner who rented his home to multiple families because the rental violated the local zoning ordinance.<sup>120</sup> In an attempt to comply with the order, the homeowner instead rented the property to his son and another young man, both of whom were graduate students at nearby Stanford University, but the lower court found that this use also violated the ordinance and held the homeowner in contempt.

When the appeal of the contempt order reached the appellate level, Judge Tobriner objected to the notion that legal families must have hierarchical relations of dependence.<sup>121</sup> In a clear defense of the functional-family canon, he wrote, “[f]amily’ signifies living as a family,” and it must “refer to the *use* of the premises as a family, or in the manner of a family.”<sup>122</sup> The target of his opinion was unmistakable: the lower court’s narrow construction of “single family,” which it defined as

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118. The Supreme Court of Illinois overturned a “blood, marriage, or adoption” ordinance in the 1966 case *City of Des Plaines v. Trottnor* on the grounds that the municipal regulation of intrahousehold relations had not been specifically authorized by the state legislature. 216 N.E.2d 116, 118 (Ill. 1966). In New Jersey, a succession of cases overturned “blood, marriage, or adoption” requirements in beach towns where rentals to groups of unrelated young people were becoming increasingly common. See, e.g., *Gabe Collins Realty, Inc. v. City of Margate City*, 271 A.2d 430, 434 (N.J. Super. Ct. App. Div. 1970). In one such case, the court found that the ordinances were overly restrictive, barring too many “harmless dwelling uses” in an attempt to ban rentals by “unruly unrelated groups of young adults who indulge in anti-social behavior.” *Kirsch Holding Co. v. Borough of Manasquan*, 281 A.2d 513, 518 (N.J. 1971). In deference to “the right of unrelated people in reasonable number to have recourse to common housekeeping facilities,” *id.* at 519, the New Jersey state courts found these ordinances were not sufficiently tailored to the harms being suffered, *id.* at 520. In 1980, the Supreme Court of California struck down Santa Barbara’s zoning definition of family for violating state constitutional privacy rights. *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980).

119. *Brady v. Superior Court of San Mateo*, 19 Cal. Rptr. 242 (Dist. Ct. App. 1962). Judge Tobriner would go on to serve as a justice on the California Supreme Court, where he would build a legacy of progressive decisions on social issues, including *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

120. *Brady*, 19 Cal. Rptr. at 242-43.

121. *Id.*

122. *Id.* at 246. As in *Carroll v. City of Miami Beach*, the *Brady* court also wrote in dicta that the town of Atherton could always provide a stricter definition of family if it chose to do so.

a unit that has a social status, a head who has a right, at least in a limited way, to direct and control those gathered into the household, a moral or legal obligation of a head to support the other members and a state of at least partial dependence by the other members for this support.<sup>123</sup>

The appellate court then compiled a set of county and city definitions of family in California. Of the sixteen ordinances cited, only one required “blood, marriage, or adoption,” while four limited occupancy depending on whether cohabitants were “related.”<sup>124</sup> Despite inroads of the formal canon during this period, the California example shows the resilience of the functional canon in some jurisdictions. In the coming decade, politicized homeowners would contest and revise many of these ordinances, creating a conflict that the U.S. Supreme Court would ultimately resolve in their favor.

### *B. Homeowner Interests and Countercultural Living*

#### *1. Homeownership and “Traditional Family” Values*

Why did the fortunes of functional-family zoning shift at midcentury? One reason is that homeowners gained enormous power in local politics following World War II, when the federal government began underwriting an unprecedented volume of private mortgages. Expanded federal housing programs significantly lowered down payments and interest rates and effectively set residential building standards.<sup>125</sup> The result was a major expansion of the suburbs; by the 1950s, nearly half of all suburban housing was financed by the Federal Housing Administration (FHA) or U.S. Department of Veterans Affairs.<sup>126</sup> White people disproportionately benefited from these programs, resulting in a massive, racialized relocation to the suburbs called “white flight.”<sup>127</sup>

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123. *Id.* at 243.

124. *Id.* at 249 n.3.

125. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 232-33, 241 (1985).

126. *Id.* at 215.

127. See generally JACKSON, *supra* note 125; KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005); MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2006); LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* (2001); ROBERT O. SELF, *AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND* (2003).

The effects of suburban growth were especially evident in California and the greater Sunbelt, where a generation of new homeowners used their electoral weight to consolidate power over local politics.<sup>128</sup> As historian Robert Self argues, “[T]he *home*—as property, as a site of consumption, and as a political identity—would come to dominate postwar politics.”<sup>129</sup> Self explains that “postwar suburbanization had the effect of creating a proto-class” united not by social politics but by a shared desire to keep local taxes low and property values high.<sup>130</sup> One element of this agenda was a consistent preference for racially homogeneous neighborhoods, even among ostensibly liberal homeowners, on the theory that white people would not pay as much for homes in racially integrated neighborhoods.<sup>131</sup> In a survey of Oakland residents in 1964, for example, Self reports that “the most common objection to mixed-race neighborhoods was ‘fear of economic loss.’”<sup>132</sup>

Well into the tax revolt of the late 1970s, as homeowners fought to reduce their local property tax burden, white suburban homeowners jettisoned racial inclusion in order to preserve property values.<sup>133</sup> Homeowners employed these arguments to foster another kind of social exclusion; through restrictions on the family through zoning, they weaponized local government as a tool of sexual regulation and discrimination on the basis of family form. Many suburban homeowners supported formal definitions of family, despite proclaiming socially liberal views, out of animus toward “alternative lifestyles” and professed fear that unconventional families living nearby would reduce their property values.<sup>134</sup>

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128. See ANDREW NEEDHAM, *POWER LINES: PHOENIX AND THE MAKING OF THE MODERN SOUTHWEST* (2014); ROBERT O. SELF, *supra* note 127; see also WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001) (arguing that homeowners exercise outsize influence on local government policy in defense of property values).

129. SELF, *supra* note 127, at 31.

130. *Id.* at 17, 130.

131. *Id.* at 76. “Voters demonstrated that they were prepared to sacrifice vital public services and traditions of liberal social welfare and ultimately to institutionalize the fiscal advantages that suburban segregation afforded.” *Id.* at 293.

132. *Id.* at 160.

133. *Id.* at 318-19. For histories of residential racial segregation, see generally RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD* (2013); ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960* (1983); BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA* (2009); and SELF, *supra* note 127.

134. According to historian Stephen Vider, “By the late 1970s, the term ‘alternative lifestyles’ had come to encompass a wide variety of ‘nontraditional’ domestic relations including com-

Functional-family doctrines also became less popular as the nuclear family became a more powerful cultural touchstone. In 1949, sociologist George Murdock had coined the term “nuclear family,” which he described as a universal social structure that performed the key functions of socialization, economic cooperation, reproduction, and sexual relations.<sup>135</sup> When servicemen returned stateside, this nuclear family ideology reinforced their places as principle breadwinners and heads of household<sup>136</sup> and became associated spatially with the single-family home of the rising suburb.<sup>137</sup> Although the two-child nuclear family with a breadwinner father and a stay-at-home mother was never the reality for most Americans, the ideal persisted during this period of economic growth and broader access to the family wage.<sup>138</sup>

White America’s urban exodus coincided with the widespread perception that the American family was in crisis.<sup>139</sup> By 1975, most mothers worked outside the home, and less than a quarter of American families represented the nuclear ideal of two heterosexual, married parents and their biological children.<sup>140</sup> As historian Matthew Lassiter argues, the recession of the early 1970s, coupled with higher rates of divorce, suggested to many observers that the nuclear family was “on the verge of collapse.”<sup>141</sup>

While some on the left called for improved social programs to support working parents, social conservatives attributed these developments to moral permissiveness in nonnuclear homes.<sup>142</sup> This imbrication of family and home

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munes, cohabitation, group marriages, heterosexual singles, single-parent households, ‘swinging’ and same-sex relationships.” Stephen Vider, *The Ultimate Extension of Gay Community: Communal Living and Gay Liberation in the 1970s*, 27 GENDER & HIST. 865, 866 (2015).

135. See GEORGE PETER MURDOCK, SOCIAL STRUCTURE 1-22 (1949); see also Ira L. Reiss, *The Universality of the Family: A Conceptual Analysis*, 27 J. MARRIAGE & FAM. 443, 443 (1965) (recognizing that Murdock coined the term “nuclear family” and that this family unit fulfilled the four functions of socialization, economic cooperation, reproduction, and sexual relations).

136. SELF, *supra* note 83, at 18.

137. SKOLNICK, *supra* note 40, at 23.

138. *Id.* at 9-10; NATASHA ZARETSKY, NO DIRECTION HOME: THE AMERICAN FAMILY AND THE FEAR OF NATIONAL DECLINE, 1968-1980, at 5-6 (2007).

139. PLECK, *supra* note 41, at 133; SKOLNICK, *supra* note 40, at 125-50; ZARETSKY, *supra* note 138 at 2; Matthew D. Lassiter, *Inventing Family Values*, in RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S, at 13, 14-15 (Bruce J. Schulman & Julian E. Zelizer eds., 2008).

140. Lassiter, *supra* note 139, at 14.

141. *Id.*

142. Matthew Lassiter argues that the news media fed this perception of “moral permissiveness” through a series of high-profile features evincing panic about the apparent decline of the family. See *id.* at 15.

brought zoning definitions of family to the attention of conservative activists, who pushed for strict interpretations of existing ordinances and for revisions to those ordinances that did not already reflect their values. Juxtaposing new family forms with “traditional” family values, these conservatives deployed a “rhetoric of family, flag, neighborhood, and work” to enhance their politics of nostalgia.<sup>143</sup> Conservative Christian activists, in particular, identified feminism and the gay rights movement as key targets, arguing that homosexuality was “an outright assault on the family.”<sup>144</sup> They successfully mobilized this fear into a campaign to redefine family in ordinances and zoning doctrines as those related by “blood, marriage, or adoption.”<sup>145</sup>

## 2. *Countercultural Living and the Rise of Formal-Family Zoning*

Between 1965 and 1975, American neighborhoods hosted thousands, or perhaps tens of thousands, of communes.<sup>146</sup> Opponents criticized communes for promoting immorality and hurting their property values on the assumption that they were primarily occupied by hippies with utopian separatist views. Despite that reputation, communal living often attracted young professionals seeking nothing more revolutionary than camaraderie and a lower cost of living.<sup>147</sup> In 1971, for example, the *Wall Street Journal* reported that “group living and sharing of household tasks such as cooking and child rearing is becoming increasingly popular among teachers, lawyers, psychologists, engineers and other professionals,” and concluded that “[b]esides the joys of sharing experiences, group living offers more economic efficiency.”<sup>148</sup> Martin Adams, a thirty-seven-year-old history teacher in Minneapolis, explained that he chose to

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143. SKOLNICK, *supra* note 40, at 137.

144. *Id.* at 24 (quoting Jerry Falwell, a well-known conservative televangelist).

145. PLECK, *supra* note 41, at 144; SELF, *supra* note 127, at 331.

146. TIMOTHY MILLER, *THE 60S COMMUNES: HIPPIES AND BEYOND*, at xviii-xx (1999).

147. *See id.* at 170 (stating that many individuals who lived in communes were from middle-class backgrounds); *see also* SKOLNICK, *supra* note 40, at 92-93; Ellen Stern Harris, *Pluses and Pitfalls of House-Sharing*, L.A. TIMES, Aug. 4, 1974, at M10; Pamela G. Hollic, *Cooperative Living: More Families Share Houses with Others to Enhance “Life Style,”* WALL ST. J., July 7, 1972, at 1, 19; *cf.* Vider, *supra* note 134, at 866 (arguing that a wide swath of society participated in the commune movement in the 1960s and 1970s); Carolyn Bell, *Let’s Eliminate the “Typical Family,”* BOS. GLOBE, May 12, 1977, at 41 (arguing that the nuclear family paradigm is obsolete and stating that individuals “move in and out of different families”).

148. Lewis M. Andrews & Miles Schlossberg, *Contemporary Communes, Con and Pro*, WALL ST. J., May 17, 1971, at 12.

live in a commune with nine other adults and twelve children because “[a]s a single family, we just couldn’t afford the kind of life style we wanted.”<sup>149</sup>

As the 1970s wore on, working families increasingly felt the squeeze of high inflation and unemployment, making communal living that much more attractive.<sup>150</sup> In the suburbs north of New York City, residents formed an organization called “Facsimile Familie” to connect people seeking communal living arrangements. “We’re not hippie freaks, like some people assume,” Bernadette Adams, a research technician, told the *New York Times*.<sup>151</sup> With home mortgage and rental prices rising, many callers to Facsimile Familie sought communities to help shoulder the financial burden.<sup>152</sup>

Beyond the economic concerns, many commune dwellers sought “nothing more radical than home and family.”<sup>153</sup> One *Boston Globe* journalist described how a local commune was not composed of “refugees from the depersonalized, technologized, much-criticized Twentieth Century American city society,” but was instead home to a group of fourteen people, “each with a definite stake in the system,” who had “chosen to live out their lives, in their house, trying to get closer to an institution our sociologists say we are losing: the family.”<sup>154</sup> The Boston commune members considered themselves a family, albeit a “self-made” or “invented” one, with intimate interpersonal relationships based on trust.<sup>155</sup>

Newspaper coverage of the commune trend noted that group living was not just for students, but also for middle-aged people who sought more affordable housing.<sup>156</sup> For example, a group of twelve “active oldsters” in Orlando, Florida who “love[d] each other as a ‘family’” lived together in a commune to “save money.”<sup>157</sup> They successfully defended their commune against legal attack, convincing a judge that their group qualified as a family under the local zoning

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149. Hollie, *supra* note 147, at 1. For the effects of the 1970s economic downturn on the working class, see generally JEFFERSON COWIE, *STAYIN’ ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* (2010); and JUDITH STEIN, *PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES FOR FINANCE IN THE SEVENTIES* (2010).

150. Hollie, *supra* note 147 (attributing the popularity of communes to economic advantages).

151. Paula R. Bernstein, “Sharing” of Homes Is Popular in Suburbs, *N.Y. TIMES*, Apr. 29, 1973, § 8 (Real Estate), at 1.

152. *Id.*

153. Jay Molishever, *A Commune, Professional Style*, *BOS. GLOBE*, May 16, 1971, at D6.

154. *Id.*

155. *Id.*

156. Frederic Hunter, *Types of Communes Multiply*, *CHRISTIAN SCI. MONITOR*, Apr. 18, 1974, at 2.

157. *12 Oldsters Get Approval for Commune*, *L.A. TIMES*, Aug. 21, 1971, at 19.

ordinance.<sup>158</sup> Like many new commune dwellers, these seniors sought community and lower financial burdens as they aged.

The reality of communes, however, did not diminish their negative reputation during this period. If the nuclear ideal was in crisis, communes were an obvious culprit. Congress was so concerned about unrelated cohabitation in 1971 that it amended the Food Stamp Act to end the eligibility of households that included unrelated people under the age of sixty.<sup>159</sup> The change sparked litigation that landed at the Supreme Court in 1973.<sup>160</sup> The Court found the distinction between related and unrelated families unconstitutional on due process and equal protection grounds.<sup>161</sup> Writing for the majority, Justice Brennan pointed to evidence that the amendment was “intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”<sup>162</sup> Justice Brennan wrote “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>163</sup> Just three years later, in *Belle Terre*, the Court would fail to apply this same logic to zoning definitions of family.

In the meantime, conflict over the definition of family spilled into zoning disputes in municipal governments nationwide. The fight generally found homeowners pressuring towns to pass narrower definitions of family or enforce existing ordinances against nonconforming uses, whether in communes or less formal collections of young singles. For example, town officials in Larkspur and Palo Alto, California, tried to evict communes from single-family homes in 1970.<sup>164</sup> In response, a group of commune dwellers calling themselves the Palo Alto Tenants Union attempted to enjoin a local business group from “‘harassing’ plaintiffs ‘under the guise of enforcement or authority’ of municipal zoning ordinances.”<sup>165</sup> At the time, Palo Alto Municipal Code section 18.04.210 defined family as “one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four

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158. *Id.*

159. Act of Jan. 11, 1971, Pub. L. No. 91-671, 84 Stat. 2048.

160. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973).

161. *Id.* at 533, 538.

162. *Id.* at 534.

163. *Id.* (emphasis omitted).

164. Editorial, *Real Meaning of “Family” – Judge States It Clearly*, SAN RAFAEL INDEP. J., Jan. 11, 1971, at 8.

165. Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 909 (N.D. Cal. 1970) (quoting PALO ALTO, CAL., MUN. CODE §§ 18.04.210, 18.88.050 (1970)), *aff’d*, 487 F.2d 883 (9th Cir. 1973).



persons living as a single housekeeping unit.”<sup>166</sup> The Tenants Union asserted that they lived as families and were perceived in their larger communities as family units.<sup>167</sup> They levied numerous constitutional objections to the ordinance, arguing that enforcement abridged their freedom of association, equal protection, and due process rights, and that the distinction between “related” and “unrelated” people constituted a suspect classification.<sup>168</sup>

The district court vehemently disagreed, invoking the historically suspect “tradition” of the formal family. “[T]here is a long recognized value in the traditional family relationship which does not attach to the ‘voluntary family,’” wrote Judge Wollenberg.<sup>169</sup> He continued,

The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being “voluntary,” is often compulsory. Finally, it has been a means, for uncounted millennia, of satisfying the deepest emotional and physical needs of human beings.<sup>170</sup>

The court attempted to draw a dividing line between “traditional” and functional families based on the permanence of the interpersonal connection, the compulsory nature of the relationships, and the emotional and physical satisfaction of the group members. Of course, the legal history illuminated in Section II.A.1 shows how courts across the country permitted functional families to occupy single-family homes, despite their associations not being backed by the sweep of “millennia.”<sup>171</sup> This move to equate nuclear families with legal tradition replaced functional-family doctrines with the formal-family approach, and at the same time normalized the notion that the nuclear family was the natural default.

Despite the court’s recognition that “[p]laintiffs are unquestionably sincere in seeking to devise and test new life-styles,” the court ultimately resorted to circular logic, arguing that legal rights could not attach to the functional family because the membership had “no legal obligations of support or cohabitation. They are in no way subject to the State’s vast body of domestic relations

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166. 487 F.2d at 884 (quoting PALO ALTO, CAL., MUN. CODE § 18.04.210).

167. *Palo Alto Tenants Union*, 321 F. Supp. at 910.

168. *Id.* at 909-11.

169. *Id.* at 911.

170. *Id.*

171. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 34 (2000).

law.”<sup>172</sup> Of course, this is precisely what the commune members sought—legal recognition of their family form. The court’s tautological reasoning led it to conclude that “the communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs.”<sup>173</sup> By predicating family recognition on preexisting legal recognition, the court could not possibly approve the plaintiffs’ claim.

Crackdowns on communal living also affected less intentional groups of people sharing homes in single-family zoned communities. In 1964, for example, homeowners attempted to evict four single men from a home they had rented for four years in Des Plaines, Illinois, arguing that they did not meet the town’s zoning definition of family.<sup>174</sup> In response, the men argued they had “adopted” each other to form a legal family.<sup>175</sup> A State Department administrator in Arlington, Virginia, also pressed his county board to enforce the town’s zoning definition of family against a group of five law students sharing a house near his own in 1966. Group living could contribute to the “deterioration of good neighborhoods,” he argued.<sup>176</sup> In 1970, similar groups throughout the country, from Takoma Park, Maryland, to Chicago, Illinois, and El Monte, California, were also targeted for eviction.<sup>177</sup> Twenty years earlier, a broad understanding of the “family” had dominated the zoning landscape, but as the cultural opposition to communal living intensified, the range of legally acceptable cohabitation arrangements narrowed.

The three most common arguments deployed against the functional family help clarify the extent of this shift in meaning and portend the disappearing recognition of nonnuclear families in zoning jurisprudence. Some formal-family advocates argued that unrelated cohabitants posed a threat to the health, safety, and tranquility of single-family zoned neighborhoods by bringing more people, cars, and noise.<sup>178</sup> Others suggested that functional families would degrade the morals of the community, like one Prince George’s County landlady

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172. *Palo Alto Tenants Union*, 321 F. Supp. at 911.

173. *Id.*

174. *Suit Is Filed: Are Single Men Single Family?*, CHI. TRIB., Nov. 26, 1964, at N2 [hereinafter *Suit Is Filed*].

175. *Id.*

176. *Family Tag in Arlington Has Thorns*, WASH. POST & TIMES-HERALD, May 1, 1966, at A22.

177. *Group Marriage Out: Definition of Family Clarified in New Law*, L.A. TIMES, Aug. 12, 1970, at E7; Jim Mann, *Commune Residents Fight Zoning Law*, WASH. POST & TIMES-HERALD, Aug. 13, 1970, at B1; Steven Pratt, *Zoning Rule May Move the “Albert Pratt Family,”* CHI. TRIB., Apr. 19, 1970, at A18.

178. A political debate on these terms erupted in Mill Valley, California, for example. See Jeff Greer, *Mill Valley Leaders Split on Communes*, SAN RAFAEL INDEP. J., Feb. 4, 1971, at 8.

who reported that “many tenants get very angry with us for renting to unmarried people. They wonder if we don’t care about the morals of their children.”<sup>179</sup> Amidst fears of family crisis, unmarried cohabitants, gay people, and other diverse family forms embodied the degradation of American family life. Zoning was one way to enshrine a community’s exclusionary preferences in law.

As detailed in Section II.B.1, however, the most common refrain from homeowners and town officials alike was that functional families would hurt residential property values.<sup>180</sup> Many proclaimed that they harbored no ill will toward functional families but objected that their homes represented their most valuable assets and the source of town revenues, and thus required that they accede to the presumed social preferences of hypothetical future homebuyers. Neighbors raised this complaint, for example, against a commune of twelve professionals in Boston.<sup>181</sup> When the group moved in, nearby residents “began to get edgy, worrying about the possibility of plummeting real estate values.”<sup>182</sup> The argument was also used against the four men living together in Des Plaines, where the city concluded “the use will damage surrounding property values if it continues.”<sup>183</sup>

### 3. *Long Island Groupers and Belle Terre v. Boraas*

All three of the most common justifications for formal family were at play on Long Island in the early 1970s, where a housing shortage, homeowner power, and a seasonal beach rental market pushed the issue to the top of the regional political agenda. Long Island had been a major beneficiary of federal investment in suburban development in the postwar period, including

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179. PLECK, *supra* note 41, at 191 (citations omitted). Fear of homosexuality also prompted an eviction effort in Wayland, Massachusetts. See *Snobbing It Up in Wayland*, BOS. GLOBE, Dec. 16, 1974, at 22. In 1978, an attempt to repeal the ordinance was defeated. *Town Meetings: Southboro*, BOS. GLOBE, Apr. 13, 1978, at 14.

180. In local government law, scholars debate whether developers (“the growth machine”) or homeowners (“the homevoter hypothesis”) are the more powerful interest in local law and politics. One feature that these leading theories share, however, is the conviction that both growth boosters and homeowners promote policies that are perceived to raise property values. See FISCHER, *supra* note 128; Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

181. Molishever, *supra* note 153, at D44.

182. *Id.*

183. *Suit Is Filed*, *supra* note 174, at N2.

construction of the iconic Levittown subdivisions near Hempstead.<sup>184</sup> Homeowners on Long Island were accustomed to using zoning laws as a vehicle for social regulation. As with other suburbs of the period, Long Island's growth was heavily financed by the FHA, which required that newly constructed homes include racially restrictive covenants.<sup>185</sup> White homeowners and builders had long supported this practice, which enabled their racial prejudice and allayed their fear that integrated neighborhoods would depress property values.<sup>186</sup>

When it came to formal-family definitions, Lee Koppelman, Executive Director of the Nassau-Suffolk Regional Planning Board, saw a similar dynamic at play. In his view, homeowner support for the formal family was reflected in municipal policy. “[Y]ou can’t pin the blame solely on local governments,” observed Koppelman.<sup>187</sup> “[G]overnment is being influenced by its constituency. It’s the most absolute reflection of the public will that you can find.”<sup>188</sup> Indeed, the question of “groupers,” or rentals by groups of unrelated young people, “was one of the leading political issues” in the 1969 elections for the Town of Southampton.<sup>189</sup> A Southampton report on group rentals explained the reason for concern: without legal reform, groupers “will seriously harm the health, endanger the safety, impair the morals, and adversely affect the general welfare . . . and impair property values in town.”<sup>190</sup> In part, the language parroted the legal definition of the local police power, but these references to the moral stature of the community, as well as the danger to property values, underscore the centrality of these concerns to formal-family advocacy on Long Island.

The conflict on Long Island reached federal courts in 1972, as groups of unrelated residents in the Village of Belle Terre fought to stay. In *Boraas v. Village of Belle Terre*, a federal district court judge ruled that six graduate students from the State University of New York at Stony Brook had violated Belle Terre’s zoning ordinance.<sup>191</sup> The ordinance at issue allowed any number of people related

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184. JACKSON, *supra* note 125, at 234-38; RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 70-71 (2017).

185. ROTHSTEIN, *supra* note 184, at 72, 84-86.

186. BROOKS & ROSE, *supra* note 133, at 39; ROTHSTEIN, *supra* note 184, at 77, 90.

187. Pamela Warrick & Jim Scovel, *Issue: Who Can Live in a Single House?*, *NEWSDAY*, Jan. 21, 1974, at 3A.

188. *Id.*

189. Knut Royce & Melvin Damski, *Anti-Grouper Laws Budding in LI Spring*, *NEWSDAY*, Apr. 1, 1970, at 2.

190. *Id.*

191. 367 F. Supp. 136 (E.D.N.Y. 1972), *rev'd*, 476 F.2d 806, 816 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974).

by blood, marriage, or adoption to reside together, but limited the number of unrelated cohabitants to two.<sup>192</sup> District Judge John Dooling rested his argument on a “legally protectable affirmative zoning interest” in the “marriage-and-blood related” nuclear family.<sup>193</sup> State and federal law “aggressively surround the traditional family of parents and their children,” he wrote, making this type of zoning ordinance in sync with “family court laws,” “laws of inheritance,” and “tax laws.”<sup>194</sup> To Judge Dooling, zoning was therefore an acceptable place to legislate family forms.

A few months later, the Second Circuit reversed Judge Dooling’s ruling, finding that the village had no rational basis for excluding “unmarried groups seeking to live together.”<sup>195</sup> The ordinance’s purpose and effect of “insuring that the community will be structured socially on a fairly homogenous basis” violated the Equal Protection Clause by creating a legislative classification with no rational relationship to the purpose of zoning law.<sup>196</sup> By mobilizing in local politics to pass new formal-family ordinances, and by pushing local officials to strictly enforce those ordinances already on the books, homeowners and social conservatives had placed functional-family zoning in jeopardy.

### C. *The Triumph of the Formal Family*

#### 1. *Belle Terre and Its Immediate Aftermath*

In 1974, the Supreme Court finally entered the debate over functional-family zoning in *Village of Belle Terre v. Boraas*.<sup>197</sup> Reversing the Second Circuit’s decision, the Court held that discrimination against functional families through zoning represented a permissible use of the police power and furthered legitimate governmental interests in promoting the suburban ideal. Writing for the majority, Justice Douglas found that “[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.”<sup>198</sup> The Court further

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192. *Id.* at 138; Fred McMorrow, *6 Students Fighting Eviction by Village*, N.Y. TIMES, Oct. 1, 1972, at 113.

193. *Boraas*, 367 F. Supp. at 146.

194. *Id.*

195. *Boraas*, 476 F.2d at 816.

196. *Id.* at 815-16. In this case, those purposes were the preservation of “public health, safety or welfare.” *Id.* at 815.

197. 416 U.S. 1 (1974).

198. *Id.* at 9.

found a legitimate exercise of municipal police power in zoning schemes “where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”<sup>199</sup> The goals of zoning law the Court deemed acceptable in *Euclid*—to protect public health, safety, and general welfare—now definitively permitted discriminating against functional families.<sup>200</sup> The Court also collapsed the distinction between nuclear families and “traditional families,” eliding the long history of the functional family in American zoning law.

Justice Marshall offered a powerful dissent. He argued that the formal-family ordinance violated the rights to free association and privacy embodied in the First and Fourteenth Amendments. Analogizing to the constitutional infirmity of racially restrictive covenants, he wrote that “zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.”<sup>201</sup> The Village, according to Justice Marshall, “ha[d], in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.”<sup>202</sup> In Justice Marshall’s analysis, the ordinance merited strict scrutiny because it implicated the fundamental right to “choice of household companions.”<sup>203</sup> Under his view, Belle Terre could use its police powers to regulate population density, noise, and traffic, but it could not discriminate on the basis of family form.<sup>204</sup>

In the two years following the decision, three state supreme courts adopted *Belle Terre* wholesale, evicting a collective family of six adults;<sup>205</sup> maintaining density limitations on unrelated cohabitants;<sup>206</sup> and preventing a group of Opus Dei members from sharing a home.<sup>207</sup> At the same time, municipalities

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199. *Id.*

200. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926). The crucial point is that zoning law can pursue these legitimate governmental interests without regulating family form. *See supra* Section II.A (arguing that, historically, zoning law has not used family form as a proxy for legitimate governmental interests in public health, safety, and general welfare); *infra* Part III (arguing that the purposes of zoning law do not necessitate narrow definitions of family).

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

202. *Id.* at 16-17.

203. *Id.* at 16.

204. *Id.* at 19.

205. *Rademan v. City & County of Denver*, 526 P.2d 1325 (Colo. 1974).

206. *Town of Durham v. White Enters., Inc.*, 348 A.2d 706 (N.H. 1975).

207. *Ass’n for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976); *see also* Lubow, *supra* note 31, at 156 & n.241 (discussing the preceding three cases in detail).

nationwide responded by passing formal-family ordinances.<sup>208</sup> Officials in Brookhaven, Southampton, Hempstead, and Ocean Beach—among the most populous towns on Long Island—announced plans to pass formal-family ordinances just days after the decision was announced.<sup>209</sup> The ordinance in Hempstead alone affected one hundred thousand homes.<sup>210</sup> In towns like East Hampton, where formal-family ordinances had been enacted before *Belle Terre*, officials ramped up enforcement. According to the East Hampton Police Chief, by June 1974 the police were actively surveilling eight houses.<sup>211</sup> Defenders of the functional-family approach tried to halt these efforts, mobilizing a group called Long Islanders for Residential Rights to turn out for a hearing on Hempstead's proposed "grouper" ban.<sup>212</sup> By one estimate, opponents of the ban outnumbered supporters four-to-one, but it was not enough to sway the town board.<sup>213</sup>

Officials like Hempstead Supervisor Alfonse D'Amato expressed support for the ban because most homeowners had put their life savings in their home, and so "the one-family character" of their neighborhoods should be protected.<sup>214</sup> Baldwin town Councilman Leo McGinity expressed similar concerns, arguing that "if this kind of use is allowed in the neighborhood then they will have trouble getting a fair price for their homes if they ever want to sell."<sup>215</sup> Like the homeowners they represented, these town officials justified exclusionary family definitions on the theory that functional families would reduce property values.

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208. See, e.g., *Commune Ban Hearing Tops Council List*, HARTFORD COURANT, Dec. 9, 1974, at 55; *Resolving a 'Family' Affair*, BOS. GLOBE, Aug. 1, 1979, at 10 ("In many cities and towns around the country, including some in Massachusetts, such ordinances have been bitterly contested, dividing communities and neighborhoods, pitting residents and civic leaders against one another."); Adella Urban, *PZC Ruling Hinges on Family Definition*, HARTFORD COURANT, Jan. 10, 1974, at 47C.

209. See *Anti-Grouper Proposal*, NEWSDAY, Apr. 26, 1974, at 24; Stuart Diamond, *Officials Take Aim at Groups*, NEWSDAY, Apr. 3, 1974, at 4-5.

210. See Dan Hertzberg, *Grouper Ban Attempt Draws Vocal Crowd*, NEWSDAY, Apr. 24, 1974, at 7. The ordinance passed on June 11, 1974. *Hempstead Enforcement on Groupers Starting*, NEWSDAY, July 19, 1974, at 24.

211. See Carole Agus & John McDonald, *1's Company, 2's a Crowd, 10's . . .*, NEWSDAY, June 30, 1974, at 3.

212. *A 2nd Grouper Hearing Set, Foes of Ban Report*, NEWSDAY, May 6, 1974, at 20.

213. Hertzberg, *supra* note 210, at 7.

214. *Id.*

215. Michael Alexander, *This "Family" Prays Together, but . . .*, NEWSDAY, June 10, 1974, at 15.

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In the aftermath of *Belle Terre*, a new defense of the formal family emerged. In Levittown, town officials discovered that groups of undocumented immigrants occupied nearly a dozen homes owned by the same landlord. Other homeowners quickly moved to redefine family more narrowly to evict these immigrants, gathering 150 signatures in support.<sup>216</sup> Kurt Krumperman, a spokesman for Long Islanders for Residential Rights, responded by writing a letter to the editor of the local newspaper.<sup>217</sup> He argued that “fear of illegal immigrants living next door in horrible conditions” should not justify “passage of such a harmful bill as the anti-grouper law.”<sup>218</sup> Antigrouper legislation in Levittown would also “adversely effect [sic] thousands of other people,” including

those who must live together in order to afford housing in a county where housing is expensive; those who must rent rooms in order to keep up payments for a house, those who live together for personal reasons, and scores of other situations which create no more problems in communities than regular families.<sup>219</sup>

In the past, homeowners had not raised fear of immigrants as a justification for formal-family laws. But by 1975, twelve of Long Island’s thirteen towns, and many of its unincorporated areas, had passed formal-family ordinances.<sup>220</sup>

Gay couples were also victims of the changed zoning landscape.<sup>221</sup> The tony Detroit suburb of Grosse Pointe made national news in November 1976 when neighbors complained that new residents violated the definition of family in their zoning code. Donald J. Mazzola and Richard Gronan, two single career

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216. See Dan Hertzberg, *Levittown Residents Ask for Anti-Grouper Law*, NEWSDAY, May 15, 1974, at 26.

217. Kurt Krumperman, Letter to the Editor, *Enforce Existing Laws*, NEWSDAY, May 14, 1974, at 49.

218. *Id.*

219. *Id.*

220. Barbara Delatiner, *Long Island Draws the Line on ‘Groupers,’* N.Y. TIMES (Aug. 31, 1975), <https://www.nytimes.com/1975/08/31/archives/long-island-draws-the-line-on-groupers-li-draws-the-line-on.html> [https://perma.cc/P55D-2KLV]. The remaining town, Riverhead, had passed an antigrouper law by 1980. See Noel Rubinton, *Oyster Bay Grouper Law Faces Trial*, NEWSDAY, Aug. 17, 1980, at 9. Anti-immigrant sentiment has prompted homeowners to consider revising the definition of family as recently as 2006. See, e.g., Sheree R. Curry, *Family Ties: When It Comes to Housing, Know Your Zone*, PORTERVILLE RECORDER, June 10, 2006, at 4D.

221. See, e.g., Alan P. Henry, *The Homosexual Impact in the Suburbs*, BOS. GLOBE, June 27, 1977, at A1; *Un-Welcomed Wagon*, FIFTH FREEDOM (N.Y.C.), Mar. 1977, at 3.



men, rented a four-bedroom house in Grosse Pointe after living together for a year and a half in Detroit. They knew Ordinance 22 defined family as those related by “blood, marriage, or adoption,” but they were told that granting a variance was a mere formality that they could reasonably expect, since cohabitating women were sometimes granted them.<sup>222</sup> Tensions escalated at two separate city council meetings, where neighbors protested that the two men “posed a threat to the family character of the neighborhood.”<sup>223</sup> A councilman who supported Mazzola and Gronan suggested that the “objections to them arise from the fact that they were men” and that the neighbors “didn’t want single men living in the area for fear it would have an effect on their kids.”<sup>224</sup> Although news coverage fell short of commenting directly on Mazzola’s and Gronan’s sexuality, the clear implication was that the men were gay. In fact, the Mattachine Society of Western New York, a branch of an early homophile organization, ran a story about their plight in their local newsletter.<sup>225</sup> Due in part to the amount of press coverage they attracted, Gronan and Mazzola were allowed to stay in their home.<sup>226</sup>

## 2. *Formal Family Since Belle Terre*

Following *Belle Terre*, the Supreme Court has returned to the question of family-composition ordinances just once, in the 1977 case *Moore v. City of East Cleveland*.<sup>227</sup> During the wave of zoning revisions in the 1970s, East Cleveland, Ohio, adopted a complicated zoning code that limited the definition of family to a small subset of family relations, excluding cohabitation between grandparents and certain grandchildren.<sup>228</sup> The Court found that this regulation violated the Due Process Clause of the Fourteenth Amendment, distinguishing it from *Belle Terre* because the ordinance went so far as to limit cohabitation between blood relatives.<sup>229</sup> The decision marked the outer limit of the Court’s tolerance for family regulation in zoning.

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222. James Njaim, *Zoning Law Variance Approved*, GROSSE POINTE NEWS, Dec. 16, 1976, § 1, at 1.

223. *Families Drive Out 2 Singles*, N.Y. TIMES (Nov. 18, 1976), <https://www.nytimes.com/1976/11/18/archives/families-drive-out-2-singles.html> [<https://perma.cc/ZBU3-55CT>].

224. *Id.*

225. *Un-Welcomed Wagon*, *supra* note 221, at 3.

226. Njaim, *supra* note 222, § 1, at 2.

227. 431 U.S. 494 (1977).

228. *Id.* at 494.

229. *Id.* at 495.

## ZONED OUT

Since the late 1970s, the number of state supreme and appellate courts to ratify formal-family ordinances has risen to fourteen.<sup>230</sup> In general, these courts continue to rely on the same arguments that animated the 1970s debate. And while the highest courts of two other states have not yet ruled on the issue, intermediate appellate decisions in both states have affirmed formal-family definitions.<sup>231</sup> Indeed, only four state courts have refused to fall in line. In one case involving a group home for preschoolers with disabilities and another case involving a fraternity, for example, the New Jersey Supreme Court found that “blood, marriage, or adoption” provisions violated the state’s due process clause.<sup>232</sup> The California Supreme Court partially adopted the reasoning from Justice Marshall’s dissent in *Belle Terre*, finding that a formal-family provision violated its state constitution’s right to privacy,<sup>233</sup> and the Michigan Supreme Court threw out a “blood, marriage, or adoption” provision on due process grounds.<sup>234</sup> In a surprising coda to the story of formal family on Long Island, New York’s highest court struck down a formal-family ordinance in the Town of Oyster Bay because regulating family form was not rationally related to legitimate governmental purposes.<sup>235</sup>

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230. They are Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Louisiana, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, South Dakota, and Utah. See *Rademan v. City & County of Denver*, 526 P.2d 1325 (Colo. 1974); *Dinan v. Bd. of Zoning Appeals*, 595 A.2d 864 (Conn. 1991); *Hayward v. Gaston*, 542 A.2d 760 (Del. 1988); *Macon Ass’n for Retarded Citizens v. Macon-Bibb Cty. Planning and Zoning Comm’n*, 314 S.E.2d 218 (Ga. 1984); *Marsland v. Int’l Soc’y for Krishna Consciousness*, 657 P.2d 1035 (Haw. 1983); *Dvorak v. City of Bloomington*, 796 N.E.2d 236 (Ind. 2003); *Kenner v. Normal Life of La.*, 465 So.2d 82 (La. 1985); *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981); *City of Worcester v. Bonaventura*, 775 N.E.2d 795 (Mass. App. Ct. 2002); *Ass’n for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976); *State v. Champoux*, 566 N.W.2d 763 (Neb. 1997); *Town of Durham v. White Enters., Inc.*, 348 A.2d 706 (N.H. 1975); *City of Brookings v. Winker*, 554 N.W.2d 827 (S.D. 1996); *Anderson v. Provo City Corp.*, 108 P.3d 701 (Utah 2005).

231. *Carroll v. Washington Twp. Zoning Comm’n*, 408 N.E.2d 191 (Ohio 1980); *City of Toledo v. Ross*, No. L-03-1181, 2004 WL 2504377 (Ohio Ct. App. Nov. 5, 2004); *Farley v. Zoning Hearing Bd. of Lower Merion Twp.*, 636 A.2d 1232 (Pa. Commw. Ct. 1994); *Lantos v. Zoning Hearing Bd.*, 621 A.2d 1208 (Pa. Commw. Ct. 1993).

232. *State v. Baker*, 405 A.2d 368, 370 (N.J. 1979); *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 891 (N.J. 1990).

233. *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980).

234. *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984).

235. *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544 (1985).

Outside these four states, functional families remain vulnerable to formal-family enforcement.<sup>236</sup> Even as the definition of family has evolved in other areas of the law, it has stayed the same in zoning regulations. As recently as 2011, the South Carolina Supreme Court upheld the constitutionality of a formal-family ordinance.<sup>237</sup> The law allowed any number of related people to cohabit in single-family zoned parts of Columbia, but limited the number of unrelated people to three.<sup>238</sup> The court conceded that the offending roommates “operated as a single household,”<sup>239</sup> but still held that they could be denied cohabitation since the ordinance was rationally related to legitimate governmental interests.<sup>240</sup>

In 2012, Laura Rozza and Simon DeSantis likewise found themselves facing exclusionary zoning regulations. The couple had purchased a ten-bedroom, five-bathroom home in a posh residential area of Hartford, Connecticut. Before moving in, they consulted the zoning codes, but as Rozza later explained, the codes “were so vague that we thought we were okay.”<sup>241</sup> Rozza and DeSantis had taken the unusual step of investigating Hartford’s zoning regulations because they knew that theirs was not the typical family: they were just two of the eight adults between the ages of thirty-one and forty, along with three children under the age of eleven, living together—the “Scarborough 11” as they were dubbed in the local press.<sup>242</sup> Between them were two married couples,

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236. See *City of Ladue v. Horn*, 720 S.W.2d 745, 747 (Mo. Ct. App. 1986); Marsha Ritzdorf, *Challenging the Exclusionary Impact of Family Definitions in American Municipal Zoning Ordinances*, 7 J. URB. AFF. 15, 22 (1985).

237. *McMaster v. Columbia Bd. of Zoning Appeals*, 719 S.E.2d 660 (S.C. 2011).

238. *Id.* at 662.

239. *Id.*

240. The rational interest cited was “controlling the undesirable qualities associated with ‘mass student congestion.’” *Id.* at 665 (“[B]ecause the City of Charleston’s zoning decision was reasonably founded and rationally related to its stated interests of preserving the area’s residential character, the city’s action in denying a rezoning application did not rise to the level of being arbitrary or capricious and thus did not violate the property owner’s substantive due process rights.” (citing *Harbit v. City of Charleston*, 675 S.E.2d 776, 782 (S.C. Ct. App. 2009))).

241. Jillian Dunham, *8 Adults, 3 Kids: Modern, Intentional Families Are on the Rise*, N.Y. MAG.: CUT (Nov. 10, 2015), <http://nymag.com/thecut/2015/11/intentional-communities-modern-family-unrelated-adults.html> [<https://perma.cc/A53Z-GDND>].

242. They include Laura Rozza, her husband Dave, and their son Milo; DeSantis and his partner Maureen Welch; Julia Rosenblatt, Josh Blanchfield, and their children Tessa and Elijah; and two single adults, Hannah Simms and Kevin Lamkins. *Id.*

their biological children, an unmarried couple, and two unrelated single adults, who had “intentionally [come] together as a family.”<sup>243</sup>

Just a few weeks after moving in, they received a cease-and-desist notice from the City of Hartford.<sup>244</sup> The notice stated that they were in violation of the Hartford Municipal Code’s single-family ordinance and ordered them to vacate the premises. Even though the Scarborough 11 shared chores, supported each other emotionally, collectively parented the children, ate together in a communal kitchen, and shared expenses out of a joint bank account, the law did not consider them a “family.” The Hartford Zoning Board of Appeals denied their appeal on a close reading of the ordinance, but the Scarborough 11 refused to vacate, resulting in a protracted court battle.<sup>245</sup>

Just four years ago, the Commonwealth Court of Pennsylvania held that “zoning ordinances defining ‘family’ using biological and legal bonds are not facially unconstitutional.”<sup>246</sup> The case consolidated appeals of several judgments, including a case involving eight Drexel sorority sisters who lived together in a home zoned for single families. The students had bought the furnishings together, shared common spaces, dined and did chores together, and “engaged in activities and planning as a group.”<sup>247</sup> At the hearing, one of the women testified that “she would describe herself as having two families,” her

243. Vanessa de la Torre, *8 Adults, 3 Children, 1 House—and a Big Zoning Dispute in Hartford*, HARTFORD COURANT: COURANT COMMUNITY (Nov. 20, 2014, 10:37 PM), <http://www.courant.com/community/hartford/hc-hartford-scarborough-zoning-1121-20141120-story.html> [<https://perma.cc/LB6V-WC82>].

244. Vanessa de la Torre, “*Scarborough 11*” *File Federal Complaint Against Hartford* [sic], HARTFORD COURANT: COURANT COMMUNITY (Mar. 25, 2015, 10:01 PM), <http://www.courant.com/community/hartford/hc-hartford-scarborough-zoning-0326-20150325-story.html> [<https://perma.cc/Y3V5-MRHP>].

245. *City of Hartford v. Rozza*, No. HHD-CV-15-6058199-S (Conn. Super. Ct. filed Mar. 24, 2015). The Scarborough 11 brought their own claim against the City for discrimination, which was dismissed for lack of jurisdiction. See *Blanchfield v. Hartford*, No. 3:15-cv-00431-JCH (D. Conn. filed Mar. 25, 2015). The case coincided with a citywide rezoning project, which ultimately increased the number of unrelated cohabitating adults from two to three. See Vanessa de la Torre, *Hartford Adopts Biggest Change in Zoning Rules in Nearly 50 Years*, HARTFORD COURANT: COURANT COMMUNITY (Jan. 13, 2016, 6:20 PM), <http://www.courant.com/community/hartford/hc-hartford-zoning-change-0113-20160112-story.html> [<https://perma.cc/QM3B-2ZUH>]. On October 26, 2016, the City of Hartford withdrew the case against the Scarborough 11, citing costs. See Vanessa de la Torre, *City of Hartford Withdraws Suit in ‘Scarborough 11’ Case*, HARTFORD COURANT: COURANT COMMUNITY (Oct. 27, 2016, 4:00 PM), <https://www.courant.com/community/hartford/hc-hartford-scarborough11-withdrawal-1028-20161027-story.html> [<https://perma.cc/MLC6-WP3S>].

246. *Schwartz v. Phila. Zoning Bd. of Adjustment*, 126 A.3d 1032, 1044 (Pa. Commw. Ct. 2015).

247. *Id.* at 1043-44; see also Brief of Appellants at 14-15, *Schwartz*, 126 A.3d 1032 (Pa. Commw. Ct. 2015) (No. 1332-CD-2014) (discussing the lifestyle of the sorority sisters).

family of birth and her family of choice.<sup>248</sup> The court found the ordinance valid, in part because the composition of the residential group changed from year to year.<sup>249</sup>

Formal-family enforcement continues outside of the courthouse, too. Even in socially liberal towns, homeowners have objected to functional-family zoning on the grounds that such regulations reduce property values and degrade neighborhood character. In Ann Arbor, Michigan, for example, several homeowners associations and citizens objected to granting six Jesuit priests an exception to occupy a single-family home, expressing their fear of “opening the door to student housing or cults, instability of the household because members aren’t related,” and lower property values.<sup>250</sup> When Boulder, Colorado, began to consider changing its zoning ordinances to allow co-ops in single-family homes in 2016, the Boulder Neighborhood Alliance launched a campaign to stop it, arguing that homeowners would “suffer grievous damage to their sense of security, stability and peaceful lifestyle. This is on top of the possible loss of monetary value of most families’ largest asset—their home.”<sup>251</sup>

These recent cases and conflicts demonstrate the staying power of the formal-family approach in American zoning jurisprudence and the persistence of defensive homeowner politics. Despite increasing judicial recognition of diverse families in family law and other areas of constitutional law, courts around the country have relied on *Belle Terre* to uphold the power of municipalities to discriminate on the basis of family form. Neighborhood groups and individual homeowners also continue to cite their desire to protect property values in espousing discriminatory zoning policies.

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248. *Schwartz*, 126 A.3d at 1044.

249. *Id.*

250. Mary Morgan, *Request for Jesuit Home to Be Reconsidered*, ANN ARBOR CHRON. (June 14, 2014, 8:00 PM), <http://annarborchronicle.com/2014/06/14/request-for-jesuit-home-to-be-reconsidered> [<https://perma.cc/PX5D-25VL>].

251. Diane Curlette, Opinion, *Healing the Rift over Proposed Co-op Ordinance*, DAILY CAMERA (Boulder, Colo.) (Aug. 20, 2016, 7:20 PM MDT), [http://www.dailycamera.com/guest-opinions/ci\\_30270388/diane-curlette-healing-rift-over-proposed-co-op](http://www.dailycamera.com/guest-opinions/ci_30270388/diane-curlette-healing-rift-over-proposed-co-op) [<https://perma.cc/5QRT-ZLZS>]; see also Dan Hunter, Letter to the Editor, *Council Should Consider Neighborhood Impacts of Co-ops*, DAILY CAMERA (Boulder, Colo.) (Jan. 6, 2017, 7:35 PM MDT), [http://www.dailycamera.com/letters/ci\\_30707984/dan-hunter-council-should-consider-neighborhood-impacts-co](http://www.dailycamera.com/letters/ci_30707984/dan-hunter-council-should-consider-neighborhood-impacts-co) [<https://perma.cc/6H8K-DHXQ>]; Steven Meier, Opinion, *Co-op Ordinance—Limit the Damage*, BOULDER NEIGHBORHOOD ALLIANCE (Nov. 29, 2016), <http://boulderna.org/2016/11/co-op-ordinance-limit-the-damage> [<https://perma.cc/RRL2-36K7>]; Jan Trussell, Opinion, *Co-op Advocates Resort to Name-Calling*, BOULDER NEIGHBORHOOD ALLIANCE (Sept. 13, 2016), <https://boulderna.org/2016/09/jan-trussell-co-op-advocates-resort-to-name-calling> [<https://perma.cc/HGF4-BRZ5>].

### III. FUNCTIONAL FAMILIES WE CHOOSE

The scope of the conflict between family law and zoning law is alarming. Over the past forty years, many state courts have adopted functional-family doctrines in an effort to recognize the diversity of family forms, often explicitly relying on cohabitation as a proxy for familial connection. At the same time, zoning law has lurched toward formalism, undermining functional-family law developments.

In thirty states, courts and legislatures have attempted to open family law to functional families, but formal-family zoning laws limiting cohabitation to “blood, marriage, or adoption” remain presumptively constitutional. In seven states, the highest courts have deemed “blood, marriage, or adoption” ordinances explicitly constitutional,<sup>252</sup> while nevertheless relying on cohabitation to make functional-family law determinations.<sup>253</sup> In an additional twenty-three states, judges have relied on cohabitation in family law cases<sup>254</sup> while the status

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252. See *Rademan v. City & County of Denver*, 526 P.2d 1325, 1327-28 (Colo. 1974); *Dinan v. Bd. of Zoning Appeals of Stratford*, 595 A.2d 864, 865 (Conn. 1991); *Hayward v. Gaston*, 542 A.2d 760, 770 (Del. 1988); *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 239-40 (Ind. 2003); *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14, 23-24 (Me. 1981); *Nebraska v. Champoux*, 566 N.W.2d 763, 768 (Neb. 1997); *Town of Durham v. White Enters., Inc.*, 348 A.2d 706, 708-09 (N.H. 1975). While the Missouri Supreme Court has explicitly endorsed formal-family zoning, the court has not issued a family law opinion on functional families. See *Ass’n for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976). That said, Missouri’s lower courts have endorsed a functional-family test in family law. See *City of Ladue v. Horn* 720 S.W.2d 745 (Mo. Ct. App. 1986). Finally, although the Supreme Court of Hawaii has never considered a constitutional challenge to a “blood, marriage, or adoption” ordinance, it has suggested that such an ordinance would be constitutional, noting that “[s]uch a classification was held to be valid in [*Belle Terre*].” *Marsland v. Int’l Soc’y for Krishna Consciousness*, 657 P.2d 1035, 1038 n.2 (Haw. 1983); see also *Lubow*, *supra* note 31, at 158 & 210 n.291 (suggesting the same).

253. These states include: Colorado, see *COLO. REV. STAT. ANN.* § 19-4-105 (West 2016); *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000); *In re Parental Responsibilities of A.R.L.*, 2013 COA 170; *In re S.N.V.*, 284 P.3d 147 (Colo. App. 2011); Connecticut, see *Boland v. Catalano*, 521 A.2d 142, 146-47 (Conn. 1987); Delaware, see *DEL. CODE ANN.* tit. 13, § 8-201 (West 2009); *Smith v. Gordon*, 968 A.2d 1, 16 (Del. 2009); Indiana, see *IND. CODE ANN.* 31-14-7-2(a)(2) (LexisNexis 2007); *Bright v. Kuehl*, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995); Maine, see *ME. REV. STAT. ANN.* tit. 19-A, §§ 1881(3), 1891(1), (4)(B) (2017); Nebraska, see *Kinkenon v. Hue*, 301 N.W.2d 77 (Neb. 1981); and New Hampshire, see *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014); *Graves v. Estabrook*, 818 A.2d 1255 (N.H. 2003); *Tapley v. Tapley*, 449 A.2d 1218 (N.H. 1982).

254. See *Levar v. Elkins*, 604 P.2d 602, 603-04 (Alaska 1980); *Cook v. Cook*, 691 P.2d 664, 667-69 (Ariz. 1984); *Posik v. Layton*, 695 So. 2d 759, 761-62 (Fla. Dist. Ct. App. 1997); *Kerkove v. Thompson*, 487 N.W.2d 693, 696 (Iowa Ct. App. 1992); *Ellis v. Berry*, 867 P.2d 1063, 1065 (Kan. Ct. App. 1993); *Wilcox v. Trautz*, 693 N.E.2d 141, 147-48 (Mass. 1998); *Carlson v. Ol-*

of “blood, marriage, or adoption” ordinances remains unclear or unchallenged.<sup>255</sup> The conflict between family and zoning law is not merely academic—it presents an urgent problem touching the most intimate relationships in functional families and must be resolved.

Functional families face a catch-22: they must live together before they can secure rights traditionally associated with marriage and biological parentage; at the same time, they cannot live together, precisely because they are not married or biologically related. The mismatch between zoning and family law could force parents to live apart from their children, or prevent adults from proving

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son, 256 N.W.2d 249, 255 (Minn. 1977); *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791-93 (Minn. Ct. App. 1991); *Larson v. Schmidt*, 400 N.W.2d 131, 135 (Minn. Ct. App. 1987); NEV. REV. STAT. 126.051(d) (LexisNexis 2018); *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984); N.M. STAT. ANN. § 40-11A-204 (LexisNexis 2013); *Chatterjee v. King*, 280 P.3d 283, 287-93 (N.M. 2012); *Lozoya v. Sanchez*, 66 P.3d 948, 957-58 (N.M. 2003); *Dominguez v. Cruz*, 617 P.2d 1322, 1323 (N.M. Ct. App. 1980); *Suggs v. Norris*, 364 S.E.2d 159, 162 (N.C. Ct. App. 1988); N.D. CENT. CODE ANN. § 14-20-10 (2015); OKLA. STAT. ANN. tit. 10, § 7700-204 (West 2018); *Friend v. Tesoro*, 167 P.3d 978 (Okla. Civ. App. 2007); *Beal v. Beal*, 577 P.2d 507 (Or. 1978); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1320-21 (Pa. Super. Ct. 1996); *Doe v. Burkland*, 808 A.2d 1090, 1093-94 (R.I. 2002); TENN. CODE ANN. § 36-2-304 (West 2014); TEX. FAM. CODE ANN. § 160.204 (West 2015); *In re Baby Boy R.*, 191 S.W.3d 916, 923 (Tex. Ct. App. 2006); *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. Ct. App. 1982); *Titchenal v. Dexter*, 693 A.2d 682, 682 (Vt. 1997); VA. CODE ANN. § 64.2-1700; *Hinkle v. McCole*, 575 P.2d 711 (Wash. 1978); WASH. REV. CODE § 26.26.115(1)(b) (West 2016); *In re Estate of Lindsay*, 957 P.2d 818 (Wash. Ct. App. 1998); *Goode v. Goode*, 396 S.E.2d 430 (W. Va. 1990); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987); WYO. STAT. ANN. § 14-2-504 (2017); *In re Paternity of IC*, 941 P.2d 46 (Wyo. 1997); *Kinnison v. Kinnison*, 627 P.2d 594 (Wyo. 1981).

255. For states that continue to maintain “blood, marriage, or adoption” ordinances, see Lubow, *supra* note 31, at 163-89, which identifies such ordinances in Alaska, Arizona, Florida, Kansas, Massachusetts, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In most of these states, the issue remains unaddressed. However, Alaska has affirmatively adopted *Belle Terre*. *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982). And courts in Florida, Massachusetts, and North Carolina have all explicitly considered the question but declined to invalidate local blood, adoption, and marriage ordinances. See *Carroll v. City of Miami Beach* 198 So. 2d 643 (Fla. Dist. Ct. App. 1967); *City of Worcester v. Coll. Hill Properties, LLC*, 987 N.E.2d 1236, 1246 (Mass. 2013) (suggesting that the issue was properly a matter of zoning ordinances); *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 431 S.E.2d 183, 185 (N.C. 1993) (leaving the question undecided). Finally, while Pennsylvania’s highest court has not yet reached the issue, lower state courts have upheld the constitutionality of formal-family ordinances. See *Schwartz v. Phila. Zoning Bd. of Adjustment*, 126 A.3d 1032, 1039-44 (Pa. Commw. Ct. 2015); *Farley v. Zoning Hearing Bd. of Lower Merion Twp.*, 636 A.2d 1232, 1236-38 (Pa. Commw. Ct. 1994); *Lantos v. Zoning Hearing Bd. of Haverford Twp.*, 621 A.2d 1208, 1211-12 (Pa. Commw. Ct. 1993).

parentage in court because zoning restrictions prevent them from living with their children.

The conflict manifests in two ways: First, formal-family ordinances undermine the purposes of family law. Second, formal-family ordinances discriminate against a wide variety of families.<sup>256</sup> This Part argues that instead of restricting cohabitation to a traditional “single-family home,” zoning law should limit cohabitation to a “single housekeeping unit” and permit as many residents as health and safety allow.

My proposal would disentangle the legal family from the legal household, preserving family law’s functional turn without undermining zoning powers. The purposes of zoning law, as it turns out, can be fully realized without defining family at all. Instead, the legal meaning of family should be adjudicated in the family law realm, not in zoning law. Courts have already come to recognize that the purposes of family law are undermined if functional families are excluded; zoning law must catch up. Even if one is normatively opposed to functional-family structures, they are the lived experience of millions of Americans, and efforts to legislate them out of existence have failed. Finally, arguments resting on relations of blood, marriage, or adoption fail to understand that such connections are not necessarily more meaningful than chosen kinship networks. The law should not engage in a futile attempt to prioritize the heterosexual nuclear family, but instead should enable diverse families to live together.

#### A. *Disentangling the Legal Family from the Legal Household*

By linking the legal family to the legal household, formal-family zoning threatens the stability of major family law doctrines in many states. Separating family law from zoning allows family law doctrines to function as intended, without undermining the purposes of zoning. Some scholars argue family law is primarily intended to recognize and order bonds of kinship to allocate benefits and responsibilities, while others identify family law as essentially a private welfare system, less concerned with kinship ties than with ensuring a base level of support for children—and, historically, women.<sup>257</sup> Excluding functional families impairs the operation of family law on both accounts.

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256. Frank S. Alexander, *The Housing of America’s Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231 (2005) (arguing that formal-family zoning discriminates against functional families).

257. On this debate, see generally D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS*, at xxxvi (5th ed. 2013); Alstott, *supra* note 39; and Cyn-



Consider the situation in Pennsylvania, where unmarried parents could be prevented from living with their child under state zoning doctrine.<sup>258</sup> If an unmarried couple broke up, like the lesbian couple in *J.A.L. v. E.P.H.* discussed in Section I.C, the nonbiological parent could easily be denied standing to seek parental rights because she had not “lived with the child and the natural parent in a family setting, whether a traditional family or a nontraditional one, and developed a relationship with the child.”<sup>259</sup> These dramatic harms clearly undermine the purposes of family law.

Indeed, the private-welfare function of the family law system is undermined, not strengthened, by formal-family zoning. As currently constructed, family law rules dictate how resources acquired on the market should be distributed privately and attempt to reduce dependency on state services when relationships end.<sup>260</sup> Justice Kennedy endorsed the private-welfare function of family law in his majority opinion in *United States v. Windsor*, striking down the Defense of Marriage Act because it “divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force.”<sup>261</sup> For the private-welfare function of family law to succeed, however, families must be able to access it regardless of what form they take. In the simplest terms, as more Americans build important personal attachments outside of heterosexual marital families, private welfare requires family law to reflect the new normal. Normative judgment of this goal is beyond the scope of this Note, but it remains the case that family law currently operates this way. As long as family law remains a key site of welfare provision in public policy, it should be expanded to include diverse family forms. As for family law’s relationship-recognition function, the system could hardly be said to accurately identify kinship bonds and allocate benefits and duties if only “blood, marriage, or adoption” relationships are considered familial.

Beyond the conflict with family law, formal-family zoning is normatively undesirable because it discriminates against functional families. Many people find their most loving and supportive relationships outside the biological or

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thia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL’Y 119 (2004).

258. Although the highest court in Pennsylvania has not addressed the issue directly, the Commonwealth Court has enforced “blood, marriage, or adoption” provisions both in *Farley v. Zoning Hearing Bd.*, 636 A.2d 1232 (Pa. Commw. Ct. 1994), and *Lantos v. Zoning Hearing Bd.*, 621 A.2d 1208 (Pa. Commw. Ct. 1993).

259. 682 A.2d 1314, 1321 (1996).

260. See generally Alstott, *supra* note 39; Bowman, *supra* note 257.

261. 133 S. Ct. 2675, 2695 (2013).

marital family. Functional families may include foster children, communes, students, seniors, single parents and their children, group homes for people with disabilities, formerly incarcerated people, and people rehabilitating from substance abuse.<sup>262</sup> Evidence from the queer rights movement and the rise of assisted reproductive technologies attests to the fact that family formation and parentage are not contingent on heterosexuality, marriage, or biology.<sup>263</sup> Indeed, millions of Americans have made commitments to one another through their actions by caring for each other, devoting their energies to raising children together, and building enduring bonds of mutual care and obligation. They take responsibility for one another by holding themselves out in their communities, at work, and at school, as families united by love and support. The fact that some object to the existence of these groups should not trump their right to make a home of their choosing and to enjoy the benefits of social, political, and economic life that flow from that right. The law should not penalize them or their children for creating these bonds outside the nuclear family.<sup>264</sup>

While the discriminatory nature of formal-family jurisprudence in zoning calls for reform, there is good reason not to eliminate cohabitation regulation in zoning altogether. Individuals and groups certainly have a strong liberty interest in deciding with whom to live. But there is also an important social interest in ensuring that home infrastructure is not overburdened, such that it poses a risk to the safety and health of the inhabitants. Many elements of domestic health and safety are governed by facilities and building requirements in local ordinances,<sup>265</sup> but only occupational density regulation can directly reduce the harms of residential overcrowding.

Fortunately, the purposes of zoning law can be accomplished without formal-family ordinances or doctrines. According to the 1926 Standard State Zoning Enabling Act, zoning ordinances may be enacted “for the purpose of promoting health, safety, morals, or the general welfare.”<sup>266</sup> The language of many contemporary state laws empowering cities to zone is substantially the same. In Illinois, for example, non-home-rule municipalities may zone:

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262. Ritzdorf, *supra* note 236, at 15.

263. VALERIE LEHR, *QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY* (1999); KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

264. This is the consensus view of family law scholars. See Suzanne B. Goldberg et al., *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of Debra H. v. Janice R.*, 20 COLUM. J. GENDER & L. 348, 360 (2011).

265. See, e.g., NEW HAVEN, CONN., CODE OF ORDINANCES ch. 13 (2018) (Fire Prevention Code); *id.* ch. 16 (Health).

266. STANDARD STATE ZONING ENABLING ACT § 1 (U.S. DEP’T OF COMMERCE 1926).

To the end that adequate light, pure air, and safety from fire and other dangers may be secured, that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, that the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted, and to insure and facilitate the preservation of sites, areas, and structures of historical, architectural and aesthetic importance.<sup>267</sup>

Relying on the definition of family to achieve these legitimate governmental purposes is both over- and underinclusive.<sup>268</sup> Formal family is overbroad because it prohibits families of choice from living together even when they pose no threat to the neighborhood's health, safety, welfare, traffic, noise level, or aesthetic preferences. It is also underinclusive because it imposes no density restrictions on the number of people related by blood, marriage, or adoption, and thus undermines those foundational principles of zoning law. In the words of the Michigan Supreme Court, "A greater example of over- and under-inclusiveness we cannot imagine."<sup>269</sup> That said, density restrictions can promote the goals of zoning without discrimination. By regulating on the basis of a "single housekeeping unit" within healthy and safe density limits, zoning ordinances can advance their historic and statutory purposes without defining family at all.

This proposal has the added advantage of raising the permitted level of residential density while protecting residents from unsafe and unhealthy living conditions. Overcrowding can endanger residents by overburdening heating and waste management systems and increasing the danger to residents when

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267. 65 ILL. COMP. STAT. ANN. 5/11-13-1 (West 2005); *see also, e.g.*, MICH. COMP. LAWS ANN. § 125.3201 (West 2006) (providing that localities can use zoning for a variety of reasons, including "to promote public health, safety, and welfare"); VA. CODE ANN. § 15.2-2283 (West 2018) ("Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public . . ."). A full discussion of the constitutionality of morals regulation is outside the scope of this Note. However, there is reason to be skeptical that regulating morality is a constitutional use of the police power. *See, e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004); John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1 (2009); Manuel Possolo, Note, *Morals Legislation After Lawrence: Can States Criminalize the Sale of Sexual Devices?*, 65 STAN. L. REV. 565 (2013).

268. Several state courts have ruled against formal-family ordinances using this logic. *See, e.g.*, *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980); *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984); *State v. Baker*, 405 A.2d 368 (N.J. 1979).

269. *Dinolfo*, 351 N.W.2d at 841-42.

fires or other disasters strike.<sup>270</sup> It can also impair residential health. The World Health Organization has found that overcrowding increases the transmission of certain communicable diseases,<sup>271</sup> and qualitative research in the U.K. has suggested links between overcrowding and anxiety, depression, and disrupted sleep patterns.<sup>272</sup> These real safety and health concerns counsel in favor of some governmental regulation of residential density. Although overcrowding arguments have sometimes been strategically deployed to prevent low-income individuals from moving into middle- and upper-class neighborhoods, such bad-faith applications of the argument should not obscure the real dangers that overcrowding can pose. Localities can address legitimate overcrowding concerns without discriminating on the basis of socioeconomic status.

The shift from family zoning to safe and healthy, high-density zoning has the added appeal of stemming the tide of racial and economic segregation. Over the past forty years, racial and class segregation has increased throughout the country.<sup>273</sup> Scholarship in this growing area has demonstrated that low-density zoning practices, like formal-family ordinances, single-family exclusive neighborhoods, and minimal lot size requirements, are drivers of racial segregation and segregation by economic class.<sup>274</sup> In a 2009 article, Jonathan Roth-

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270. U.S. FIRE ADMIN., FEMA, USFA REP. TR-067, EIGHT FATALITY ROW HOUSE FIRE: LESSONS LEARNED FROM RESIDENTIAL FIRES WITH FIVE OR MORE FATALITIES 10 (Dec. 1992), <https://www.usfa.fema.gov/downloads/pdf/publications/tr-067.pdf> [<https://perma.cc/GXF8-E9DD>]; U.S. FIRE ADMIN., FEMA, USFA REP. 170, SOCIOECONOMIC FACTORS AND THE INCIDENCE OF FIRE 21-22 (June 1997), <https://www.usfa.fema.gov/downloads/pdf/statistics/socio.pdf> [<https://perma.cc/V6BY-AYR6>]; Jenn Abelson, *Shadow Campus Part 1: A House Jammed with Students, a Life of Promise Lost*, BOS. GLOBE (Apr. 28, 2013), <http://www.bostonglobe.com/metro/specials/shadow-campus> [<https://perma.cc/MG55-EWK9>].
271. *What Are the Health Risks Related to Overcrowding?*, WORLD HEALTH ORG., [http://www.who.int/water\\_sanitation\\_health/emergencies/qa/emergencies\\_qa9/en](http://www.who.int/water_sanitation_health/emergencies/qa/emergencies_qa9/en) [<https://perma.cc/KS36-NT46>].
272. Liam Reynolds, *Full House? How Overcrowded Housing Affects Families*, SHELTER 4 (Oct. 2005), [https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0004/39532/Full\\_house\\_overcrowding\\_effects.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0004/39532/Full_house_overcrowding_effects.pdf).
273. Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 6 (2016); Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123 (2010) [hereinafter Rothwell & Massey, *Density Zoning and Class Segregation*]; Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779, 779 (2009) [hereinafter Rothwell & Massey, *The Effect of Density Zoning*].
274. See Lens & Monkkonen, *supra* note 273; Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290 (2011); Rothwell & Massey, *Density Zoning and Class Segregation*, *supra* note 273; Rothwell & Massey, *The Effect of Density Zoning*, *supra* note 273.

well and Douglas Massey demonstrated that “patterns and processes of racial segregation in the post-civil rights American city are strongly affected by density zoning.”<sup>275</sup> Michael Lens and Paavo Monkkonen similarly found that “more density restrictions are strongly associated with elevated levels of income segregation.”<sup>276</sup> The good news is that looser density restrictions, like functional-family approaches, can have the opposite effect: Rothwell and Massey also found that between 1980 and 2000, metropolitan areas “that allowed higher density development moved more rapidly toward racial integration than their counterparts with strict density limitations.”<sup>277</sup> In fact, they found that restrictions on multifamily home construction represent the biggest obstacle to integration. By eliminating formal-family zoning, existing single-family housing stock could accommodate more people, thus increasing density and potentially reducing racial and economic segregation.<sup>278</sup>

### B. Zoning Law as Social Regulation

But what of the deeper question of whether zoning law should be in the business of social regulation in the first place? My answer is no.

As a starting point, there is reason to believe that the formal-family approach, by using marriage as a proxy for family, unduly discriminates on the basis of socioeconomic status. June Carbone and Naomi Cahn show how marriage has become the near-exclusive purview of the privileged. “For the majority of Americans who haven’t graduated from college,” they write, “marriage rates are low, divorce rates are high, and a first child is more likely to be born to parents who are single than to parents who are married.”<sup>279</sup> Economic concerns, rather than political or moral choices, help explain why Shelltrack and Loving chose not to marry. They told a reporter they had discussed the possi-

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275. Rothwell & Massey, *The Effect of Density Zoning*, *supra* note 273, at 801.

276. Lens & Monkkonen, *supra* note 273, at 11; *see also* Rothwell & Massey, *Density Zoning and Class Segregation*, *supra* note 273, at 1123 (“Socioeconomic segregation rose substantially in U.S. cities during the final decades of the 20th century, and we argue that zoning regulations are an important cause of this increase.”).

277. Rothwell & Massey, *The Effect of Density Zoning*, *supra* note 273, at 781.

278. Of course, as Rothwell and Massey note, density regulation does not emerge in a vacuum. Their research is not meant to suggest that racism and classism are not among the underlying sentiments driving low-density zoning. They write, “[r]esidents of suburban jurisdictions had strong fiscal incentives, buttressed by racial and class prejudice, to maintain the character of their towns by blocking dense residential development.” Rothwell and Massey, *Density Zoning and Class Segregation*, *supra* note 273, at 1141.

279. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 20 (2014).

bility, but instead they prioritized paying for their house.<sup>280</sup> Shelltrack explained, “We’re happy with the way our lives are . . . We don’t feel that a piece of paper is going to change [that]. It’s not going to make us better parents. It’s not going to make us better neighbors.”<sup>281</sup> In other words, zoning law’s formal-family doctrines reinforce inequality.

Beyond their normative deficiency, as a practical matter, formal-family doctrines are ineffective at encouraging the formation of nuclear families. According to a report from the Pew Research Center, “[T]here is no longer one dominant family form in the U.S.”<sup>282</sup> The number of children living with married opposite-sex parents has been “largely supplanted by the rising shares of children living with single or cohabiting parents.”<sup>283</sup> As of 2016, there were 8.075 million unmarried cohabiting opposite-sex couples, 3.031 million (or 37.54%) of whom are raising a biological child under age 18 of at least one parent.<sup>284</sup> Even after gay marriage became legal nationwide, 55% of same-sex couples remained unmarried.<sup>285</sup> Census data collected in 2013 also showed that “nearly 27,000 same-sex couples [were] raising an estimated 58,000 adopted and foster children in the United States.”<sup>286</sup> Approximately 54% of these children lived with their unmarried same-sex parents.<sup>287</sup>

In the face of these trends, some scholars and commentators argue that law should privilege formal family because it produces better social outcomes, including child-rearing, income levels, and emotional satisfaction.<sup>288</sup> Law profes-

<sup>280</sup>. Moore, *supra* note 1.

<sup>281</sup>. *Id.*

<sup>282</sup>. *Parenting in America: Outlook, Worries, Aspirations Are Strongly Linked to Financial Situation*, PEW RES. CTR. 15 (Dec. 17, 2015), [http://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17\\_parenting-in-america\\_FINAL.pdf](http://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf) [<https://perma.cc/HQJ3-K6LN>] [hereinafter *Parenting in America*].

<sup>283</sup>. *Id.* at 15.

<sup>284</sup>. *America’s Families and Living Arrangements: 2016*, U.S. CENSUS BUREAU (2016), <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> (click link beneath Table UC3).

<sup>285</sup>. Gary J. Gates & Taylor N. T. Brown, *Marriage and Same-Sex Couples After Obergefell*, WILLIAMS INST. 1 (Nov. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-and-Same-sex-Couples-after-Obergefell-November-2015.pdf> [<https://perma.cc/5YVP-V23W>].

<sup>286</sup>. Gary J. Gates, *Demographics of Married and Unmarried Same-Sex Couples: Analyses of the 2013 American Community Survey*, WILLIAMS INST. 1 (Mar. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> [<https://perma.cc/KH9L-68BN>].

<sup>287</sup>. *Id.*

<sup>288</sup>. See generally DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* (2007); KAY S. HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL*

sor Amy Wax has called the heterosexual nuclear family the “‘gold standard’ for family form,” writing that “the two parents in a same-sex family can never both be the ‘real parents.’”<sup>289</sup> Rather than change the contours of family law to match how people are living their lives, Wax argues that a range of factors including “the courts’ recognition of children’s and parental rights outside of marriage play[] some role” in “family disintegration.”<sup>290</sup> When applied to zoning, this view supports the position that local ordinances should incentivize desirable behavior and punish undesirable conduct.

But the trouble with the logic of formal-family advocates like Wax is that the trend toward diversity in family forms predates the major revisions in family law.<sup>291</sup> Wax has her chain of causation backwards: law has not incentivized family diversity, but rather proponents of family diversity have compelled changes in family law doctrines. Even assuming it would be desirable to incentivize traditional families through law, family law is a poor mechanism for doing so. Prevailing research suggests that legal efforts to channel people into favored family forms overwhelmingly fail.<sup>292</sup> Even if one disagrees with the normative argument in favor of functional families, it remains true that formal-family definitions are ineffective as social policy. While such definitions effectively penalize functional families for deviating from the nuclear ideal, they do not incentivize people to form different kinds of families. By preserving the

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AGE (2006); Helen M. Alvare, *Father-Absence, Social Equality, and Social Progress*, 29 QUINNIPIAC L. REV. 123 (2011); Helen M. Alvare, *Same-Sex Marriage and the Reconceiving of Children*, 64 CASE W. RES. L. REV. 829 (2013); Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 225 (2004); Maggie Gallagher, *What Is Marriage for—The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2001).

289. Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 407 (2006). For a synthetic engagement with Wax and other critiques of gay marriage, in particular, see Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431.

290. Amy L. Wax, *The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1086 (2005).

291. *Parenting in America*, supra note 282; Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married: As Values, Economics and Gender Patterns Change*, PEW RES. CTR. 4 (Sept. 24, 2014), [http://www.pewresearch.org/wp-content/uploads/sites/3/2014/09/2014-09-24\\_Never-Married-Americans.pdf](http://www.pewresearch.org/wp-content/uploads/sites/3/2014/09/2014-09-24_Never-Married-Americans.pdf) [<https://perma.cc/QF5X-ZXJ5>].

292. ROBERT G. WOOD ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., OPRE REP. 2012-28B, THE LONG-TERM EFFECTS OF BUILDING STRONG FAMILIES: A RELATIONSHIP SKILLS EDUCATION PROGRAM FOR UNMARRIED PARENTS, at xi (2012), [https://www.acf.hhs.gov/sites/default/files/opre/bsf\\_36\\_mo\\_impact\\_report.pdf](https://www.acf.hhs.gov/sites/default/files/opre/bsf_36_mo_impact_report.pdf) [<https://perma.cc/4T8U-N3FU>]; Bryce Covert, *The Government Is a Terrible Marriage Matchmaker*, NATION (Jan. 28, 2014), <https://www.thenation.com/article/government-terrible-marriage-matchmaker> [<https://perma.cc/NRE2-UVZG>].

formal-family canon in zoning law, advocates fail to change family patterns. Instead, they inflict material and dignitary harms on functional families by forcing them to defend their cohabitation arrangements in administrative hearings and courtrooms, placing strain on the court systems and leaving romantic partners and children unprotected.

Another common criticism of the functional family is that it abandons “tradition.”<sup>293</sup> As demonstrated in Section II.B.1, however, the “traditional” family form in America is more myth than reality. Rather, the historical reality – i.e., the real “tradition” – for American families is diversity of form. Historians have overwhelmingly demonstrated that the notion of a “traditional” American family composed of man, wife, kids, and Spot the dog is a myth reflecting the 1950s, when the nuclear heterosexual family was, briefly, the norm.<sup>294</sup> Sociologist Arlene Skolnick goes so far as to call the 1950s “the deviant decade” because family patterns so differed from those that preceded and followed it. “For middle-class women,” she writes, “the return to ‘tradition’ in fact marked a turning away from choices made by their counterparts in earlier generations.”<sup>295</sup> Although it is common to refer to the heterosexual nuclear family as the “traditional family,” Skolnick shows that “the family pattern that dominated the 1950s was both a response to its unique time and an anachronism.”<sup>296</sup> The cases discussed throughout Part II also bear out this history, as many people chose to live in functional families, and courts saw little reason to stop them before midcentury.

Finally, critics might argue that formal-family zoning is desirable to the extent that it reflects the preferences of autonomous local communities, and may even mirror neighborhood perceptions of “health, safety, and welfare.” As demonstrated in Section II.B, however, the prevalence of formal-family ordinances reflects the preferences of a motivated constituency of homeowners.<sup>297</sup>

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293. Ryan Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, HERITAGE FOUND. (2013), <https://www.heritage.org/marriage-and-family/report/marriage-what-it-why-it-matters-and-the-consequences-redefining-it> [https://perma.cc/EN4Z-9XFU].

294. COONTZ, *supra* note 171; JOANNE MEYEROWITZ, NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945-1960 (1994); PLECK, *supra* note 41; SELF, *supra* note 83; SKOLNICK, *supra* note 40.

295. SKOLNICK, *supra* note 40, at 52.

296. *Id.* at 73.

297. The implications of this point may be of interest to scholars in the growing law and political economy movement. Since homeowners exert unequal power in the local democratic process, their prejudices against functional families result in discriminatory regulation with social and economic consequences. In other words, the ostensibly rational desire to protect economic investment in property masks the additional coercive power over social relations



Within functioning local democracy, however, functional families would have just as much of a right to express their social preferences in zoning law as any other family. Furthermore, choice of family form is not necessarily an indication of family values. On the contrary, married couples raising biological children may subscribe to very progressive beliefs about gender dynamics or religion. Similarly, unmarried couples may value the stability of a long-term partnership but simply not be able to access marriage or prefer not to marry for personal reasons. In the case of multigenerational families and families with more than two parents, partnership and parental relationships exist without marriage. Functional-family doctrines allow families and courts to make that meaningful distinction. And indeed, the Constitution may require that courts defend functional families against precisely this sort of argument; as will be discussed in Part IV, functional families qualify as discrete and insular minorities under the Equal Protection Clause.

#### IV. HARMONIZING FAMILY LAW AND ZONING LAW

##### A. Legislative Solutions

Legislative action is the best way to reduce the harms inflicted on family law and functional families by the formal-family canon in zoning. This is especially true for families in the seven states where family law has taken the functional turn but where state courts have explicitly endorsed the constitutionality of formal-family ordinances.<sup>298</sup> Unlike litigation, which is expensive, slow, and sometimes limited to particular neighborhoods, legislation could quickly eliminate formal-family zoning law in entire cities and states.<sup>299</sup> State-level legisla-

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and economic access that homeownership confers in the political process. For an introduction to law and political economy, see generally LAW & POL. ECON. BLOG, <https://www.lpeblog.org> [<https://perma.cc/XA63-G35E>]. See also David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179 (2018); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018).

<sup>298</sup>. See *supra* note 253.

<sup>299</sup>. Federal legislation is extremely unlikely. Congress has not traditionally paid attention to zoning issues, and it is arguably unconstitutional for the federal government to regulate zoning under *Euclid*. See *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926). The federal government does not have any specific zoning powers, and may only pass zoning legislation incident to its other powers.

tion would be more efficient but potentially more difficult to enact. Several recent examples at the municipal and state levels suggest possible ways forward.

In 2017, both Boulder, Colorado, and Minneapolis, Minnesota, joined Hartford, Connecticut, in revising their zoning ordinances to be more inclusive of functional families. In Boulder, the fight raged for a year in local newspaper columns and community meetings as advocates pushed for a “co-op ordinance” to allow twelve to fifteen people to legally live together in a single-family residence.<sup>300</sup> The Minneapolis City Council passed a similar ordinance to enable “intentional communities” to live in the city.<sup>301</sup> In response to the Scarborough 11 controversy, Hartford eventually amended its zoning ordinance to remove any definition of family at all, instead reverting to a “household unit” definition similar to those of the early twentieth century.<sup>302</sup> By targeting local legislators, functional-family advocates ensured that all interested parties would be able to present their arguments in public fora, and the resulting ordinances brought an end to local discrimination on the basis of family form.

Action at the state level would be even more efficient. A statewide experiment is currently underway in Iowa, where legislators passed a law last year to prohibit formal-family zoning for rental properties in cities throughout the state.<sup>303</sup> As of January 1, 2018, cities in Iowa may not pass or enforce “any regulation or restriction related to the occupancy of residential rental property that is based upon the existence of familial or nonfamilial relationships between the occupants of such rental property.”<sup>304</sup>

A coalition of civil rights groups and real estate interests supported this legislation, while some cities including Des Moines, Iowa City, Coralville, and Cedar Falls opposed it. The LGBT organization One Iowa also supported the bill as a means to address the negative impact of formal-family ordinances on queer

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300. Alex Burness, *At Long Last, Boulder Approves New Co-op Housing Ordinance*, DAILY CAMERA (Boulder, Colo.) (Jan. 4, 2017), [http://www.dailycamera.com/news/boulder/ci\\_30703047/at-long-last-boulder-approves-new-co-op](http://www.dailycamera.com/news/boulder/ci_30703047/at-long-last-boulder-approves-new-co-op) [<https://perma.cc/2BVT-B5CZ>].

301. Emma Nelson, *Change Allows “Intentional Communities” in Minneapolis*, STAR TRIB. (Minneapolis, Minn.) (Dec. 9, 2016), <http://www.startribune.com/change-allows-intentional-communities-in-minneapolis/405702806> [<https://perma.cc/S2XQ-H8FS>].

302. de la Torre, *supra* note 245. The new definition is: “A collection of individuals occupying the entire dwelling unit, sharing a household budget and expenses, preparing food and eating together regularly, sharing in the work to maintain the premises, and legally sharing in the ownership or possession of the premises.” *Id.*

303. The issue garnered attention from civil rights groups following the Iowa Supreme Court’s decision to uphold the constitutionality of formal-family zoning in *Ames Rental Property Ass’n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007).

304. 2017 Iowa Acts 235.

functional families.<sup>305</sup> During debate in the Iowa Legislature, State Senator Herman Quirnbach proposed an amendment that would grandfather in preexisting formal-family ordinances.<sup>306</sup> State Senator Rich Taylor rose in opposition to the amendment, arguing that the bill “prevents discrimination,” and that “there are other ways for them [in towns like Ames] to address issues of overoccupancy without discriminating against people.”<sup>307</sup> While recognizing the unique housing issues in college towns like Ames, legislators agreed that cities could use nondiscriminatory means to regulate density.

By passing state legislation, Iowa was able to invalidate formal-family zoning statewide without undermining the important function of residential zoning to protect health and safety. Since the law went into effect, cities across Iowa have sought ways to regulate density without discriminating against functional families. In Ames, there are proposals to limit the number of residents based on the number of bedrooms in a home.<sup>308</sup> Iowa City officials may limit the total number of rental units.<sup>309</sup> These approaches demonstrate how municipalities and states can regulate density without discrimination.

### B. Judicial Solutions

State courts present an alternative to the legislative approach.<sup>310</sup> If the political will or interest is insufficient to follow the footsteps of cities and states

305. William Petroski, *Bill Nixing Family Rental Housing Rules Gets Iowa Senate Ok, Heads to Branstad*, DES MOINES REG. (Apr. 11, 2017), <https://www.desmoinesregister.com/story/news/politics/2017/04/11/bill-nixing-family-rental-housing-rules-gets-iowa-senate-ok-heads-branstad/100324528> [https://perma.cc/W9MJ-B963]. According to One Iowa’s Executive Director Daniel Hoffman-Zinnel, “Allowing municipalities to define ‘family’ and use that definition to determine who can and can’t rent a home opens the door to discrimination against LGBTQ families.” *Id.*

306. Sen. Quirnbach represents Story County, which includes the City of Ames. *See id.*

307. *Senate Debate on Iowa Senate SF 419 (replaced by HR 134): Amendment 3239*, IOWA LEGISLATURE (Apr. 11, 2017, 11:24:36 AM) (Statement of Sen. Taylor), <http://www.legis.state.ia.us/dashboard?view=video&chamber=S&clip=s20170411090621780&dt=2017-04-11&offset=7986&bill=HF%20134&status=i> [https://perma.cc/2WE4-VC49].

308. Alex Connor et al., “Striking a Balance”: *Students, Landlords and Homeowners Diverge on Next Step for City*, IOWA ST. DAILY (Nov. 6, 2017), [http://www.iowastatedaily.com/app\\_content/article\\_f7211b7c-b6c3-11e7-b629-ob3393f9f916.html](http://www.iowastatedaily.com/app_content/article_f7211b7c-b6c3-11e7-b629-ob3393f9f916.html) [https://perma.cc/Y8H6-Y9KD].

309. Madison Arnold, *Iowa City Looks Anew for Ways to Regulate Rentals*, GAZETTE (Iowa City, Iowa) (Dec. 17, 2017), <https://www.thegazette.com/subject/news/government/iowa-city-looks-anew-for-way-to-regulate-rentals-20171217> [https://perma.cc/S7FS-PTGW].

310. At present, it would be unwise to bring such a challenge before the current U.S. Supreme Court, given the Court’s likely hostility to expanding equal protection or substantive due process doctrines to nonnormative families.

like Boulder, Minneapolis, Hartford, and Iowa, advocates of the functional family can bring litigation to invalidate formal-family zoning. Using the functional-family canon in such challenges could alleviate the potential family law crisis in twenty-three states where family law has taken the functional turn, but the highest courts have remained silent on the status of “blood, marriage, or adoption” ordinances.<sup>311</sup> Courts in those states would not be forging new legal ground but rather returning to a long history of the functional canon in zoning law. Like the Illinois court in *City of Des Plaines v. Trottner*,<sup>312</sup> state courts could draw from the precedents herein described as resources for broad interpretations of family in zoning codes.<sup>313</sup>

Courts have multiple possible avenues for approaching the question. We cannot forecast what path judicial solutions might take with any certainty, but there are several models that advocates and judges could consider. Depending on existing state constitutional law, they might rely on federal or state constitutional principles like due process,<sup>314</sup> equal protection, and privacy.

For example, several state supreme courts have relied on state constitutional due process principles to invalidate formal-family ordinances. In *McMinn v. Oyster Bay*, the New York Court of Appeals invalidated a formal-family ordinance because “[m]anifestly, 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.”<sup>315</sup> The court also found that the ordinance constituted an unconstitutional deprivation of property without due process because “by limiting occupancy of single-family homes to persons related by blood, marriage or adoption or to only two unrelated persons of a certain age, [it] excludes many households who pose no threat to the goal of preserving the character of the

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311. See *supra* notes 254-255.

312. 216 N.E.2d 116 (Ill. 1966).

313. One could simply remove the cohabitation requirement from functional-family doctrines, but that would not prevent zoning ordinance enforcement from breaking up American families. Other scholars have identified the positive effects of removing cohabitation from the functional-family inquiry, given the ways that cohabitation is both overbroad and underinclusive. See Berenson, *supra* note 39; Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353; Rosenbury, *supra* note 17.

314. Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401 (2015) (arguing that formal-family zoning violates the due process right to choose one’s household companions).

315. 66 N.Y.2d 544, 550 (1985).

traditional single-family neighborhood.”<sup>316</sup> These arguments resonate with Justice Marshall’s *Belle Terre* dissent, where he argued that regulation of one’s cohabitants implicates the fundamental rights to make a home, to freely choose associates, and to enjoy privacy.<sup>317</sup> Contemporary courts could similarly combine state and federal constitutional due process values to invalidate formal-family ordinances.

Functional families may also succeed by arguing that “blood, marriage, or adoption” ordinances violate equality provisions in state constitutions on the grounds that these ordinances differentiate between similarly situated persons on the basis of a “suspect classification.” Again, it is difficult to generalize from fifty jurisdictions, but scholars agree that most states recognize the same suspect classes as federal law.<sup>318</sup> To qualify as a suspect class under the U.S. Constitution, the group must demonstrate (1) a history of discrimination; (2) that the characteristic is “immutable” or highly visible;<sup>319</sup> (3) that the characteristic does not interfere with the group’s participation in society; and (4) that the group is powerless to defend its interests politically.<sup>320</sup>

The history uncovered in this Note helps functional families make a plausible case that they qualify as a suspect class under this rubric. Section II.A.2 demonstrated that functional families have faced explicit discrimination since the middle of the twentieth century. Section II.B.3 attested to the outsize influence of homeowners in local politics and to their strong tendency to deploy their power to pass and enforce formal-family ordinances. Functional families are highly visible variants from the nuclear ideal, as evidenced by the consistent record of formal-family ordinance enforcement actions, all of which required neighbors to report on the happenings on their block. Making up around half of adult relationships, functional families are not impaired in their ability to

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316. *Id.*; see also *City of Santa Barbara v. Adamson*, 610 P. 2d 436, 439 (Cal. 1980) (invalidating Santa Barbara’s zoning definition of family for violating “commands of the California Constitution concerning people’s rights to enjoy life and liberty, to possess property, and to pursue and obtain happiness and privacy”); *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984) (holding that a township’s ordinance aiming to preserve normative family values deprived six individuals of due process in violation of the state constitution).

317. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15-20 (1974) (Marshall, J., dissenting).

318. See Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 814 n.193 (2010); Edward D. Crane, Note, *Five Is a Crowd: A Constitutional Analysis of the Boston Zoning Amendment Prohibiting More than Four College Students from Living Together*, 43 SUFFOLK U. L. REV. 217, 224 (2009).

319. See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (citation omitted).

320. See *Varnum v. Brien*, 763 N.W.2d 862, 887-88 (Iowa 2009).

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participate fully in society. Together, these factors could convince state courts to find functional families eligible for heightened scrutiny as a suspect class.

## CONCLUSION

The conflict between the functional canon in family law and the formal canon in zoning law shows that the definition of family remains a contentious issue in American law, forcing confrontations with deep questions about how we should organize social life. At the most concrete level, the inverse histories of family definitions in family law and zoning law illuminate a legal contradiction that must be resolved to vindicate the purposes of American zoning law, protect diverse families in family law, and end discrimination against functional families.

Viewed through a broader lens, this story might suggest lessons for law and social movements. While progressives oriented their campaigns at the state level, homeowners imbued local governance with conservative social politics in defense of their prejudices and property values. Neither social movements, nor the judges adjudicating their cases, nor the legislators revising state and local statutes, paid adequate attention to the interlocking nature of these doctrines, rendering their efforts less fruitful than they previously appeared. Though we tend to think of family law and zoning law as distinct legal regimes, ignoring the multifaceted ways that their doctrines overlap, connect, and contradict can have perilous consequences. Their blind spot has grown to encompass millions of Americans.