

# Roommate Wanted: The Right to Choice in Shared Living

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*In recent years, the government and private actors have applied state and federal housing-discrimination statutes to shared-living arrangements. These statutes limit the factors that an individual may consider in choosing a roommate or housemate. This limitation can compel an individual to live with someone with whom she is not comfortable sharing a home or with whom she does not care to live. An individual's right to choose the people with whom she shares a living arrangement is a fundamental liberty interest protected by the Constitution. Therefore, since legislators have not narrowly tailored housing-discrimination statutes to protect the constitutional freedoms that provide the foundations for shared living, existing housing-discrimination law is unconstitutional insofar as it limits the right of private individuals to choose the people with whom they wish to share their homes.*

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## I. INTRODUCTION

In February 2006, the Chicago Lawyers' Committee for Civil Rights Under Law ("CLCCRU") sued the website Craigslist for publishing advertisements for roommates that violated federal housing-discrimination law.<sup>1</sup> The ads contained such phrases as "looking for gay latino,"<sup>2</sup> "African-Americans and Arabians tend to clash with me so that won't work out,"<sup>3</sup> and "Requirements: Clean Godly Christian Male."<sup>4</sup> CLCCRU did not limit its legal action to Craigslist; it also filed complaints against the individuals who posted the ads.<sup>5</sup> The individuals currently face such penalties as monetary damages, injunctions, and compulsory attendance at fair-housing classes.<sup>6</sup>

The Craigslist lawsuits are not the only incidents where courts have applied housing-discrimination statutes to shared-living situations. In 1999, a California woman seeking a housemate refused to share her apartment with a black man because she felt uncomfortable doing so; he sued her for violating state housing-discrimination law.<sup>7</sup> The court realized that the case "raise[d] significant issues of the constitutional protections of freedom of speech and the right to privacy and association," but stated that it had no power to declare the statute unconstitutional before an appellate court had done so.<sup>8</sup> The court awarded the man \$740 in compensatory damages and expenses, and required the woman to attend and pay for "four hours of training on housing discrimination."<sup>9</sup>

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1. Mike Hughlett, *Craigslist Sued Over Housing Ad Bias; Online Classified Sites Standards in Question*, CHI. TRIB., Feb. 8, 2006, at C1. Craigslist is a website that provides free advertising and searchable databases, covering subjects from housing to employment and more, and is located at <http://www.craigslist.com>.

2. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 685 (N.D. Ill. 2006).

3. *Id.*

4. *Id.* at 686.

5. Chi. Lawyers' Comm. for Civil Rights Under Law, Craigslist Lawsuit, [http://www.clccru.org/projects/the\\_fair\\_housing\\_project/craigslist\\_lawsuit.html](http://www.clccru.org/projects/the_fair_housing_project/craigslist_lawsuit.html) (last visited Feb. 7, 2008).

6. U.S. Dep't of Justice, Fair Housing: Recent Accomplishments of the Housing and Civil Enforcement Section (June 5, 2008), <http://149.101.1.32/crt/housing/fairhousing/whatnew.htm> ("In FHA cases, the Department can obtain injunctive relief, including affirmative requirements for training and policy changes, monetary damages and, in pattern or practice cases, civil penalties.").

7. DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 132-33 (2003) (citing Dep't of Fair Employment & Hous. v. DeSantis, No. 02-12, 2002 WL 1313078 (Cal. Fair Employment & Hous. Comm'n May 7, 2002)).

8. *DeSantis*, 2002 WL 1313078, at \*9 n.1.

9. *Id.* at \*9. Fair-housing training can cost as much as \$310. See Spectrum Enterprises, Inc., Spectrum Fair Housing/Section 504 Training, <http://www.spectrumseminars.com/fairhousing.htm> (last visited Feb. 7, 2008) (quoting tuition prices).

Other cases have been much more costly. In 1996, three housemates living in Madison, Wisconsin, were looking for two new housemates.<sup>10</sup> A lesbian woman applied for a spot, but when the housemates discovered her sexual orientation they refused to share their home with her.<sup>11</sup> She responded by suing them under the city's housing-discrimination ordinance.<sup>12</sup> The court upheld an award of over \$3,000 in damages and \$23,000 in attorney's fees.<sup>13</sup>

Over the past century, legislatures have enacted housing-discrimination laws to ensure equal access to housing for all citizens.<sup>14</sup> This Note does not argue against the existence of housing-discrimination law per se. When homes are sold, or when the non-resident landlord of a ten-story apartment complex evaluates potential tenants, the constitutional considerations are vastly different than when an individual looks for someone with whom to share her personal living space. Housing-discrimination laws are properly directed to the former situations, but they should not apply to the latter.<sup>15</sup>

However, the government and private individuals have begun to apply these housing-discrimination laws to shared-living arrangements in a way that inhibits individuals' ability to choose the people with whom they will share their living spaces.<sup>16</sup> This occurs even where the legislature did not intend for these laws to apply to shared-living arrangements.<sup>17</sup>

The right to choice in shared living, i.e., an individual's right to choose the members of her household, is a fundamental liberty right at the core of

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10. State *ex rel.* Sprague v. City of Madison, No. 94-2983, 1996 Wisc. App. LEXIS 1205, at \*2 (Wis. Ct. App. Sept. 26, 1996).

11. *Id.*

12. *Id.*

13. BERNSTEIN, *supra* note 7, at 131-32 (citing Sprague v. Hacklander-Ready, No. 1462 (City of Madison Equal Opportunities Comm'n Feb. 9, 1995), <http://www.ci.madison.wi.us/eoc/cases/01462>.

htm). The Wisconsin Court of Appeals later vacated the \$23,000 damages award on the grounds that the housing-discrimination ordinance did not authorize compensatory damages. *Sprague*, 1996 Wisc. App. LEXIS 1205, at \*11.

14. See *infra* Part II (surveying state and federal housing-discrimination statutes that courts have applied or could possibly apply to constrain individuals' choice in shared living).

15. While the discussion of what limitations legislatures may validly place on transactions involving private property is an important one, that discussion is outside the scope of this Note.

16. See, e.g., Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 685 (N.D. Ill. 2006) (applying general housing-discrimination statutes to shared-living arrangements); *Sprague*, 1996 Wisc. App. LEXIS 1205, at \*1 (involving a suit brought against housemates who refused to live with a lesbian); Dep't of Fair Employment & Hous. v. DeSantis, No. 02-12, 2002 WL 1313078, at \*1 (Cal. Fair Employment & Hous. Comm'n May 7, 2002) (involving a woman sued for refusing to live with a black man).

17. See *Sprague*, 1996 Wisc. App. LEXIS 1205, at \*3 (noting that Madison's fair-housing agency held that the city council did not intend for the statute to apply to shared-living situations but holding that the defendants violated the statute nonetheless).

an individual's constitutional rights to privacy,<sup>18</sup> freedom of intimate<sup>19</sup> and expressive association,<sup>20</sup> free exercise of religion,<sup>21</sup> and free speech.<sup>22</sup> Shared living, when it is voluntary, can provide deep, meaningful relationships for those who live together and can produce positive results for the community.<sup>23</sup>

This Note discusses the strong, constitutional support underpinning the right to choice in shared living and concludes that current housing-discrimination laws are unconstitutional when applied in a way that affects individuals' ability to choose with whom they will live.<sup>24</sup> Part II provides a survey of current state and federal laws that have been or could possibly be applied to restrict individuals' right to choice in shared living. Part III then discusses the constitutional protections for the right to choose one's cohabitants, including the rights to privacy, freedom of association, free exercise of religion, and freedom of speech. Having established the de facto right to choose, Part IV addresses issues involved in exercising the right through public advertisement. Finally, Part V concludes that current housing-discrimination laws, as courts have applied them to an individual's choice in shared living, violate the U.S. Constitution.

## II. A SURVEY OF STATE AND FEDERAL STATUTORY RESTRICTIONS ON THE RIGHT TO CHOICE IN SHARED LIVING

### A. SECTION 1982 OF THE CIVIL RIGHTS ACT OF 1866

Congress first addressed the issue of equal housing opportunities when it passed section 1982 of the Civil Rights Act of 1866.<sup>25</sup> This statute gave "all citizens" the same rights as white citizens to "inherit, purchase, lease, sell,

18. See *infra* Part III.A (discussing the protection that the right to privacy provides to choice in shared living).

19. See *infra* Part III.B.1 (discussing the protection that the right to freedom of intimate association provides to choice in shared living).

20. See *infra* Part III.B.2 (discussing the protection that the right to freedom of expressive association provides to choice in shared living).

21. See *infra* Part III.C (discussing the protection that the right to free exercise of religion provides to choice in shared living).

22. See *infra* Part III.D (discussing the protection that the right to free speech provides to choice in shared living).

23. See *infra* Part III.C (noting the important role that shared living plays in participants' lives and in the community).

24. The author was unable to find any laws of general application that attempted to prohibit shared living per se, i.e., restricting all residences to inhabitation by a single individual. As a preliminary matter, this Note assumes the existence of a general right to cohabitate. A thorough discussion of that right is outside the scope of this Note and perhaps unnecessary. However, many of the arguments made for the right to choice in shared living—primarily those addressed in Parts III.A and III.B.1, *infra*—are also applicable to the general right itself.

25. The Civil Rights Act of 1866 § 1982, 42 U.S.C. § 1982 (2000).

hold, and convey real and personal property.”<sup>26</sup> Unlike later legislation, section 1982 is not a “comprehensive open housing law” because it only applies to racial discrimination.<sup>27</sup> Section 1982 is also different from later laws in that it contains no exemptions of any kind.<sup>28</sup> In this respect, it is potentially further-reaching than the Fair Housing Act (discussed below in Part II.C).<sup>29</sup>

Section 1982 was Congress’s attempt to enforce the Civil War amendments and preempt the so-called Black Codes that several southern states enacted to return newly freed slaves to “virtual slave[ry].”<sup>30</sup> Among other things, the Black Codes unconstitutionally restricted blacks’ ability to make contracts, purchase homes, and engage in commerce.<sup>31</sup> Congress’s intent in passing section 1982 was not to compel transactions between whites and blacks, but rather to equalize the races by removing the state-erected barriers that prohibited blacks from conducting transactions with willing participants of either race.<sup>32</sup> In this context, section 1982 was a constitutional exercise of Congress’s ability to enforce the Thirteenth Amendment by “abolishing all badges and incidents of slavery.”<sup>33</sup>

Prior to the landmark case *Jones v. Alfred H. Mayer Co.*,<sup>34</sup> it was thought that section 1982 applied to state action only,<sup>35</sup> if that was the case, the

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26. *Id.*

27. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

28. *See* 42 U.S.C. § 1982 (containing no exceptions of any kind).

29. SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 991 (4th ed. 2003). In suggesting that section 1982 can apply in situations where the participants would otherwise be exempt from federal housing-discrimination law, Professors Kurtz and Hovenkamp cite *Johnson v. Zaremba*, 381 F. Supp. 165 (N.D. Ill. 1973). In that case, although the landlord was exempt from the provisions of the Fair Housing Act as a landlord-in-residence, the court found that section 1982 restricted him from discriminating on the basis of race in the rental of residential housing. *Id.* at 165, 168.

30. Charles C. Tansill, Alfred Avins, Sam S. Crutchfield & Kenneth W. Colegrove, *The Fourteenth Amendment and Real Property Rights*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 68, 69 (Alfred Avins ed., 1963) [hereinafter OPEN OCCUPANCY]; *see* SOL RABKIN, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, A LANDMARK DECISION ON SEGREGATION IN HOUSING: JONES V. MAYER 15 (1969) (discussing Congress’s desire to “do away” with the Black Codes).

31. Tansill et al., *supra* note 30, at 69.

32. *Id.*

33. Civil Rights Cases, 109 U.S. 3, 20 (1883); *see* David A. Thomas, *Fixing Up Fair Housing Laws: Are We Ready for Reform?*, 53 S.C. L. REV. 7, 34 (2001) (“Because the language of the amendment itself, without legislative reinforcement, suffices to prohibit slavery and involuntary servitude, it has long been held that the enabling clause in Section 2 empowered Congress to do more.”).

34. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

35. Thomas, *supra* note 33, at 34. The *Jones* Court held that the Thirteenth Amendment extended beyond eradicating state perpetuation of the vestiges of slavery to reach “purely private discrimination, unaided by any action on the part of the government.” *Jones*, 392 U.S. at 419.

statute would have no bearing on shared-living situations. However, the *Jones* Court held that private individuals can violate section 1982.<sup>36</sup> If section 1982 were to apply to private conduct, it would modify all previous constitutional protections for the right to choice in shared living.<sup>37</sup> The arguments made below in Part III, then, would be subject to section 1982's prohibition of race discrimination.<sup>38</sup> However, extending section 1982 into the realm of private conduct has proved to be extremely controversial.<sup>39</sup>

The practical effects of *Jones's* interpretation of section 1982 would be that individuals could make face-to-face choices among potential roommates—and advertise their intent to make these choices—on any grounds other than race. There is no exception whatsoever for shared living; section 1982 would apply to every aspect of housing law. However, it is unclear whether section 1982 would bar advertisements that express racial preferences if no discrimination were detectable in the subsequent face-to-face transaction.

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The majority reached this conclusion based on its interpretation of what it saw as the sweeping terms in which section 1982 was cast. *Id.* at 422. Regarding the Thirteenth Amendment, the Court held that it gave Congress the power to “enact laws ‘direct and primary, operating upon the rights of individuals, whether sanctioned by State legislation or not.’” *Id.* at 438 (quoting *Civil Rights Cases*, 109 U.S. at 23).

36. *Jones*, 392 U.S. at 409.

37. Applying the model of statutory construction to constitutional interpretation, all constitutional amendments that address specific issues have the effect of modifying all previously existing portions of the Constitution that address those issues more generally. See Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 616 (2005) (“Regardless of whether the Supreme Court’s approach is the most logical one (at least from a statutory interpretation point of view), this methodology has held true with respect to the effects of several amendments.”). Therefore, the Thirteenth Amendment—which is the basis for section 1982—would modify all of the protections that the earlier amendments provided.

38. However, this Note sides with the many scholars who feel that *Jones* was decided incorrectly. In his dissent in *Jones*, Justice Harlan characterized the majority’s holding as being “most ill-considered and ill-advised.” *Jones*, 392 U.S. at 449 (Harlan, J., dissenting). He pointed out that the Supreme Court had firmly established that the Thirteenth Amendment only applied to state action, *id.* at 450–52, and that the original language of section 1982 indicated as much, *id.* at 454. He then went to great lengths to criticize the majority’s characterization of the statute’s legislative history, quoting the congressional record numerous times to argue that all of section 1982’s sponsors believed it would apply only to state action. *Id.* at 454–73. This criticism has not abated with time and has led one commentator to note that even though current law from *Jones* may be that section 1982 can apply to private action, that interpretation is not based on good history and is therefore incorrect. Thomas, *supra* note 33, at 35.

39. See RABKIN, *supra* note 30, at 21–24 (commenting on the importance of *Jones* and its impact on constitutional issues in housing law); Thomas, *supra* note 33, at 13–19.

B. STATE HOUSING-DISCRIMINATION LAW

While section 1982 remained the only federal legislation related to housing discrimination for over a century, the states began to supplement it with statutes of their own.<sup>40</sup> Some of these laws, rather than focusing on equal opportunity, went one step further and attempted to eradicate discrimination in the provision of housing.<sup>41</sup> States did not limit the laws to the area of racial discrimination—they also addressed discrimination based on gender, religion, and national origin.<sup>42</sup> In this respect state law provided, at least in part, the impetus for the later expansion of federal law to cover similar classifications.<sup>43</sup>

These state laws remain in effect today and, for the most part, provide remedies that are separate and independent from the protections offered under federal law.<sup>44</sup> In some cases, state and local legislatures have enacted extremely broad statutes that regulate discrimination far beyond the

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40. Alfred Avins, *Anti-Discrimination Legislation in Housing: A Denial of Freedom of Choice, in OPEN OCCUPANCY*, *supra* note 30, at 3 n.1.

41. Thomas, *supra* note 33, at 51. Previous laws granted minorities the same rights as whites to conduct real-estate transactions (i.e., buy and sell property). *Id.* Legislators intended for these new state laws to address and eliminate discrimination in conducting those transactions. *See id.* (describing the differences between the old and new state laws).

42. *Id.*

43. *Id.* at 11.

44. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 368 (1983) (compiling all state and district housing-discrimination statutes existing at that time). An updated look shows that forty-seven states, plus the District of Columbia, currently have housing-discrimination statutes. ALA. CODE § 24-8-4 (2007); ALASKA STAT. § 18.80.240 (2007); ARIZ. REV. STAT. ANN. § 41-1491.14 (2007); ARK. CODE ANN. § 16-123-204 (2007); CAL. CIV. CODE § 51 (West 2007); COLO. REV. STAT. § 24-34-502 (2007); CONN. GEN. STAT. §§ 46a-64(b)–(c) (2007); DEL. CODE ANN. tit. 6, § 4603 (2007); D.C. CODE § 2-1402.21(a) (2007); FLA. STAT. § 760.23 (2007); GA. CODE ANN. § 8-3-202 (2007); HAW. REV. STAT. § 515-3 (2007); IDAHO CODE ANN. § 67-5909 (2007); 775 ILL. COMP. STAT. 5/3-102 (2007); IND. CODE ANN. § 22-9.5-5-1 (LexisNexis 2007); IOWA CODE § 216.8 (2007); KAN. STAT. ANN. § 44-1016 (2007); KY. REV. STAT. ANN. § 344.360 (LexisNexis 2007); LA. REV. STAT. ANN. § 51:2606 (2007); ME. REV. STAT. ANN. tit. 5, § 4582 (2007); MD. ANN. CODE art. 49B § 22 (2007); MASS. GEN. LAWS ch. 151B, § 4 (2007); MICH. COMP. LAWS § 37.2502 (2007); MINN. STAT. § 363A.09 (2007); MO. REV. STAT. § 213.040 (2007); MONT. CODE ANN. § 49-2-305 (2007); NEB. REV. STAT. § 20-318 (2006); NEV. REV. STAT. § 118.100 (2007); N.H. REV. STAT. ANN. § 354-A:8 (2007); N.J. STAT. ANN. § 10:5-12 (West 2007); N.M. STAT. § 28-1-7 (2007); N.Y. EXEC. LAW § 296 (McKinney 2007); N.C. GEN. STAT. § 41A-4 (2007); OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2007); OKLA. STAT. tit. 25, § 1452 (2007); OR. REV. STAT. § 659A.421 (2007); 43 PA. CONS. STAT. § 953 (2007); R.I. GEN. LAWS § 34-37-4 (2007); S.C. CODE ANN. § 31-21-40 (2007); S.D. CODIFIED LAWS § 20-13-20 (2007); TENN. CODE ANN. § 4-21-601 (2007); TEX. PROP. CODE ANN. § 301.021 (Vernon 2007); UTAH CODE ANN. § 57-21-5 (2007); VT. STAT. ANN. tit. 9, § 4503 (2007); VA. CODE ANN. § 36-96.3 (2007); WASH. REV. CODE § 49.60.222 (2007); W. VA. CODE ANN. § 5-11-9 (West 2007); WIS. STAT. § 106.50 (2007). Mississippi, North Dakota, and Wyoming are the only states that do not currently have housing-discrimination statutes. *See* SCHWEMM, *supra*, at 369 n.156 (listing housing-discrimination statutes from every state other than Mississippi, North Dakota, and Wyoming).

traditional categories of race, gender, religion, and national origin.<sup>45</sup> It is not unusual for these state statutes also to forbid discrimination based on such categories as sexual orientation, source of income, and “unfavorable discharge from military service.”<sup>46</sup> The District of Columbia’s statute is exceptionally broad, prohibiting in any real-property transaction or advertisement discrimination based on such additional classifications as “personal appearance,” “gender identity or expression,” “family responsibilities,” “matriculation,” “political affiliation,” “place of residence,” or “business.”<sup>47</sup>

These statutes are not mere lip service to desires for a utopia free from discrimination; they are enforced in shared-living situations and produce harsh results for anyone who would attempt to have free rein in choosing the people with whom she will live.<sup>48</sup> For example, *State ex rel. Sprague v. City of Madison*<sup>49</sup> involved two female housemates looking for two other housemates to replace their friends who were moving out.<sup>50</sup> With the exception of their private bedrooms, the women shared equal access to all areas of the house.<sup>51</sup> When Caryl Sprague asked to live with them, the women interviewed her, took her deposit, and said that they would accept her application, subject to approval by the other new roommate.<sup>52</sup> In a later conversation, Sprague revealed to the housemates that she was a lesbian and was nervous about living with heterosexuals, stating that she did not want to live there if the women would be uncomfortable with her sexual orientation.<sup>53</sup> After this, the women discussed whether they were comfortable inviting Sprague to live with them.<sup>54</sup> Ann Hacklander mentioned that she had previously lived with a lesbian who had been

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45. See *supra* note 44 (listing state housing-discrimination statutes).

46. Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/3-102 (2007); Thomas, *supra* note 33, at 51.

47. D.C. CODE § 2-1402.21(a) (2001).

48. See *supra* note 16 (listing cases involving the application of general housing-discrimination statutes to shared-living arrangements).

49. *State ex rel. Sprague v. City of Madison*, No. 94-2983, 1996 Wisc. App. LEXIS 1205, at \*1 (Wis. Ct. App. Sept. 26, 1996).

50. *Id.*

51. Petition for Writ of Certiorari at 5, *Hacklander-Ready v. Wisconsin ex rel. Sprague*, 520 U.S. 1212 (1997) (No. 96-1457), *cert. denied*.

52. *Id.* at 7.

53. *Id.* It is interesting to note that Sprague’s behavior would itself qualify as housing discrimination under certain housing-discrimination laws. Under statutes where it would not constitute discrimination (those statutes that only deal with discrimination in the provision of housing), parties seeking housing may discriminate as much as they want. This disparate treatment shows, in part, the practical shortcomings of current laws’ attempts to eradicate housing discrimination.

54. *Id.*

attracted to her sister.<sup>55</sup> Hacklander consequently felt compelled to remain fully clothed whenever that roommate was present.<sup>56</sup> In a subsequent conversation Maureen Rowe stated that living with a lesbian was just like living with a male housemate and would violate her privacy.<sup>57</sup> Due to the tension that sharing a house with a lesbian would cause, the housemates denied Sprague's application and returned her deposit.<sup>58</sup> Sprague successfully sued under Madison's housing-discrimination ordinance, and the court awarded her over \$3,000 in compensatory and punitive damages.<sup>59</sup> In addition, the housemates had to pay attorney's fees totaling more than \$23,000.<sup>60</sup> During the course of the litigation, Madison changed its statute to exempt shared-living arrangements.<sup>61</sup> However, this amendment did not help Hacklander and her housemates; they had to buy their right to choice in shared living for almost \$30,000.<sup>62</sup>

### C. THE 1968 FAIR HOUSING ACT AND AMENDMENTS

A century after the enactment of section 1982, the 1968 Fair Housing Act ("FHA") was Congress's next foray into the field of housing discrimination.<sup>63</sup> Taking the lead from state legislation, the FHA was Congress's attempt to eradicate essentially all discrimination in residential housing.<sup>64</sup> The original act forbade discrimination on the basis of race, color, religion, or national origin.<sup>65</sup> Later amendments added sex,<sup>66</sup> familial status,<sup>67</sup> and handicap<sup>68</sup> as protected classifications.

For the purposes of this Note, the FHA differs from section 1982 in three major ways. First, as previously mentioned, its coverage includes protection for several types of discrimination other than race.<sup>69</sup> Second, it contains several exemptions, including one for religious organizations and

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55. *Id.*

56. Petition for Writ of Certiorari, *supra* note 51, at 7.

57. *Id.*

58. *Id.*

59. State *ex rel.* Sprague v. City of Madison, No. 94-2983, 1996 Wisc. App. LEXIS 1205, at \*3 (Wis. Ct. App. Sept. 26, 1996).

60. BERNSTEIN, *supra* note 7, at 132 (citing Sprague v. Hacklander-Ready, No. 1462 (City of Madison Equal Opportunities Commission Feb. 9, 1995)).

61. *Id.* at 131.

62. *Id.* at 131-32.

63. 42 U.S.C. §§ 3601-3631 (2000).

64. Thomas, *supra* note 33, at 11.

65. 42 U.S.C. § 3604(a).

66. *Id.*

67. *Id.*

68. *Id.* § 3604(d), (f).

69. *Id.* § 3604(a), (d), (f).

private clubs<sup>70</sup> and another for a landlord-in-residence who owns fewer than four single-family units.<sup>71</sup> Third, it goes beyond prohibiting discrimination in the actual transaction by banning all discriminatory advertising.<sup>72</sup>

The exemptions mentioned above are very limited in scope.<sup>73</sup> For example, the landlord-in-residence exemption—which is most relevant to shared-living situations—applies to “dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other” where the owner resides.<sup>74</sup> In the context of shared living, this exemption—which encompasses many, but not all, shared-living arrangements<sup>75</sup>—allows the owner to discriminate “at the door” between potential roommates (i.e., on a face-to-face basis). However, the exemption contains an exception. Although the owner may discriminate on a face-to-face basis, she still must comply with the discriminatory advertising restriction prohibiting her from “mak[ing], print[ing], [and] publish[ing] any notice, statement, or advertisement . . . that indicates any preference, limitation, or discrimination . . . or an intention to make any such preference, limitation, or discrimination” based on any of the protected classifications.<sup>76</sup>

The court evaluates any possible discriminatory advertising according to the ordinary-reader test.<sup>77</sup> If an ordinary reader would detect discrimination upon reading the advertisement, then the advertisement violates the statute.<sup>78</sup> Words such as “‘restrictive,’ ‘integrated,’ ‘private,’ and

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70. 42 U.S.C. § 3607(a) (2000).

71. *Id.* § 3603(b). This exemption is sometimes referred to as the “Mrs. Murphy” exemption. SCHWEMM, *supra* note 44, at 48. Mrs. Murphy was a hypothetical individual (used to provide support for the exemption) meant to convey an image “of the ancient widow operating a three or four room tourist home” who had a specific interest (due to the ensuing close contacts she would have) in choosing her boarders based on any considerations she wished. James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 608 (1999).

72. 42 U.S.C. § 3604(c).

73. *Id.* § 3607(a). The exemption for religious organizations only applies when the organization does not operate for a commercial purpose. *Id.* Furthermore, the exemption only excuses discrimination in favor of “persons of the same religion” and does not apply if the organization restricts its membership on account of any of the other protected classifications. *Id.* Private clubs (defined as those “not in fact open to the public”) may discriminate on behalf of their members in providing lodging, as long as doing so is neither their primary purpose nor a commercial activity. *Id.*

74. 42 U.S.C. § 3603(b)(2).

75. Certain large-scale, shared-living arrangements, such as communes or houses with more than four unrelated housemates, would not fall within the landlord-in-residence exemption.

76. 42 U.S.C. § 3604(c) (2000).

77. See *infra* note 78 and accompanying text (describing the test).

78. SCHWEMM, *supra* note 44, at 175.

‘traditional’” are just a few examples of potentially illegal words.<sup>79</sup> Courts have found that the ordinary-reader test is not limited to ads that “jump out at the reader with their offending message,” but also applies when the ad discourages an “‘ordinary reader of a particular [protected group] from answering it.’”<sup>80</sup> An individual can enforce a violation either by filing a complaint with the Department of Housing and Urban Development or by bringing a private action under the FHA’s citizen-suit provision.<sup>81</sup>

These three sources of housing-discrimination law, when applied by the courts to individuals looking for and establishing roommate and housemate arrangements, violate individuals’ right to choice in shared living. The next Part of this Note discusses the constitutional protections that undergird this right.

### III. CONSTITUTIONAL PROTECTIONS FOR THE RIGHT TO CHOICE IN SHARED LIVING

The right to choose the members of one’s household is a logical extension of the Supreme Court’s substantive-due-process jurisprudence that protects fundamental rights.<sup>82</sup> First, the right to privacy protects shared-living arrangements insofar as the choice of one’s roommate directly impacts activities taking place entirely within the confines of one’s private dwelling.<sup>83</sup> Second, the intimate and exclusive nature of the shared-living relationship, as well as the expectations of companionship and cooperation, justifies the inclusion of the right to choice in shared living among those rights that the freedom of intimate association protects.<sup>84</sup> In the same vein, the freedom of expressive association is implicated when individuals wish to associate with particular people in one living arrangement either to convey a message to the surrounding community or to mutually support one another in a thematic environment. Third, the First Amendment right to free exercise of religion provides protection in those cases where deeply rooted

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79. *Id.* at 176.

80. *Janick v. Dep’t of Hous. & Urban Dev.*, 44 F.3d 553, 556 (7th Cir. 1995) (quoting *Ragin v. N.Y. Times Co.*, 923 F.3d 995, 999–1000 (2d Cir. 1991)).

81. 42 U.S.C. § 3612 (2000); SCHWEMM, *supra* note 44, at 176. Anybody who reads a discriminatory advertisement has standing to assert a claim. *Haveings Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (“[T]he sole requirement for standing to sue under [the FHA] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant’s actions he has suffered ‘a distinct and palpable injury.’” (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975))).

82. *See infra* Part III.A–B (discussing the fundamental liberty interests in the rights to privacy and freedom of association as the basis for the right to choice in shared living).

83. *See infra* Part III.A (discussing the protection that the right to privacy provides to choice in shared living).

84. *See infra* Part III.B (discussing the protection that the freedoms of intimate and expressive association provide to choice in shared living).

religious beliefs require an individual to refrain from choosing certain people as roommates.<sup>85</sup> Finally, the right to freedom of speech protects statements made to prospective applicants regarding one's living situation, including statements about the people with whom an individual wants, or does not want, to live.<sup>86</sup>

#### A. RIGHT TO PRIVACY

The right to privacy, while not explicitly mentioned in the Constitution, is well recognized today as an integral part of constitutional doctrine.<sup>87</sup> Samuel Warren and future Supreme Court Justice Louis Brandeis first identified the right to privacy in their seminal law-review article of the same name.<sup>88</sup> The idea of a right to privacy slowly grew in acceptance until the Supreme Court explicitly established it as a constitutional protection in the landmark case of *Griswold v. Connecticut*.<sup>89</sup> Today, the right has developed from Warren and Brandeis's generalized "right to be let alone" into the idea that the government has a limited ability to regulate individuals in certain private settings.<sup>90</sup>

The constitutional right to privacy is, in large part, rooted in the domain of the home.<sup>91</sup> When the Supreme Court gave the right to privacy its

85. See *infra* Part III.C (discussing the protection that the freedom of religious exercise provides to choice in shared living).

86. See *infra* Part III.D (discussing the protection that the freedom of speech provides to choice in shared living).

87. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (identifying a constitutional right to privacy). C. Keith Boone has pointed out that, in a liberal democracy like ours, privacy is such a fundamental right that even if it were completely unsupported by the Constitution, our society would be forced to create and recognize the right nevertheless. C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 22 (1983). Boone states:

Privacy is so closely linked to the liberal ideal that a free society would have to invent it if it did not already exist. In fact, this is a credible explanation of the Supreme Court's "discovering" a right to privacy in the nooks and crannies of a Bill of Rights that does not explicitly mention it. It is also a way of understanding the fact that most appeals to privacy are associated with—without being identical to—appeals to other freedoms, usually freedom of association, freedom from unreasonable search and seizure, and procedural due process.

*Id.*

88. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); see also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626 (1980) (crediting Warren and Brandeis with developing the right to privacy).

89. See *Griswold*, 381 U.S. at 485 (identifying "a zone of privacy created by several fundamental constitutional guarantees").

90. Warren & Brandeis, *supra* note 88, at 193; see *Griswold*, 381 U.S. at 484 (identifying various "zones of privacy" created by the Bill of Rights).

91. See *Griswold*, 381 U.S. at 484–85 (pointing to provisions in the Bill of Rights that provide protection within the home).

imprimatur in *Griswold*,<sup>92</sup> it justified its decision by pointing to the concepts of privacy that the Bill of Rights contains.<sup>93</sup> Protections for the sanctity of citizens' homes appear in two of the four cited Amendments: the Third Amendment's freedom from forced quartering of soldiers<sup>94</sup> and the Fourth Amendment's right of citizens to be secure "in their persons, houses, papers, and effects" from unwarranted searches.<sup>95</sup> These constitutional protections, in turn, have their roots in the "centuries-old principle of respect for the privacy of the home"<sup>96</sup> and the idea "that a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown."<sup>97</sup>

Impositions upon individuals' fundamental privacy rights by forcing them to accept undesired cohabitants were precisely the sort of tyranny that sparked the passage of the Third Amendment.<sup>98</sup> In the years leading up to the American Revolutionary War, the British government passed the Quartering Acts of 1765<sup>99</sup> and 1774,<sup>100</sup> which forced American families to provide food and lodging for the greatly despised British soldiers.<sup>101</sup> The presence of these unwanted lodgers offended the colonists' sense of dignity and privacy and reduced their castles to open pastures.<sup>102</sup>

The right to privacy in a home with a shared-living arrangement does not change simply because the living space is a combined household.<sup>103</sup> Though the individual brings another into her home, she does not give the government the same right to intrude as she does the roommate. In the context of the Fourth Amendment's protection of privacy by forbidding unwarranted searches and seizures, the Supreme Court has rejected the notion that "privacy shared with another individual is privacy waived . . . ."<sup>104</sup>

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92. *Id.* at 485.

93. *Id.* at 484–85.

94. U.S. CONST. amend. III; *Griswold*, 381 U.S. at 484.

95. U.S. CONST. amend. IV; *Griswold*, 381 U.S. at 484–85.

96. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (citing *Wilson v. Layne*, 526 U.S. 603, 610 (1999)).

97. *Id.* (citing *Miller v. United States*, 357 U.S. 301, 307 (1958)).

98. U.S. CONST. amend. III; *Engblom v. Carey*, 677 F.2d 957, 966–67 (2d Cir. 1982) (Kaufman, J., concurring in part and dissenting in part) ("With its historical origins rooted in the English Bill of Rights of 1689, the Third Amendment . . . embodies a fundamental value the Founders of our Republic sought to insure after casting off the yoke of colonial rule: the sanctity of the home from oppressive governmental intrusion.").

99. Quartering Act, 1765, 5 Geo. 3, c. 33 (Eng.).

100. Quartering Act, 1774, 14 Geo. 3, c. 54 (Eng.).

101. *Engblom*, 677 F.2d at 967.

102. *See id.* (noting that the Acts' results were extremely intrusive).

103. *See Georgia v. Randolph*, 547 U.S. 103, 122–23 (2006) (holding that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant").

104. *Id.* at 115 n.4.

Therefore, the Constitution still protects an individual's right to privacy even in the area of criminal law, where state interests are the strongest.<sup>105</sup> This same protection should also apply when an individual's rights in housing are at issue. The importance of an individual's ability to choose whether to allow a law-enforcement official to conduct a brief search of her dwelling for what may be a once-in-a-lifetime occurrence pales in comparison to the importance of that same individual's ability to choose whether to allow a prospective roommate to share her house every hour of every day for the duration of the shared-living arrangement.

Case law that announces the right of individuals to conduct activities in the private confines of their homes that they would otherwise be unable to do in public further supports the sanctity of the home. In *Stanley v. Georgia*<sup>106</sup> and *Paris Adult Theatre I v. Slaton*,<sup>107</sup> the Court announced that, while the government has broad power to regulate obscene materials, the First and Fourteenth Amendments protect individuals' right to view such materials within the home.<sup>108</sup> Put more generally, the Court's rulings established that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."<sup>109</sup>

These rulings show that the home has special protections not afforded to individuals in other settings. They establish the idea of a "public/private" distinction where the government has no ability to control certain thoughts, ideas, and behaviors in private even though it may do so when the same things occur in public. Therefore, even though the government may prohibit people in public arenas from making certain choices—such as improperly selecting employees based on prohibited classifications (e.g., race, gender, etc.)—it cannot similarly reach inside the home to restrain an individual from considering all the factors she deems relevant in choosing a roommate.

In *State ex rel. Sprague*, the Madison Equal Opportunity Commission imposed a fine on three housemates under a city ordinance for failing to accept a prospective housemate's application, despite their objections that living with a lesbian would violate their privacy.<sup>110</sup> Similarly, a California

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105. *Id.* at 122–23.

106. *Stanley v. Georgia*, 394 U.S. 557 (1969).

107. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

108. *Stanley*, 394 U.S. at 565, 568 ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.").

109. *Id.* at 566.

110. *State ex rel. Sprague v. City of Madison*, No. 94-2983, 1996 Wisc. App. LEXIS 1205, at \*3 (Wis. Ct. App. Sept. 26, 1996), *cert denied*, 520 U.S. 1212 (1997); *Petition for Writ of Certiorari at 5, Hacklander-Ready v. Wisconsin ex rel. Sprague*, 520 U.S. 1212 (1997) (No. 96-1457), *cert. denied*.

statute resulted in the imposition of a fine on a woman who declined to share her home with a black man because she was scared of black men.<sup>111</sup> When the black applicant showed up at her door, she unknowingly was faced with a choice: live with this person of whom you are scared or pay a fine. When the cost can be in the tens of thousands of dollars, individuals who are aware of these laws likely would choose to live with unwanted applicants and to suffer from the resulting tensions rather than run the risk of a lawsuit. In essence, the government uses the threat of a fine to coerce private individuals to bring unwanted outsiders into their homes to live.

One may say that privacy and property unite in the context of shared living; the four walls of the home physically define boundaries of the “legitimate sense of spiritual territoriality” involved in the right to privacy.<sup>112</sup> The coerced inclusion of an unwanted stranger into an individual’s most sacred realm, then, becomes an *invasion* of privacy in the most literal, militaristic sense of the word.<sup>113</sup> Therefore, any statute that seeks to force an individual who desires to share her living quarters to confer that right to another against her will violates her constitutional right to privacy. Housing-discrimination statutes, when courts apply them to shared-living arrangements, eviscerate the individual’s right to determine the terms upon which she is willing to admit other people into the privacy of her home by imposing the state’s view of what terms are acceptable.<sup>114</sup> The Constitution simply does not allow the government to abridge the “centuries-old principle of respect for the privacy of the home”<sup>115</sup> by denying the fundamental right to privacy inherent in an individual’s choice of cohabitants.

### B. RIGHT TO FREEDOM OF ASSOCIATION

At its most basic level, shared living involves an association: two or more people come together under the same roof to share part of their lives with one another. Freedom of association encompasses both intimate relationships and associations that are forms of expression.<sup>116</sup> Concerning

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111. BERNSTEIN, *supra* note 7, at 132 (citing Dep’t of Fair Employment & Hous. v. DeSantis, No. 02-12, 2002 WL 1313078, at \*3 (Cal. Fair Employment & Hous. Comm’n May 7, 2002)).

112. Boone, *supra* note 87, at 23.

113. *Id.* Boone noted that violations of privacy are so grievous that “[i]t is no surprise that we have adopted a military term to describe the gravity of the violation, namely, the ‘invasion’ of privacy.” *Id.*

114. *See id.* at 25 (“In the absence of weighty reasons to the contrary, people ought to be free to choose when, in what way, and with whom they share access to those inner chambers in which personal existence is secured and celebrated.”).

115. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quoting *Wilson v. Layne*, 526 U.S. 603, 610 (1999)).

116. *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 544 (1987) (“[T]he Constitution protects against unjustified government interference with an individual’s choice to

intimate association, while it is true that some roommates can and do arrange for their level of interaction to be so miniscule that they remain perfect strangers,<sup>117</sup> in other cases the shared-living relationship has the same depth, intimacy, and commitment that exist in a traditional family.<sup>118</sup> The same is true of expressive association in the context of shared living. While some living arrangements contain little or no significance for the participants, others communicate deeply held ideas and beliefs among both the individuals themselves, as well as the outside world.<sup>119</sup> As the following Section discusses, shared living plays an integral role in both intimate and expressive association.

### 1. Intimate Association

The Supreme Court has stated that “the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.”<sup>120</sup> The freedom of intimate association—which extends to relationships that are selective, have personal relevance, and are not composed of multitudes of people—encompasses the shared-living relationship.<sup>121</sup> Despite intimations to the contrary,<sup>122</sup> the

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enter into and maintain certain intimate or private relationships [and association] for the purpose of engaging in protected speech or religious activities.”).

117. One can imagine a shared-living arrangement where two roommates have alternating work schedules, spend all their leisure time away from home, and only return to sleep. It is important to note that even in this setting, however, the roommates must still maintain some level of interaction and must communicate about such issues as household cleanliness, routine chores, payment of bills, and any other issues related to the apartment that may arise.

118. See Karst, *supra* note 88, at 686–89 (making parallels between traditional and “artificial” families and arguing that both deserve equal protection).

119. See *infra* Part III.C (noting the important role that shared living plays in its participants’ lives and in the community).

120. *Rotary Club*, 481 U.S. at 545.

121. See *id.* (arguing that the freedom of intimate association “protects those relationships, including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life’” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984))).

122. See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 2, 7–10 (1974) (holding valid a zoning restriction that limited the number of unrelated people who could share living arrangements while imposing no limit on the number of related people who could live together). While the facts of *Belle Terre* did involve shared living, one scholar has posited that the case can be limited to one dealing with “zoning ordinances that seek community stability by preventing *transiency*.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1403 (2d ed. 1988). This view would comport with the relatively minimal treatment that the majority gave to Justice Marshall’s dissent, which focused specifically on the constitutional protections involved in the choice of one’s cohabitants. See *Belle Terre*, 416 U.S. at 12–20 (Marshall, J., dissenting) (arguing that the ordinance was an unconstitutional infringement on the freedom of association).

Supreme Court has made it clear that the law does not limit intimate association to familial relationships.<sup>123</sup>

In determining what relationships qualify as intimate, the Supreme Court looks at “factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.”<sup>124</sup> In the case of shared living, each of these factors supports the treatment of shared living as an intimate association. In most cases, the number of people who share a house or apartment is small. The purpose, at its very basic level, is to provide the members with a functioning household.<sup>125</sup> Most people have at least some preference about the type of person with whom they want to share a living situation,<sup>126</sup> and they prohibit nonmembers from entering the living area without invitation.

Absent from the applicable factors is any mention of duration. Some may disparage the idea that the roommate relationship constitutes an intimate association by pointing to the lack of stability in the relationship; in some cases, an incompatible shared-living arrangement may result in the roommate who arrived Monday morning moving out on Friday night.<sup>127</sup> Despite this relative lack of certainty regarding the duration of the relationship, the list of protected intimate associations should include the right to choice in shared living.<sup>128</sup> For example, the Supreme Court has already established marriage as a protected intimate association<sup>129</sup> despite

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123. *Rotary Club*, 481 U.S. at 545 (“Of course, we have not held that constitutional protection is restricted to relationships among family members. . . . [T]he First Amendment protects those relationships, *including family relationships*, that presuppose [certain characteristics].” (emphasis added)).

124. *Id.* at 546.

125. Other concurrent purposes may include friendship, mutual support, or common interests, to list a few.

126. See *State ex rel. Sprague v. City of Madison*, No. 94-2983, 1996 Wisc. App. LEXIS 1205, at \*3 (Wis. Ct. App. Sept. 26, 1996) (involving an individual uncomfortable living with lesbians); *BERNSTEIN*, *supra* note 7, at 132–33 (citing *Dep’t of Fair Employment & Hous. v. DeSantis*, No. 02-12, 2002 WL 1313078 (Cal. Fair Employment & Hous. Comm’n May 7, 2002) (involving an individual uncomfortable living with black men)).

127. The movie *The Odd Couple* is a perfect example of how a roommate relationship can start off with a bright outlook and quickly fall into stridence and discord that ultimately result in the roommate moving out. *THE ODD COUPLE* (Paramount Pictures 1968).

128. See *Karst*, *supra* note 88, at 632–33 (arguing that it is the potential for a long-lasting relationship, not the actual duration of any particular relationship, that is beneficial and warrants protection).

129. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (discussing “the notions of privacy surrounding the marriage relationship”). The Court stated that

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

the fact that a couple may dissolve and create this relationship anew through divorce and remarriage as the individuals react to changing feelings or circumstances.<sup>130</sup>

The idea that “most people who abandon particular intimate associations soon form new ones”<sup>131</sup> serves as the rationale for protecting even those intimate associations that have the potential for quick dissolution. The Court affords constitutional protection even to these “casual intimate associations” because of their potential to become durable, long-lasting relationships.<sup>132</sup> To mandate that constitutional protection should extend only to cases of prolonged commitment requires “intolerable inquiries” into extremely private, subjective feelings and states of mind.<sup>133</sup> Therefore, even in instances where the selection of a roommate—whether or not aided by filters based on religion, age, sexual orientation, or any other classification—results in an incompatible and quickly terminated shared-living arrangement, “the ideal [of truly intimate association] remains” and motivates the search for a roommate who will provide the desired intimate relationship.<sup>134</sup>

Necessarily included in the freedom to enter into intimate associations is the right not to enter into intimate associations.<sup>135</sup> Coercing individuals to associate in a shared-living setting is “plainly outside government authority in a liberal democracy.”<sup>136</sup> In his dissent in *Village of Belle Terre v. Boraas*,<sup>137</sup> Justice Marshall argued strongly for the recognition of choice in shared living as a form of intimate association.<sup>138</sup> He posited:

The choice of household companions—of whether a person’s “intellectual and emotional needs” are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate

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*Id.*

130. See *Austin v. Austin*, No. FA910058178S, 1999 WL 989430, at \*2 (Conn. Super. Ct. Oct. 19, 1999) (noting that this is an age “of multiple marriages”).

131. Karst, *supra* note 88, at 632 (citation omitted).

132. *Id.* at 633. Since people establish intimate associations in part on the values that commitment between the parties provides, Karst argues that individuals can only fully realize this “value of commitment” when they have the ability to decide if their associations will be “fleeting or enduring.” *Id.* Thus, short-lived relationships—such as quickly annulled marriages and terminated living situations—receive the same protection as the desired long-term relationships.

133. *Id.* at 633.

134. *Id.* at 632.

135. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

136. Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, & the Dynamic of Exclusion*, in *FREEDOM OF ASSOCIATION* 75, 75 (Amy Gutman ed., 1998).

137. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

138. *Id.* at 16–18.

relationships within the home. That decision [of with whom one desires to live] surely falls within the ambit of the . . . Constitution. . . . I am still persuaded that the choice of those who will form one's household implicates constitutionally protected rights.<sup>139</sup>

He was persuaded that a statute must be able to pass strict scrutiny before it could abridge the right to choice in shared living.<sup>140</sup>

The freedom of intimate association affirms the fundamental right of an individual to refuse to live with an unwanted applicant, as well as her ability to choose affirmatively the person or persons with whom she will live. Therefore, statutes that impede the ability of individuals to form the close relationships involved in shared living—by telling them with whom they must or may not choose to live—violate the constitutional right to freedom of intimate association.

## 2. Expressive Association

When associations are voluntary, that is, when the individual can enter into them with the people of her choosing, they become expressive statements that define the individual.<sup>141</sup> This results from the idea that associations “profoundly affect our personalities and our sense[] of self.”<sup>142</sup> A number of oft-quoted truisms such as “birds of a feather flock together”<sup>143</sup> and “a man is known by the company he keeps”<sup>144</sup> acknowledge this idea.

When individuals have a desire to express a message through a shared-living arrangement, either among the members of the living situation or to the community at large, the arrangement becomes an expressive association.<sup>145</sup> This Note assumes that most individuals in shared-living

139. *Id.* at 16, 18.

140. *Id.* at 18.

141. Karst, *supra* note 88, at 637; *see* Rosenblum, *supra* note 136, at 96–97 (arguing that “social attachments and membership in voluntary associations . . . [are] the chief settings for cultivating a sense of self-worth”).

142. Karst, *supra* note 88, at 637; *see* Rosenblum, *supra* note 136, at 96–97 (noting that “fellowship groups[] and self-styled ‘identity groups’ form around personal disabilities and social disadvantages, stigmas, real or imagined victimization, disappointment, and rejection of all kinds”).

143. *United States v. Karathanos*, 531 F.2d 26, 37 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (using the truism); *United States v. Chamley*, 376 F.2d 57, 61 (7th Cir. 1967) (same); *Auto. Club of Mich. v. Comm’r*, 230 F.2d 585, 597 (6th Cir. 1956) (same). The Latin equivalent of this expression, frequently used in the law, is *ejusdem generis*.

144. *Pittsburgh Press Club v. United States*, 388 F. Supp. 1269, 1274 n.9 (W.D. Pa. 1975) (using the truism); *Panci v. United States*, 256 F.2d 308, 312 (5th Cir. 1958) (same); *Auto. Club of Mich.*, 230 F.2d at 597 (same). The Latin equivalent of this expression, also frequently used in the law, is *noscitur a sociis*.

145. The association may be affirmative, when all the members are found to possess some characteristic in common, or negative, when the members desire to exclude from their shared-living arrangement outsiders who do not conform to certain requirements. Both involve an

arrangements are not consciously trying to express a message; rather, most shared-living situations are instead structured around the needs of their members, such as compatibility, companionship, and the division of housing costs. However, some individuals in shared-living arrangements consider whether to express or not express a message to those around them. The right to expressive association protects the rights of people in shared-living arrangements to choose their fellow members.

Many examples of these expressive, shared-living arrangements exist today in the form of community residences.<sup>146</sup> For example, group homes for the elderly help provide retirement-age individuals with a financially affordable living arrangement where the goal is to achieve “continuing independence through interdependence.”<sup>147</sup> These homes send the message that the elderly are still active members of society.

For patients recovering from mental illnesses, community residences are an “important part of the deinstitutionalization process”<sup>148</sup> that allows for an “essential transition between confinement to an institution and total integration in society.”<sup>149</sup> Community residences for the mentally handicapped help residents integrate into the surrounding community.<sup>150</sup> From the public’s perspective, these arrangements give the message to surrounding neighborhoods that the mentally ill and handicapped are not to be feared, but rather to be welcomed into society.

Such community residences exist for people with a variety of other characteristics. “Half-way houses” for drug addicts and alcoholics allow recovering substance abusers to benefit from the support and accountability of their fellow housemates as they transition away from dependency and back into society.<sup>151</sup> Other group homes focus on people suffering from

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effort to use the shared-living environment to establish an expressive theme or message; indeed, the difference between the two is largely semantic. A shared-living arrangement that seeks to fill its ranks with members who possess or promote a certain characteristic produces the same membership as the shared-living arrangement that seeks to exclude all members who do not possess or promote that characteristic.

146. See Daniel Lauber, *A Real Lulu: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments of 1988*, 29 J. MARSHALL L. REV. 369, 369–70 (1996) (providing a definition for “community residences” that “includes group homes, halfway houses, hospices, shelters and other group living arrangements primarily for people with disabilities”). Though this definition of community residences could potentially include large institutions, this Note limits its consideration to those arrangements found in houses located in residential neighborhoods.

147. Michael J. Davis & Karen L. Gaus, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 U. KAN. L. REV. 777, 804 (1998) (quoting SHELLA M. PEACE & CHARLOTTE NUSBERG, INT’L FED’N ON AGEING, SHARED LIVING: A VIABLE ALTERNATIVE FOR THE ELDERLY? I (1984)).

148. Michael B. Gerrard, *The Victims of Nimby*, 21 FORDHAM URB. L.J. 495, 508 (1994).

149. *Id.*

150. Davis & Gaus, *supra* note 147, at 805.

151. *Id.*

HIV/AIDS.<sup>152</sup> Women who are victims of domestic violence can also find support and assistance through group homes sponsored by community groups.<sup>153</sup> Similar programs exist to provide the homeless with support and friendship, as well as with financial assistance.<sup>154</sup>

These community residences communicate to two different groups. On one hand, the group home communicates to those people that possess the home's defining characteristics a message that people and resources exist to help them through their struggles. On the other hand, the group home alerts society at large to the existence of the issues that the group home addresses. This exposure can benefit the entire community by bringing often-ignored controversies to the forefront, because people affected by the home's presence are no longer able to avoid the issue.<sup>155</sup>

According to the Supreme Court, the Constitution affords expressive associations full protection.<sup>156</sup> The Court has further stated that the mere presence of an economic element within an association does not diminish its constitutional protection.<sup>157</sup> As a result, it is important to distinguish between businesses that attempt to masquerade as expressive associations in order to engage in discrimination and true expressive associations where any financial or economic element is secondary to the purpose that necessitates the organizations' discrimination. Expressive shared-living arrangements fall into the latter group; in these settings, any payment of living expenses is secondary to the organizational purpose for which the members created it. Therefore, the simple division of rent and other incidental costs of living

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152. See *Baxter v. City of Belleville*, 720 F. Supp. 720, 721 (S.D. Ill. 1989) (addressing the issuance of a use permit for a residential group home for AIDS patients).

153. See *Becky's House Residential Program*, <http://www.ywcasandiego.org/programs-domestic-violence.shtml> (last visited Feb. 3, 2008) (describing Becky's House as a "transitional residential program for survivors of domestic violence"); *Types of Battered Women's Programs in Minnesota*, <http://www.mcbw.org/resources.htm> (last visited Feb. 3, 2008) (listing various housing and shelter arrangements for battered women).

154. *House of Rachel*, <http://www.ccdsd.org/howohr.php> (last visited Feb. 3, 2008) (stating that its mission is "[t]o provide women 50 years and older a safe, supportive and sober home environment in which residents have the opportunity to end their risk for homelessness, become economically stable, find permanent housing, and establish community support").

155. The fear that some people might have of living next to someone with a disability is usually a product of ignorance. Mary O'Hara, *Living with a Label*, THE GUARDIAN (London), Jan. 24, 2007, available at <http://guardian.co.uk/society/2007/jan/24/disability.equality>. When such people become properly educated about the disability, for instance by interacting with the members of a group home, the "prejudice is broken down." *Id.*

156. *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987) (citations omitted).

157. *Id.* ("The Court also has recognized that the right to engage in activities protected by the First Amendment implies 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" (emphasis added) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984))).

does not remove the expressive–associational aspects of the shared-living arrangement.

The Constitution prohibits any legislative attempt to coerce the inclusion or exclusion of members into a shared-living arrangement. If the government had such power, the result to the members’ message would be disastrous. “[T]he power to change the membership of a bona fide private association is unavoidably the power to change its purpose, its programs, its ideology, and its collective voice.”<sup>158</sup> If, for example, the government required a community residence composed of mentally disabled people to accept applicants having no mental disabilities, it is reasonable to believe that the mandate would interfere with the community’s purpose of integrating mentally disabled people into the community. When the government compels association by forcing people in an expressive shared-living arrangement to accept members that are inconsistent with the purpose of the arrangement (or forbids them from excluding the same), it interferes with the group’s “deliberate, self-chosen purpose” and violates the constitutional right to freedom of expressive association.<sup>159</sup>

### C. RIGHT TO FREE EXERCISE OF RELIGION

An additional constitutional protection for the right to choice in shared living, although perhaps somewhat infrequent in its actual occurrence, involves the First Amendment right to the free exercise of religion.<sup>160</sup> Many religions mandate separation from those not of the same faith.<sup>161</sup> Adherents to religions that require this abstention from intimate contacts or interactions with unbelievers can only share their living spaces with fellow, like-minded believers.<sup>162</sup> Any regulation that would coerce them to accept members of different religions as cohabitants would limit their ability to freely exercise their religions.

These principles exist in many religions. For example, some Christians have interpreted the Apostle Paul’s charge to the Corinthians calling them to not be “unequally yoked” with unbelievers<sup>163</sup> as a general principle urging

158. Rosenblum, *supra* note 136, at 77 (quoting *Roberts*, 468 U.S. at 633 (O’Connor, J., concurring)).

159. *Id.* at 89; *see also Roberts*, 468 U.S. at 623 (majority opinion) (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”).

160. U.S. CONST. amend. I.

161. *Cf. Boone*, *supra* note 87, at 22 (noting the trends of some religious groups to emphasize a strict separation between their adherents and the secular world).

162. *See infra* notes 163–64 and accompanying text.

163. 2 *Corinthians* 6:14–16 (“Do not be bound together with unbelievers; for what partnership have righteousness and lawlessness, or what fellowship has light with darkness? Or what harmony has Christ with Belial, or what has a believer in common with an unbeliever?”).

Christians not to enter into financial or social partnerships with non-Christians.<sup>164</sup> Some Muslims have interpreted the Prophet Mohammed's command to "[t]ake not the Jews and Christians for your friends and protectors" in a similar manner.<sup>165</sup> The Torah teaches that those of the Jewish faith are called to be a nation that "dwells alone,"<sup>166</sup> which has been interpreted by some as a command to have no close relationships with non-Jews.<sup>167</sup> Those that hold these religious views are required to choose only members of their religions to live with and must consequently refuse to live with anyone who has different religious beliefs. For the government to coerce them to do otherwise impacts their free exercise of religion.

This analysis is somewhat complicated by the fact that existing housing-discrimination law is facially neutral toward religion.<sup>168</sup> The test that a facially neutral statute that indirectly impacts the free exercise of religion must pass to comply with the Constitution varies depending on what governing body created it. Courts review facially neutral state statutes that indirectly impact an individual's free exercise of religion under the test set forth in *Employment Division v. Smith*.<sup>169</sup> In general, the fact that a religion mandates a prohibited activity does not provide a follower of that religion with an exception from compliance with a broadly applicable, valid statute.<sup>170</sup>

However, when a facially neutral state law that prohibits religious exercise also violates another constitutionally protected freedom such as the freedom of expression or freedom of association, the religious-exercise

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164. See Thomas A. Droleskey, *Razing More Catholic Bastions*, CHRIST OR CHAOS, June 1, 2006, <http://www.christorchaos.com/RazingMoreCatholicBastions.htm> (stating that the Roman Catholic Church "takes pains to warn her children about the spiritual shipwreck that comes from *any kind of association with unbelievers*, especially in the context of the Sacrament of Holy Matrimony" (emphasis added)).

165. THE HOLY QUR'AN 5:51 ("O ye who believe! Take not the Jews and the Christians for your friends and protectors: They are but friends and protectors to each other. And he amongst you that turns to them [for friendship and protection] is of them. Verily God guideth not a people unjust.").

166. *Bamidbar* 23:9 ("[L]o, it is a people that shall dwell alone, and shall not be reckoned among the nations."); *Numbers* 23:9 (same). *Bamidbar* and *Numbers* refer to the same text, the former from the Torah and the latter from the Bible.

167. Israel Shamir, *Tsunami in Gaza* (Jan. 3, 2004) <http://www.jewishtribalreview.org/shamir16.htm> ("This is a part and parcel of Jewish faith, the pinnacle of 'The Nation Shall Dwell Alone' commandment—Jews are not supposed to live or to die with non-Jews.").

168. See *supra* Part II (describing facially neutral housing-discrimination statutes).

169. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

170. See *id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (internal quotation marks omitted))).

claim reinforces the other constitutional claim.<sup>171</sup> In the case of the right to choice in shared living, both freedom of expression<sup>172</sup> and freedom of intimate association<sup>173</sup> claims can be present. Consequently, these claims further bolster the strict-scrutiny standard that applies when an individual violates a state fair-housing statute for religious reasons.<sup>174</sup> Therefore, when a facially neutral state fair-housing statute restricts religious exercise, the courts review the statute under the highest level of scrutiny because of the hybrid constitutional rights present.<sup>175</sup>

Federal statutes impeding religiously motivated conduct may have to pass a higher level of scrutiny than state statutes because of Congress's passage of the Religious Freedom Restoration Act ("RFRA") in 1993.<sup>176</sup> While the Supreme Court held that the RFRA was an unconstitutional exercise of Congress's power to enforce the Fourteenth Amendment—and therefore inapplicable to the states<sup>177</sup>—it did not address the validity of Congress's power to enact RFRA under any of its other enumerated powers. "Every single . . . [c]ircuit court that has squarely addressed the question"<sup>178</sup> has held that the RFRA is still good law as applied to the federal government.<sup>179</sup> If it is still good law, and does apply, then courts apply strict scrutiny to any facially neutral federal statute that imposes a restriction on

171. *Id.* at 881–82. The Court stated:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . . Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion . . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.

*Id.* at 881. While what the Court means by "reinforcement" is unclear, one plausible explanation is that it would tip the scales in favor of limiting government action when other competing interests are at play, such as conceptions of equality and principles of antidiscrimination.

172. *See supra* Part III.B.2 (discussing the protection provided by the freedom of expressive association in shared living); *infra* Part III.D (discussing the protection provided by the freedom of speech to choice in shared living).

173. *See supra* Part III.B.1 (discussing the protection that the right to freedom of intimate association provides to choice in shared living).

174. *Smith*, 494 U.S. at 881–82.

175. *Id.*

176. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–1 (2000).

177. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

178. *Jama v. INS*, 343 F. Supp. 2d 338, 368 (D.N.J. 2004).

179. *Id.* Although Congress might lack the constitutional authority to restrain the *states* by enacting RFRA, it is entirely possible that it does possess the authority to restrain the federal government. *Id.*

an individual's exercise of religion, regardless of whether any other constitutional issues are present.<sup>180</sup> Alternatively, if the RFRA cannot bind the federal government, then the bolstering doctrine that is applicable to state claims would likely apply in the federal arena as well.<sup>181</sup> Federal statutes that impact the free exercise of religion would then receive strict scrutiny also, bolstered by combination with the other constitutional claims involved in restrictions of shared living.<sup>182</sup>

#### D. FREEDOM OF SPEECH

The First Amendment right to freedom of speech protects an individual who communicates her living-arrangement preferences to potential roommates. The Supreme Court has established that “under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers.”<sup>183</sup> When an individual tells others about herself in the process of searching for a roommate, the preferences she has established may offend some people. Similarly, when interested applicants show up at her door, she may offend them when she declines to live with them because of their beliefs, values, or characteristics.

The offense that such statements create, however, cannot justify restraining the individual's freedom of speech.<sup>184</sup> Silencing speech simply because it causes offense is at odds with a system of government premised upon “individual dignity and choice.”<sup>185</sup> Statements in this context are not fighting words meant to stir up violence;<sup>186</sup> though they may offend some people, the individuals are merely trying to procure a suitable roommate.<sup>187</sup>

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180. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1546 (15th ed. 2004) (quoting 42 U.S.C. § 2000bb-1).

181. The idea that the “hybrid rights” rationale should apply to situations that the RFRA would cover—even if it were not valid as to the federal government—has found support in case law. See, e.g., Equal Employment Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (citing the case at hand as the type of “hybrid situation” referred to in *Smith*).

182. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990); see *supra* Parts III.A–B (discussing the constitutional protection that the rights to privacy and freedom of association provide to shared living); *infra* Part III.D (discussing the constitutional protection that free speech provides to shared living).

183. Street v. New York, 394 U.S. 576, 592 (1969).

184. *Id.*

185. Cohen v. California, 403 U.S. 15, 24 (1971).

186. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (recognizing the “fighting words” exception to the free-speech doctrine).

187. Indeed, many statements that qualify as discrimination under current housing-discrimination laws are completely inoffensive. An advertisement that describes the owner as a student who loves Mexican food and Japanese samurai films would, under the FHA's ordinary-

Therefore, the right to free speech protects an individual's self-description and statements of preference when seeking a roommate.

#### IV. THE ABILITY TO EXERCISE THE RIGHT TO CHOICE IN SHARED LIVING THROUGH ADVERTISING

Flowing naturally from the right to choice in shared living is the ability to exercise that right.<sup>188</sup> Although many individuals may organize shared-living arrangements by word of mouth, others must advertise their desire to the general public through many mediums—including newspapers, fliers, and Internet sites like Craigslist.<sup>189</sup> When an individual has already determined what characteristics (1) are inconsistent with the individual's concept of privacy,<sup>190</sup> (2) are more conducive to fostering a long-term, intimate shared-living relationship,<sup>191</sup> (3) enhance—or detract from—the expressive theme that the individuals intend to convey,<sup>192</sup> or (4) are required by the individual's religion,<sup>193</sup> information about those determinations typically accompany the advertisement.<sup>194</sup> In many cases, individuals include the information not to offend those who read the

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reader test, discriminate on the basis of age, race, and ethnicity. *See supra* Part II.C (discussing the ordinary-reader test).

188. *See* John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live Up to the Moniker “World Trade Court?”*, 31 *LAW & POL'Y INT'L BUS.* 739, 758 (2000) (“[A] right without the effective ability to exercise that right is meaningless.”).

189. This is especially the case in a society as mobile as ours. *See Centrifugal Forces*, *ECONOMIST*, July 16, 2005 (discussing the high mobility of modern American society). From 1995 to 2000, almost half of all Americans moved to a different residence, and the article estimated that over forty million Americans would relocate in 2005 alone. *Id.* This frequent relocation leads to a breakdown in the social networks that individuals have traditionally used to facilitate group activity (thus necessitating public advertisement). *See generally* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (discussing the impact that a lack of interpersonal connections has on society's ability to function efficiently).

190. *See supra* Part III.A (discussing the right-to-privacy basis for choice in shared living).

191. *See supra* Part III.B.1 (discussing the right-to-freedom-of-intimate-association basis for choice in shared living).

192. *See supra* Part III.B.2 (discussing the right-to-freedom-of-expressive-association basis for choice in shared living).

193. *See supra* Part III.C (discussing the right-to-free-exercise-of-religion basis for choice in shared living).

194. The inclusion of such information in the advertisement speeds the selection process by directing compatible respondents to the individual placing the ad and by reducing the number of applications that the advertiser would discard *de facto*. Similarly, such information also speeds the process for individuals responding to the ad by allowing them to identify and forego making applications that the advertisers would ultimately discard. *See also supra* note 189 and accompanying text (arguing that an increasingly mobile culture that lacks social connections necessitates advertisement).

advertisement but to be considerate to people with whom they feel they are unable to live.<sup>195</sup>

The question then becomes what level of protection the Constitution affords to shared-living advertisements. Although shared living does, in the vast majority of cases, contain inherent economic duties—such as division of rent and other incidental costs of living—the commercial-speech doctrine should not apply to it.<sup>196</sup> Economically speaking, it is safe to assume that most people looking for roommates do not anticipate making a profit but rather defraying their own living costs or perhaps attempting to live in dwellings that they otherwise could not afford.

Even when one assumes that the economic aspect incident to shared living transforms the transaction into a commercial one, speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully-protected speech.”<sup>197</sup> The multiple constitutional protections that the law affords to an individual’s choice in shared living indicate that the ability to choose whom to live with is fully protected expression.<sup>198</sup> The use of advertising as a means to exercise the right to choice in shared living should then receive the same First Amendment free-speech protection given when an individual expresses her preferences in a face-to-face setting.<sup>199</sup>

#### V. THE UNCONSTITUTIONALITY OF HOUSING-DISCRIMINATION STATUTES AS APPLIED TO THE RIGHT TO CHOICE IN SHARED LIVING

In light of the protections that the Constitution gives to the fundamental right to choice in shared living, any state or federal statute that

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195. See *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972) (noting that the owner’s intent in using the terms “white home” in his search for tenants was out of kindness to minority applicants, not wanting to “mak[e] them come” when he was not willing to rent to them).

196. See *supra* note 157 and accompanying text (discussing the fact that having an economic aspect does not lessen constitutional protections).

197. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988). Though at least one court has ruled that restrictions on discriminatory advertising are constitutional, see *Hunter*, 459 F.2d at 213, it based its decision on the now-abandoned ruling in *Valentine v. Chrestensen*, 316 U.S. 52 (1942). The *Valentine* Court held that the First Amendment did not protect commercial advertising whatsoever, *id.* at 54, a doctrine that the modern Court has discarded. See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980) (“The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.”).

198. See *supra* Part III (discussing the multiple constitutional protections given to the right to choice in shared living). The fact that the government bears the burden of proving that the Constitution does not protect the speech that the government seeks to regulate further bolsters this proposition. *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620 (2003).

199. See *infra* Part III.D (discussing the constitutional protection that individuals seeking roommates have under the free-speech guarantee).

attempts to abridge that right must pass strict judicial scrutiny.<sup>200</sup> For any legislative action to be valid, the legislature must have a compelling interest in restricting an individual's choice in shared living.<sup>201</sup> Additionally, the legislature must narrowly tailor the method of regulation to achieve this end and meet that interest.<sup>202</sup> While the strict-scrutiny hurdle is not "strict in theory, but fatal in fact,"<sup>203</sup> it nevertheless constitutes an "exacting review"<sup>204</sup> and a "high hurdle."<sup>205</sup>

Assuming that both the federal government and the states have a compelling interest in eliminating discrimination in housing situations that do not involve the constitutional protections present in shared-living arrangements,<sup>206</sup> regulations that do not make exceptions that allow individuals in shared-living arrangements to exercise choice in selecting their cohabitants are not narrowly tailored to achieve that interest. As a result, any attempt to apply section 1982 to bar an individual's exercise of choice in shared living would be unconstitutional.<sup>207</sup> Since the right to choice in shared living is a fundamental liberty right,<sup>208</sup> the Fourteenth Amendment likewise would apply to bar the application of state housing-discrimination laws to individuals' shared-living choices.<sup>209</sup> Finally, the FHA's ban on advertisements that express preferences would also be unconstitutional as applied to individuals exercising their right to choice in

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200. See *Elrod v. Burns*, 427 U.S. 347, 363 (1976) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973))); see also *supra* Part III (discussing the multiple constitutional protections given to the right to choice in shared living).

201. See *Elrod*, 427 U.S. at 363 (describing how the inhibition of a First Amendment right must further a "vital government end" to be constitutionally valid).

202. *Id.*

203. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)).

204. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 783 (1996).

205. *Toll v. Moreno*, 458 U.S. 1, 41 n.12 (1982) (quoting *Foley v. Connelie*, 435 U.S. 291, 295 (1978)).

206. See *supra* Part I (discussing scenarios such as a property owner selling his house or a non-resident landlord leasing apartments in a ten-story apartment complex).

207. The Civil Rights Act of 1866 § 1982, 42 U.S.C. § 1982 (2000). This Note takes the position that applying section 1982 to private conduct violates the Constitution. Even if section 1982 did apply, it would be applicable only to regulate racial discrimination. See *supra* note 38 (discussing Justice Harlan's dissent in *Jones*).

208. See *supra* Part III (discussing the multiple fundamental liberty interests that make up the right to choice in shared living).

209. See *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (stating that the Fourteenth Amendment's Due Process Clause, which applies to the states, protects the abridgment of fundamental liberty interests).

shared living through means of public advertisement.<sup>210</sup> Therefore, all existing housing-discrimination law is unconstitutional as applied to individuals who are exercising their fundamental right to choice in shared living.

## VI. CONCLUSION

The right to choice in shared living is a fundamental liberty interest, supported by multiple constitutional doctrines.<sup>211</sup> First and foremost, it is a realization that an individual's home is her castle; that the decision whether to allow another person to *share* her home is even more important than her decision to allow another to *enter* it.<sup>212</sup> The right to choice acknowledges that the roommate-housemate relationship has the potential to become a deep, intimate relationship where mutual support, companionship, and trust play integral parts.<sup>213</sup> Furthermore, it recognizes that an individual's choice to live with someone involves an expression of her personal beliefs concerning who she is and with whom she feels comfortable to share her home.<sup>214</sup> Recognizing this right also affirms the ability of individuals in one living arrangement both to convey a message to the surrounding community and to support one another mutually in a thematic environment.<sup>215</sup> The right to choice in shared living takes into account the necessity for individuals with certain religious beliefs to share living space in a manner that complies with their religions,<sup>216</sup> and is an affirmation of the individual's right to speak about who she is and with whom she will live.<sup>217</sup>

It is essential for our society to continue to recognize the principles of liberty that form the basis of the right to choice in shared living because of the value that these principles provide to both individual citizens and the community at large.<sup>218</sup> A roommate or housemate interaction can be an incredibly positive experience and can result in friendships that last a lifetime. For victims of domestic violence, substance abusers, and those

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210. See *supra* Part IV (discussing protections given to the exercise of the individual's choice in shared living through public advertisement).

211. See *supra* Part III (discussing the multiple constitutional protections given to the right to choice in shared living).

212. See *supra* Part III.A (discussing the right-to-privacy basis for choice in shared living).

213. See *supra* Part III.B.1 (discussing the right-to-freedom-of-intimate-association basis for choice in shared living).

214. See *supra* Part III.B.2 (discussing the right-to-freedom-of-expressive-association basis for choice in shared living).

215. *Id.*

216. See *supra* Part III.C (discussing the right-to-free-exercise-of-religion basis for choice in shared living).

217. See *supra* Part III.D (discussing the free-speech basis for choice in shared living).

218. See *supra* Part III.B.2 (discussing the right-to-freedom-of-expressive-association basis for choice in shared living).

recovering from mental illness, shared living can provide a safety net of support and understanding as they transition back into normal life in society.<sup>219</sup> Shared living for the mentally handicapped and minority groups can provide instant access to the surrounding community, providing them with interactions that educate, inform, and improve all those with whom they come into contact.<sup>220</sup> Rather than attempting to manipulate these relationships and all the benefits they provide, the government should support them and affirm their value.

The act of discrimination is a reprehensible thing; conversely, the exercise of personal autonomy by making choices related to an individual's self-perception, values, and experiences is a highly valued part of our system of government. Some people may agree in principle with the right to choice in shared living but at the same time be wary of its ability to offend people through discrimination.

It is important, however, to separate the two. The right to choice in shared living ultimately boils down to an individual's ability to establish her home—a basic element of society—in the way she sees fit. Discrimination is a problem much broader than the home; it permeates our society and stretches into every facet of life. Since discrimination is bound up with an individual's right to make choices, attempts to eliminate it through laws will drive it underground<sup>221</sup> or, worse, eliminate the individual's right to make choices altogether. We must deal with the problem by informing people's choices, removing the ignorance at the heart of discrimination, and retaining the right to choice.

Justices Blackmun and Brandeis perhaps summed it up best:

There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not

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219. See *supra* Part III.B.2 (same).

220. See *supra* Part III.B.2 (same).

221. Antidiscrimination statutes have already driven some forms of discrimination, such as employment discrimination, underground. See *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 363 n.10 (4th Cir. 1983) (“[P]roving intentional race discrimination may be increasingly difficult as its more overt forms have been driven underground by the first wave of major Title VII litigation victories . . .”); see also Victor Suthammanont, Note, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y.L. SCH. L. REV. 1173, 1175 (2004) (“Unfortunately, minorities still face political and social challenges. Some of these challenges can be addressed by the law; some are beyond the law’s reach. Racial animosity has been driven underground. There it lurks, awaiting its chance to rise, as it does from time to time in matters of social policy . . .”).

ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.<sup>222</sup>

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If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.<sup>223</sup>

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222. *Linmark Assocs., Inc. v. Willingbro Twp.*, 431 U.S. 85, 97 (1977) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976)).

223. *Id.* (citing Justice Brandeis's concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927)).