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ABSTRACT

In its 2015 landmark civil rights decision in Obergefell v. Hodges, the Supreme Court finally held that the Equal Protection and Due Process Clauses of the United States Constitution guarantee same-sex couples' marital equality. The Court's unprecedented declaration that the right to marry is a fundamental right under the Due Process Clause strengthened married couples' right to privacy because it subjects government actions infringing on marital unions to heightened scrutiny. The Supreme Court has the option to minimize the impact of Obergefell by interpreting the right to marriage very narrowly—as only encompassing the right to enter into a state-recognized union with another person. However, drawling from Justice Douglas' "penumbras principle" from Griswold v. Connecticut, this Note argues that interpreting the right to marriage to include its peripheral rights, like cohabitating, is the more principled approach. Using this approach, public housing authorities as government entities must prove that policies that disqualify ex-felons and arrestees from residing on their premises—even when their spouses are current residents—are necessary to further a compelling interest and narrowly tailored to be constitutional. Recognizing that a penumbra approach to interpreting the right to marriage would nonetheless leave non-marital families subject to broad governmental interference, this Note concludes by reasoning that non-marital families would have a strong argument that the differential treatment violates the Equal Protection Clause.

INTRODUCTION

"I have three children. I take care of a disabled uncle. I haven't had any infractions since I was incarcerated. I've worked at one place for nine years," explains Dana Monroe of Charlottesville whose nearly ten-year hunt for consistent housing has proved unsuccessful due to a single felony conviction.[1] Ms. Monroe's struggle to find housing is familiar among low-income ex-felons and arrestees. The sting of rejection that accompanies each rental denial ex-felons receive push some to give up applying altogether and submit to what seems inevitable—homelessness.[2]

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[1] Emily Hays, *Barred from Affordable Housing*, CHARLOTTESVILLE TOMORROW (May 13, 2018, 7:00 PM), https://www.cvilletomorrow.org/articles/barred-from-affordable-housing.

[2] *See* Amy Qin, *Public Housing Appeals Give Hope to Homeless with Criminal Records*, PITT. POST-GAZETTE (Sep. 10, 2018, 6:15 AM), https://www.post-gazette.com/local/city/2018/09/10/public-affordable-housing-criminal-homeless-Pittsburgh-housing-authority/stories/201808190012.

During the 1980s, Public Housing Authorities (PHAs) began excluding applicants who had been arrested for, or criminally convicted of, a broad spectrum of crimes.[3] The impact of public housing "bans" is diffuse because if one member of a family is ineligible, the remaining members eligible for residency must decide which is more tolerable: enduring indefinite periods of separation or committing to unaffordable private living arrangements. This dilemma is particularly alarming for families with young children or those with family members who suffer from a disability.[4] While non-profit supportive housing entities provide relief to some,[5] the critical question is not what can these entities do to help, but rather, why is their help needed in the first place?

How is it permissible for government agencies to perpetuate homelessness and family separation on the grounds of a single member's previous criminal history? One answer lies within the United States' failure to strictly enforce constitutional rights and liberty interests to family sanctity and privacy. The text of the Constitution does not explicitly provide families with greater privacy rights, but several controversial Supreme Court decisions pieced together demonstrate that the Court recognizes the particular need for privacy in familial decisions.[6] As a result, the Court has relied on the Due Process Clause to restrain government action that touches upon family matters. The disconnect, however, between the Constitution's text and society's special appreciation for families has resulted in extremely malleable "familial rights." The unpredictable nature of the jurisprudence is partly due to the fact that substantive due process cases are inherently fact-specific and viewed with great skepticism by strict textualists and originalists.[7]

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[3] *See generally* Lahny R. Silva, *Criminal Histories in Public Housing*, WIS. L. REV. 375 (2015).

[4] *See Stories of Annapolis Residents Challenging Housing Policy that Tears Families Apart*, AM. C.L. UNION, https://www.aclu.org/other/stories-annapolis-residents-challenging-housing-policy-tears-families-apart (last visited Oct. 24, 2019).

[5] *See* Qin, *supra* note 2.

[6] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding for the first time that the due process clause "denotes not merely the freedom from bodily restraint but also the right of the individual to. . . marry, establish a home and bring up children. . ."); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925) (striking down the Compulsory Education Act of 1922 that forced parents to send their children to a public school in their residential district because "[u]nder the doctrine of Meyer v. Nebraska. . .the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing both Meyer v. Nebraska and Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary as evidence that the "custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" and "that these decisions have respected the private realm of family life which the state cannot enter."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("reaffirm[ing] the principles of the Pierce and Meyer cases" in its decision that while the "association of people is not mentioned in the Constitution. . . various guarantees [in the Bill of Rights] create zones of privacy," including the marriage relationship, that the state cannot unnecessarily invade); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499-504 (1977) (striking down a zoning ordinance that "narrowly defined family patterns" in a manner that prevented a grandmother from residing with her grandson on the grounds that the Court's decisions "establish that the Constitution protects the sanctity of the family" which includes extended family households).

[7] Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. Rev. 63, 79 (2006) ("[T]here is no persuasive evidence that these liberties were embraced by the original, objective public meaning of the clause. It seems plain that substantive due process grants constitutional protection to rights that are neither enumerated in the text nor grounded in the original meaning of the Fourteenth Amendment. Instead, the Court is protecting values that emerge from a process of nonoriginalist judicial decisionmaking. Needless to say, the identification and protection of unenumerated, nonoriginalist constitutional rights **by** the

This Note examines PHA policies that ban ex-felons and arrestees from residing with or visiting tenants in their complexes to illustrate that our current approach to protecting familial rights from governmental interference is insufficient in sensitive areas, like housing. It is helpful to view the problem through the lens of public housing bans for two reasons. First, discriminatory housing bans quite literally disrupt families. The lack of heightened judicial review despite the policies' consequences demonstrates the vulnerability of familial rights. Second, recent Supreme Court decisions, stemming from Justice Kennedy's landmark opinion *Obergefell v. Hodges*,[8] known for securing marriage equality, makes attempts at bolstering familial rights most likely to succeed in the realm of housing. Now, married families in public housing have legitimate claims that housing bans infringe upon their marital union, which is constitutionally protected under *Obergefell*.[9] If married families successfully leverage *Obergefell*, constitutionally-mandated relief becomes contingent upon whether one attains a particular status—marriage—and as such, relief is not still available to all families. This Note envisions a future where such an arbitrary differentiator traditionally utilized to treat nonmarital families as somehow "less than" will become the very vehicle to expanding the constitutional right to family sanctity for all families.

This Note proceeds in three parts. Part I provides an overview of the organizational structure of public housing. It then details the pattern of racially-biased practices in the realm of public housing, ending with public housing bans and the consequences of family separation generally. It concludes by summarizing cases where the constitutionality of public housing bans is contested.

Part II begins by demonstrating that while the Supreme Court has consistently afforded families heightened protection from government interference, families living in. public housing complexes remain vulnerable because the Supreme Court's cases are not considered collectively. Then Part II contends that advocates may utilize *Obergefell* to expand the right to family sanctity by urging the Supreme Court to adopt a penumbra-type approach to interpreting the scope of the right to marriage. Part II concludes with a description of the legal framework under the proposed penumbra-type approach.

Part III hypothesizes that once advocates establish the right to marriages encompasses the right for spouses to cohabitate through *Obergefell*, they can then challenge public housing bans infringing upon non-marital families under the Equal Protection Clause. Part III concludes by analogizing the future of *Obergefell* to the legacy of *Griswold* and *Eisenstadt*.[10]

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unelected Supreme Court-with the Court nullifying legislative judgments on fundamental questions of political morality-is a highly controversial practice. As a result, it is hardly surprising that some have condemned the entire enterprise of substantive due process, calling it an unjustified judicial usurpation of political power and a flagrant violation of the basic principle of majoritarian self-government.").

[8] 135 S. Ct. 2584 (2015).

[9] Justice Kennedy, writing for the majority in *Obergefell*, struck down same-sex marriage bans on the grounds that the fundamental right to marriage includes the right to marry a same-sex partner. *See* Mark Strasser, *Obergefell, Dignity, and the Family*, 19 J. GENDER RACE & JUST. 317, 319 (2016). The declaration of marriage equality was not necessarily unanticipated, but Justice Kennedy's approach in deriving the right surprised lawyers and scholars paying close attention. *Id.* at 317-18.

[10] *Griswold*, 381 U.S. at 483; Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

I. PUBLIC HOUSING IN AMERICA

In the United States, public housing "provide[s] affordable housing for the financially disadvantaged."[11] As of 2010, approximately two million residents lived in one of the 14,000 developments.[12] The following section details the role of the federal and state governments in public housing, identifies policy initiatives that disproportionately impact communities of color, and reviews the constitutional tools available to public housing tenants challenging government action.

A. Organizational Structure of Public Housing

This Note focuses on public housing complexes that are federally-subsidized, state-owned developments overseen by public housing authorities (PHAs).[13] PHAs are created under state laws and are responsible for managing the day-to-day operations of public housing complexes.[14] The federal government, through the U.S. Department of Housing and Urban Development (HUD), provides PHAs with financial and professional assistance.[15] HUD purports to grant PHAs the "maximum amount of responsibility and flexibility in program administration."[16] In practice, however, it is unclear whether PHAs are sufficiently detached from HUD.[17] The responsiveness of PHAs to federal political pressure to target drug offenders in the 1980s suggests skepticism towards the notion that PHAs are independent from HUD.

B. Racial Bias in Public Housing Policies

A brief summary of the evolution of racist housing policies implemented by the government is helpful insofar as it provides support for viewing purportedly legitimate justifications for housing bans with great skepticism.

During the conception of public housing in the early 1930s, the government constructed housing developments exclusively for Black people in underdeveloped areas of towns.[18] The geographic placement of homes for Black people was partially limited because of legally enforced racially restrictive covenants and similar policies.[19] During the 1950s, Federal Housing Authority (FHA) loans helped White families rapidly relocate into suburban neighborhoods[20] because housing was cheaper and economic activities

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[11] Jamie L. Wershbale, *The Second Amendment under a Government Landlord: Is There a Right to Keep and Bear Legal Firearms in Public Housing?*, 84 ST. JOHN'S L. REV. 995, 1000 (2010).
[12] *Id*. at 997–98.
[13] The focus is narrow, because in the litigation presupposed, tenants will need to demonstrate there is "government action" and cannot do so under other housing assistance programs, including vouchers.
[14] Wershbale, *supra* note 11, at 1000-01.
[15] *See id*. at 1001.
[16] *Id*. at 1000–01.
[17] *See* Martin D. Abravanel, *Is Public Housing Ready for Freedom?*, URBAN INST. (Apr. 1, 2004), https://www.urban.org/sites/default/files/publication/57301/1000631-Is-Public-Housing-Ready-For-Freedom-.PDF.
[18] MARGERY AUSTIN TURNER ET AL., PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 4 (2008).
[19] *See generally* John Kimble, *Insuring Inequality: The Role of the Federal Housing Authority in the Urban Ghettoization of African Americans*, 32 L. & SOC. INQUIRY 399 (2009). Restrictive covenants are contracts that prohibit certain races from occupying a particular neighborhood. *Id*. at 411.
[20] *See* John M. Stahura, *Suburban Development, Black Suburbanization and the Civil Rights Movement Since World War II*, 51 AM. SOCIO. REV. 131, 132 (1986).

were also moving to the suburbs.[21] The opportunities for Black families to take advantage of the benefits of suburbanization were limited because of discriminatory policies in the administration of FHA loans[22] and exclusionary zoning ordinances, amongst other government policies.[23] As a result, many Black families of all economic circumstances found themselves restricted to urban areas.[24]

The federal government then launched its "urban renewal" program, justified by the increasing and entrenched urban poverty during the 1950s and 1960s.[25] Urban renewal generally referred to policies authorizing state and local governments to eliminate urban blight.[26] In reality, urban renewal meant "driving poor people out of their homes, i.e., black and minority removal, and building on the vacated premises luxury housing and commercial projects. . . profitable to speculators."[27] At the start of the urban renewal era, Congress passed the Housing Act of 1949, which called for the construction of 135,000 public housing units per year for six years beginning in 1950.[28] Perhaps unsurprisingly, Congress ultimately only approved funding for between one-sixth and two-fifths of the promised 135,000 units each year.[29] States and localities hoping to receive federal funds responded by drafting plans for buildings that maximized the number units built at the lowest cost point.[30] Alas, the infamous "high-rise" housing projects were birthed.

The high-rise projects were different than the designs proposed during the 1930s when the concept of public housing was first proposed as a vehicle to help White *and* Black families.[31] These new high-rise projects may be characterized as "steel and concrete developments. . . surrounded by fields of extreme poverty" and for all effective purposes, were removed from mainstream society.[32]

By the early 1980s, conditions in high-rise projects had deteriorated due to income-based tenant selection policies, which resulted in a high number of unemployed tenants. To make matters worse, inadequate funding for security resulted in hazardous

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[21] *See id*.
[22] Discriminatory policies included outright refusal to ensure mortgages as well as requiring developers to include clauses in deeds prohibiting resales to Black people in the future. *See* Richard Rothstein, *Public Housing: Government-Sponsored Segregation*, THE AM. PROSPECT (Oct. 11, 2012), https://prospect.org/article/public-housing-government-sponsored-segregation.
[23] *Id. See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).
[24] LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 20 (U. Chi. Press eds. 2000).
[25] TURNER, *supra* note 18, at 4.
[26] Richard Freeman, *The 1949 Housing Act versus 'Urban Renewal'*, in 23 EXECUTIVE INTELLIGENCE REV. (EIR) 27, 28 (1996).
[27] *Id*. at 28–29.
[28] *Id*. at 28.
[29] *Id*.
[30] *See* D. Bradford Hunt, *How Did Public Housing Survive the 1950s?* 17 J. POL'Y HIST. 193, 210 (2005).
[31] *See* SUDHIR ALLADI VENKATESH, AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO 18 (2000) ("The public housing project therefore continues to be laid out as a 'community unit' as large as possible and entirely divorced from its neighborhood surroundings, even though this only dramatizes the segregation of charity-case families. Standardization is emphasized rather than alleviated in project design, as a glorification of efficient productions methods and an expression of the goal of decent, safe and sanitary housing for all.").
[32] *Id*.

conditions.[33] During the "tough on crime" era, politicians eager for constituents' support politicized and further dehumanized the Black and brown tenants in these state-created pockets of crime and isolation by making promises to (over)police public housing complexes.[34]

C. History & Characteristics of Public Housing Bans

In 1988, Congress passed the Anti-Drug Abuse Act which required PHAs to evict tenants if they, any of their household members, or guests engaged in criminal activity on or near the complex.[35] This was the first act that targeted public housing tenants exclusively, but many followed after President Bill Clinton's 1996 State of the Union Address, when he declared: "If you break the law, you no longer have a home in public housing, one strike and you're out. That should be the law everywhere in America."[36] In April 1996, HUD issued its *One Strike Guide* to PHAs.[37] The guide encouraged the PHAs to utilize their authority to implement stringent screening practices and eviction procedures.[38]

If the Anti-Drug Abuse Act, Clinton's passionate declaration, and HUD's *One Strike Guide* were insufficient to convince PHAs to evict tenants and reject applicants based on perceived and past criminal behavior, HUD delivered the message by making PHAs' funding contingent on their ability to screen and evict ex-offenders.[39] Congress followed suit with the Quality Housing and Work Responsibility Act of 1998 (QHWRA), which conditioned PHAs' funding on the implementation of successful screening procedures and granted PHAs the discretion to determine what types of offenses could lead to exclusion and the length of time the exclusion would last.[40] The QHWRA is perhaps most directly responsible for the wide variety of policies that exist today.[41] Additionally, the *One Strike Guide* permitted PHAs to implement their own exclusion criteria. This discretion created a multiple housing bans that vary broadly in regard to the types of crimes that trigger ineligibility.

A practice among many PHAs is to reject applicants or evict tenants based solely on arrest records, even when their charges were dropped or consist of minor, non-violent offenses that are often correlated with poverty and are unrelated to applicants' likelihood of being "good" tenants.[42] Corinne Casey, a researcher at Human Rights Watch, describes one Black mother, P.C., who was denied housing because of one arrest four

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[33] TURNER, *supra* note 18, at 5.
[34] *See* Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 551, 563 (2005) (suggesting that housing bans may be a consequence of the War on Drugs).
[35] *Id.* at 560.
[36] *Id.* at 560–61.
[37] *Id.* at 561.
[38] *Id.*
[39] *See generally* Quality Housing and Work Responsibility Act of 1998, Pub. L No. 105-276, 112 Stat. 2518 (codified as amended in scattered sections of 42 U.S.C.).
[40] *See* Carey, *supra* note 34, at 562.
[41] Janet Weiner, *No-Trespass Policies in Public Housing* 41 (Jan. 1, 2016) (unpublished Doctor of Philosophy Dissertation) (on file with Publicly Accessible Penn Dissertations), https://repository.upenn.edu/cgi/viewcontent.cgi?article=3876&context=edissertations.
[42] *See* Carey, *supra* note 34, at 566–67.

years prior to her application; the mother declared, "It's done and over with, it's in the past. I'm trying to do the right thing; I deserve a chance. Everyone deserves a chance."[43] P.C. was never convicted of the offense that triggered the denial of her application for housing.[44]

It is also common for individuals who have been arrested or convicted of disqualifying crimes to be ineligible for housing for periods of time much longer than the sentence attached to the underlying conviction.[45] Finally, where proposed tenants have a criminal record, PHAs regularly neglect to perform case-by-case individualized reviews of applications, as HUD guidelines advise. Instead, PHAs often implement blanket denials for those with a criminal record.[46] The characteristics of the bans demonstrate why "rehabilitated," hardworking people who previously broke the law, and their family members, are almost categorically excluded from finding refuge from the disastrous housing market in public housing. These practices in the implementation of bans suggest that PHAs exclude more people than necessary to achieve their alleged government purpose.

D. Family Separation as a Result of Public Housing Bans

There are broad and severe consequences of these overreaching bans, namely family separation.[47] Housing bans have the capacity to impact thousands of families. According to the National Center for Health in Public Housing, over two million people live in public housing, and children make up approximately 37% of public housing residents.[48] The negative implications of family separation, a probable consequence of housing bans, cannot be overstated.

Familial compositions impact the socio-emotional, academic, and physical development of children.[49] For example, Robert Sampson and John Laub, criminologists awarded for their work on crime and the life course and crime and public policy, found that "family dysfunction[50] . . . [can] increase the propensity of the individual's life course toward criminal behavior."[51] Family dysfunction may appear in the form of abuse or negative characteristics, such as those stemming from the forced separation a housing ban

[43] *Id.* at 545.
[44] *Id.*
[45] *See id.* at 569. Exclusion periods differ between counties and cities, but the trend of excessive periods is consistent. A misdemeanor conviction for marijuana in New York City may lead to a five-year ban from PHAs, but a criminal sentence of probation for six months. Similarly, in Pittsburgh, Pennsylvania, a conviction for a violent felony can lead to lifetime ineligibility regardless of evidence of rehabilitation.
[46] *See id.* at 572. The failure to perform case-by-case reviews suggests that the policy infringing upon the constitutional rights of applicants may not be narrowly tailored.
[47] *Id.* at 584. In analyzing a substantive due process or equal protection challenge under strict scrutiny (as proposed), courts may be less convinced by allegedly compelling needs proffered by the government if courts understand (1) that PHA bans are often overly broad and (2) such bans have severe ramifications.
[48] Nat'l Ctr. for Health in Pub. Housing, *Demographic Facts: Residents Living in Public Housing* (May 31, 2016), https://nchph.org/wp-content/uploads/2016/07/Demographics-Fact-Sheet-2016-1.pdf.
[49] S*ee* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 170 (2015). *See generally* Lisa Strohschein et al., *Family Structure Histories and High School Completion: Evidence from a Population-Based Registry*, 34 CAN. J. SOC. 83, 83–103 (2009).
[50] Defined: John H. Laub et al., *Assessing Sampson and Laub's Life Course Theory of Crime*, *in* 15 ADVANCES IN CRIMINOLOGICAL THEORY 313-33 (Francis T. Cullen et al. eds., 2006).
[51] *Id.*

may cause. Similarly, Robert Agnew's "general strain theory" suggests that familial stress leads to feelings of loss or anger, which strains the expected conditions of relationships and pushes people to compensate for the strain by engaging in delinquency or crime.[52]

The majority of these studies do not discuss the scenario of "intact" families, which for the purposes of this Note, are families who live separately because of public housing bans but otherwise function as one unit. Instead, studies primarily look solely at families separated due to divorce or incarceration. These families may face different hardships that alter the correlation between their composition and future delinquency or criminality. Nonetheless, the aforementioned studies are relevant because family stress is generally linked to subsequent discord and forced separation almost indefinitely results in family stress.[53]

Literature surrounding "non-resident"[54] parents also provides helpful insight into the consequences of housing bans because the cause of the familial separation is less pertinent than the mere fact and consequences of the separation itself.[55] These studies often focus on "contact levels" between non-resident parents and their children,[56] as scholars believe that the removal of a parent from a child's life, rather than the physical separation alone, causes negative outcomes for the child.[57] Generally, higher contact rates between non-resident parents and their children result in less familial stress.[58] Contact rates between non-resident fathers and their children increase where fathers are employed and have high educational attainment and decrease when either parent begins cohabitating with a new partner.[59]

Currently, no empirical studies focus on contact rates between non-resident parents and children who reside in a public housing complex where the non-resident parent is banned from visiting or residing. Thus, it is difficult to know whether educational attainment or employment status correlates with higher contact levels in these scenarios. If a similar trend does exist, however, it is particularly alarming as ex-felons often struggle to obtain meaningful employment.[60]

More research is needed to determine the impact of housing bans on "intact" families. However, existing scholarship demonstrates that the separation forced by

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[52] *See* Robert Agnew, *Foundation for a General Strain Theory of Crime and Delinquency*, 30 CRIMINOLOGY 47, 49 (1992).
[53] John H. Laub et al., *supra* note 50.
[54] Non-resident parents refers to parents living separately from their children.
[55] This line of literature is similarly limited because it tends to focus on the inter-parental relationship and resident parents' as "gatekeepers," which is unlikely to be the case in intact families forced to be separated. *See generally* Daniel N. Hawkins et al., *Parent-Adolescent Involvement: The Relative Influence of Parent Gender and Residence*, 68 J. MARRIAGE & FAM. 125 (2006); Graeme B. Wilson, *The Non-Resident Parental Role for Separated Fathers: A Review*, 20 INT'L. J.L. POL'Y & FAM. 286 (2006).
[56] Note that the majority of studies on non-resident parents focus on fathers as non-resident parents since mothers are more likely to be the residential parent. This trend is not necessarily problematic because housing bans are more likely to impact men.
[57] *See* Wilson, *supra* note 55, at 287.
[58] *Id.*
[59] *See id.* at 290.
[60] *See* Patricia M. Harris & Kimberly S. Keller, *Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions*, 21 J. CONTEM. CRIM. JUST. 6, 6 (2005) ("Most states have enacted various laws that make it difficult, if not impossible, for ex-offenders to acquire employment, regardless of their work history or risk of reoffending.").

housing bans is likely to cause negative outcomes for both children and parents.[61] Contact levels between non-resident parents and children will presumably be lower due to economic and educational predicaments compounded by the additional burden for non-resident parents to join shared family activities when they cannot visit the residential family home.

E. Limited Success of Constitutional Challenges to Public Housing Bans

In light of the negative consequences of public housing bans, and the persistence of racist housing policies in the United States, is it unsurprising advocates and families have consistently challenged the bans' constitutionality. The cases described in this subpart illustrate how courts have routinely rejected challenges brought under the First and Fourteenth amendments. To appreciate the rationale provided for these rejections, it is helpful to understand the legal framework lawyers must rely on in these claims.

1. First Amendment: Right to Intimate Association

The right to intimate association, derived from the First Amendment, is premised on the belief that the State cannot unjustifiably interfere with "highly personal relationships" because the decision to enter these relationships is central to the concept of individual liberty protected by the Bill of Rights.[62] Step one, then, is determining whether a relationship is "intimate" for constitutional purposes.[63] Once plaintiffs surpass this hurdle, they must demonstrate that the challenged state action amounts to "unwarranted state interference."[64] The Court is not particularly clear on the standard of review it applies to determine the permissibility of state interference on intimate associations. The Supreme Court's reasoning in *Roberts v. Jaycees* provides insight the most insight. The Court indicates that the lower courts may provide "varying degrees of protection" to intimate associations, with family relationships receiving the most protection and business relationships receiving the least.[65]

The Supreme Court has explicitly held that familial relationships, including cohabitation with relatives, fall within the right to intimate association.[66] Thus, tenant-

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[61] *See* Ann Mooney et al., *Impact of Family Breakdown on Children's Well-being: Evidence Review*, INST. OF EDUC., UNIV. OF LONDON 11 (2009) (noting that "the quality of parenting and of parent-child relationship often diminishes with separation. . ." and that "lone parenthood reduces the time and attention that is available for children[,]" increasing the likelihood that children suffer from behavioral problems).
[62] *See* Nancy Leong, *The First Amendment and Fair Housing in the Platform Economy*, 78 OHIO ST. L.J. 1001, 1012 (2017); *see also* Joshua P. Roling, *Functional Intimate Association Analysis: A Doctrinal Shift to Save the Roberts Framework*, 61 DUKE L.J. 903**,** 908 (2012).
[63] In determining whether relationships are "intimate," courts consider the following factors, amongst others: size, purpose, selectivity, and seclusion from others. *See* Roberts v. Jaycees, 468 U.S. 609, 620 (1984).
[64] *See id.* at 619; *see also* Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 945 (6th Cir. 2004) (recognizing that while "[T]he freedom of intimate association is coextensive with the right of privacy; both the freedom of intimate association and the right of privacy describe that body of rights that protect[s] intimate human relationships from unwarranted intrusion or interference by the state.").
[65] Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269, 278–279 n.55 (2006).
[66] *See Roberts*, 468 U.S. at 619.

plaintiffs' primarily hurdle in intimate relationship cases is convincing courts the state action is unwarranted.

2. Fourteenth Amendment

Tenants and their advocates have also challenged housing bans under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[67]

i. Due Process

Procedural due process claims are analyzed according to a three-part test: (1) whether there is state or governmental action; (2) whether the state action affects private interests; and (3) whether there is a risk of erroneous deprivation of a private interest affected by the state action.[68] The risk of erroneous deprivation is determined through an evaluation of procedural safeguards triggered before the deprivation occurs.[69] Courts balance the interest of the government and the private individual to determine whether the procedural safeguards adopted are sufficient.[70]

Substantive due process claims similarly require plaintiffs to demonstrate that a state or governmental action deprived the individual of a liberty interest.[71] Then, once these prongs are satisfied, the government must produce a justification for the deprivation.[72] Courts determine whether the proffered justification is sufficient through a "means-end" analysis.[73] The level of scrutiny exercised in this means-end analysis depends on whether the government action deprived the individual of a fundamental right.[74] Government action infringing upon fundamental rights or liberty interests are subjected to strict scrutiny, which requires the government to prove that the infringement is "necessary to further a compelling interest" and that it is narrowly tailored.[75] If the government action does not infringe upon a fundamental right, rational basis review applies, and state action is generally upheld.[76]

ii. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment states: "No State shall deny to any person within its jurisdiction the equal protection of the laws."[77] Laws often inherently draw distinctions among categories of people, so the issue in equal protection

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[67] *Infra* pt. I(E)3.
[68] *See* James M. Klein & John E. Schrider Jr., *Procedural Due Process and the Section 8 Leased Housing* Program, 66 KY. L.J. 304, 344 (1977).
[69] *See id*.
[70] *See id*. at 331.
[71] *See* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 626 (1992).
[72] *See id*. at 627.
[73] *See id.* at n.12 ("Means-end scrutiny is an analytical process used to evaluate the government's justification for conduct that harms individuals. In applying means-end scrutiny, courts examine the purposes (ends) which government conduct is designed to serve and the methods (means) chosen to further those purposes.").
[74] *Id.* at 627. Fundamental rights are enumerated in the Constitution or identified by the Supreme Court.
[75] *Id.*
[76] *Id.*
[77] U.S. CONST. amend. XIV, § 1.

claims is not whether the statute treats all people in exactly the same way, but whether a particular classification is permissible.[78]

Laws distinguishing on any basis *other than* race, national origin, or gender[79] are traditionally subject to rational basis review.[80] Courts overturn very few laws under rational basis review because the government is only required to provide "any conceivable rational basis" that justifies the legislation.[81] As a result, laws distinguishing on the basis of race, and thus subject to strict scrutiny where the government is forced to articulate the law serves a "compelling government interest" and is "narrowly tailored" to minimize discrimination, are significantly more likely to be overturned.[82] However, "facially neutral" laws that irrefutably disproportionately impact racial minorities, including housing bans, are not subject to this more searching review intended to protect vulnerable populations.[83]

It is highly unlikely that public housing tenants will prevail on a disparate impact theory of racial discrimination under the Equal Protection Clause.[84] To do so, plaintiff-tenants have to demonstrate the PHA issuing the challenged public housing ban *intended* to discriminate on the basis of race.[85] Evidence that public housing bans disproportionately *impact* Black and Latinx people, without a showing of such intent to discriminate, is insufficient.[86] To be clear, however, public housing bans do disproportionally impact communities of color.

First, racial disparities at every stage in the criminal justice system lead to a disproportionate percentage of minorities being imprisoned.[87] Second, approximately sixty percent of households living in public housing are Black or Latinx.[88] Thus, public

[78] *See* Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1206 (2006).
[79] *Id.* at 1207.
[80] *Id*. at 1206–08 (citing United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938); Williamson v. Lee Optical, Inc., 348 U.S. 435 (1955); and FCC v. Beach Commc'n, Inc., 508 U.S. 307, 309 (1993)).
[81] *Id.* at 1207.
[82] *Id.* at 1206.
[83] *See generally* Washington v. Davis, 426 U.S. 229 (1976) (holding proof of discriminatory racial purpose is required in equal protection challenges based on a law's disparate impact on a particular race, and consequently, placing an almost insurmountable burden on plaintiffs in an era where implicit bias is more commonplace than overt racism).
[84] *Id*.
[85] *Id*.
[86] *Id*. at 239.
[87] Julia A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 334 (2018).
[88] I find it important to note that I am not intentionally continuing the pattern of disregarding the overrepresentation of Native Americans in the criminal justice system. *See* The Sentencing Project, *Race & Justice News: Native Americans in the Justice System* (Mar. 28, 2016), https://www.sentencingproject.org/news/race-justice-news-native-americans-in-the-justice-system/. My decision to focus primarily on Black and Latinx families is due to the fact that Native Americans are less likely to be impacted by housing bans because they do not make up a significant percentage of public housing residents; U.S. DEP'T OF HOUS. & URB. DEV., *Resident Characteristics Report* (Dec. 2018), https://pic.hud.gov/pic/RCRPublic/rcrmain.asp.

housing bans on the basis of criminal arrests or convictions are more likely to impact families of color.[89]

3. Strengthening Familial Protections in the Courtroom: A Summary of Relevant Cases Challenging Housing Bans

Challenges to public housing evictions and bans on the basis of criminal convictions reached the Supreme Court in the early 2000s. In *Department of Housing and Urban Development v. Rucker*,[90] four tenant-plaintiffs evicted under the Anti-Drug Abuse Act alleged their evictions violated the First Amendment guarantee of freedom of association and the Fourteenth Amendment Due Process Clause.[91] The Court held that the tenants' due process claim failed because the government was "acting as a landlord of property" as opposed to criminally punishing or civilly regulating "members of the general populace."[92] As a result, the tenant-plaintiffs failed to fulfill the "state action" requirement of the Fourteenth Amendment.[93]

The Court similarly rejected the tenants' freedom of association claim in a single sentence in a footnote reasoning that its decision in *Lyng v. Automobile Workers*[94] foreclosed the argument. In *Lyng*, the Court upheld the Food Stamp Act on the grounds that precluding household eligibility for food stamps where members were on strike does not unconstitutionally infringe upon the right to associate with their families because the Act does not prohibit families from dining together or otherwise "directly and substantially" interfere with family living arrangements.[95] Since the Court did not actually analyze *Lyng*'s applicability to *Rucker*, Judge Sneed's application in his dissenting opinion from the 9th Circuit is the most informative.[96] Judge Sneed reasons that the associational rights of the family members deprived of food stamps because *one* member was on strike in *Lyng*, like the tenants barred from public housing because *one* member's arrest or conviction in *Rucker*, are "implicated" but not in "significant danger" because of the withdrawal of the government benefit.[97] Further, the Court is deferential to the congressional view of "what constitutes wise economic or social policy."[98]

One year after *Rucker*, in *Virginia v. Hicks*, a barred individual brought suit against a Richmond public housing development's ban policy under the First Amendment after being convicted of trespass for trying to return to the development.[99] On the day that the

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[89] This disparity is evidenced by the fact that "a black child born today is less likely to be raised by both parents than a black child during slavery." MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 224 (2012).
[90] 535 U.S. 125 (2002).
[91] *Id*. at 128, 136 n.6.
[92] *Id*. at 135.
[93] *See* Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement,* 1976 SUP. CT. REV. 221, 222 (1976).
[94] 485 U.S. 360 (1988).
[95] *Id*. at 365. Dismissal of the freedom of the association claims on these grounds illustrates the ambiguity within the second prong of First Amendment intimate association claims briefly mentioned.
[96] Rucker v. Davis, 237 F.3d 1113, 1128 (9th Cir. 2001).
[97] *Id*. at 1139.
[98] *Id*.
[99] *See* Virginia v. Hicks, 539 U.S. 113, 115 (2003). The overbreadth doctrine invalidates enforcement of a law that "punishes a substantial amount of protected free speech, in relation to statute's plainly legitimate sweep" unless a limiting construction narrows the law. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

plaintiff, Hicks, was issued a summons for trespass, he informed the officer he was only there to bring pampers for his baby.[100] Hicks's mother lived on the premises, and he had asked the housing development's manager, Mrs. Rogers, for permission to return on two separate occasions to no avail.[101] Richmond Redevelopment and Housing Authority (RRHA) enacted a trespassing policy that authorized Richmond police officers to serve persons on RRHA premises without "a legitimate business or social purpose" with notice barring such persons from the premises and to arrest those who returned or refused to leave.[102] The Virginia Supreme Court held the RRHA policy was unconstitutionally overbroad because the policy vested too much discretion in the individual housing development's manager.[103] The concern over discretion resulted from an "unwritten rule" where the manager would grant nonresidents permission to hand out flyers on the sidewalks of the development.[104] The Supreme Court reversed, holding that RHHA's policy was not facially invalid because there was no evidence that the policy "prohibit[ed] a substantial amount of protected speech."[105]

Despite these unsuccessful claims, the American Civil Liberties Union (ACLU) challenged the Housing Authority of the City of Annapolis (HACA)'s policy of banning individuals "who have been involved in or conduct criminal activity on or near public housing"[106] from being on HACA property on First and Fourteenth Amendment grounds in 2009.[107] The ACLU responded to the government-as-private-landlord safeguard discussed in *Rucker* by naming the city of Annapolis and Annapolis Police Department as defendants.[108] If the case had not settled, it would have proceeded on the theory that the policy could only be upheld if it survived strict scrutiny. To prevail, the government would have needed to demonstrate that the ban was narrowly tailored to serve a compelling state interest because the City's policy deprived tenants of their fundamental right to freedom of association and suspended their First and Fourteenth Amendment rights in the realm of public housing.[109] Going forward, subjecting the housing policies to strict scrutiny could drastically change the jurisprudence surrounding public housing bans.

Rucker, *Hicks,* and *City of Annapolis* do not require the total abandonment of First and Fourteenth Amendment challenges to housing bans. However, the intimate association doctrine remains undeveloped and, as a result, lawsuits on this ground are inherently vulnerable.[110] Further, in equal protection claims, tenant-plaintiffs' only hope of receiving heightened scrutiny rests on successfully arguing that ex-felons are a "discrete and insular minority" or introducing evidence of discriminatory intent in a

[100] Hicks v. Commonwealth, 535 S.E.2d 678, 680 (2000).
[101] *Id*.
[102] *Hicks*, 539 U.S. at 124.
[103] *Id*. at 115, 118.
[104] *Id*. at 121.
[105] *Id.* at 124.
[106] *See* Weiner, *supra* note 41, at 179. (citing Annapolis Trespass Policy).
[107] *See* Sharps v. Hous. Auth. of the City of Annapolis, Civil Case No. 02C09143799 (2009).
[108] Weiner, *supra* note 41, at 53.
[109] *Id*.
[110] *See* Marcus, *supra* note 65, at 283 ("[T]wentieth century Supreme Court decisions that mentioned intimate association only minimally addressed intimate association in terms of what it is not, without providing meaningful guidance on what it is.").

disparate impact theory of discrimination on the basis of race. While there is merit to both of these arguments, the likelihood that either one prevails in the housing context is far from guaranteed.[111] For these reasons, advocates should begin exploring less traditional approaches to challenging public housing bans.

The remainder of this Note suggests that the Court's decision *Obergefell v. Hodges*, a case involving a right to marriage, may serve as a steppingstone to achieving a constitutional right to family life that would then offer a novel angle from which to approach a constitutional challenge to public housing bans.

II. THE POSSIBILITY OF THE RIGHT TO FAMILY SANCTITY

Part II sets forth a pathway to securing broader constitutional protections for families affected by public housing bans. A significant portion of Part II focuses on *Obergefell*,[112] the landmark marriage equality case because it creates holes that advocates should exploit to push us closer to protecting all families regardless of marital status. To the extent the discussion focuses on marital families, it is because the pathway proposed requires advocates to: (1) secure protections for marital families and then (2) utilize the equal protection clause to expand the newly developed protections to cover all families, regardless of marital status.

Obergefell established a constitutional right to marriage without clarifying the scope of that right.[113] Parties have begun to utilize the resulting ambiguity to challenge government actions that interfere with marital unions.[114] Consequently, cases that turn on how broadly or narrowly the right to marriage is interpreted will likely become more frequent. Families injured by public housing bans are in a great position to urge courts to rule that the right to marriage includes the right to live with one's spouse. If courts adopt this broader interpretation of the right to marriage, then PHA bans would be subject to more stringent review.

A brief review of Supreme Court cases regarding government action touching families provides support for a broad interpretation in the realm of family living arrangements.

A. Seeds to a Future Right to Family Sanctity: Precedential Cases

The right to family life in the United States, whatever it encompasses, is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[115] The following subparts illustrate how the rights to family life and privacy in America have

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[111] Zach Newman, *Hands Up, Don't Shoot: Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 HASTINGS CONST. L.Q. 117, 139 (2015) ("Even when the laws have disparate impacts, facially neutral laws receive strict scrutiny only where there is a proven discriminatory intent."); *see* Geiger, *supra* note 78, at 1992 (suggesting ex-offenders' responsibility for their membership in the classification and moral culpability serves as a "major doctrinal obstacle" to treatment as a suspect class).
[112] Obergefell v. Hodges, 135 S.Ct. 2584, 2589 (2015).
[113] *See generally* Kerry v. Din, 575 U.S. 86 (2015).
[114] *Id*. *See also* Yafai v. Pompeo, 924 F.3d 969, 971 (7th Cir. 2019) (rejecting plaintiff's argument that a citizen's "liberty interest in bringing [one's] wife to America" cannot be deprived without a detailed explanation of the grounds for inadmissibility.)
[115] *See supra* note 6 and accompanying text.

evolved. Notably, the Supreme Court recognized a number of parental rights[116] prior to the expansion of privacy rights more generally after its landmark decision in *Griswold v. Connecticut*.[117]

1. Development of Parental Rights

The evolution of a parental liberty to control the education of one's children as a liberty interest guaranteed by the Fourteenth Amendment began in 1923 in *Meyer v. Nebraska*.[118] In *Meyer v. Nebraska*, the Court held unconstitutional a state statute prohibiting persons from teaching any foreign languages to children who have not successfully passed the eighth grade.[119] The Court explained that legislative action interfering with a recognized liberty interest, including the right of parents to give their children the education "suitable to their station in life,"[120] may only be upheld if it is "reasonably relat[ed] to some purpose within the competency of the state to effect."[121] After clarifying the standard, the Court conceded that the proffered purpose of the statute, fostering a homogeneous community with American ideals,[122] was permissible. However, the Court held the statute was unconstitutional because the "means adopted . . . exceed the limitations upon the power of the State."[123] Thus, it appears the Court applied a proportionality-based inquiry despite purporting to determine the statute's constitutionality based on a mere relation to a permissible purpose.

Two years later, in *Pierce v. Society of Holy Names of Jesus and Mary*,[124] parental liberty was reinterpreted as encompassing a general right of parents to direct the upbringing, including their education decisions, of children under their care.[125] Similarly to its reasoning in *Meyer*, the Court recited a "reasonable relation to some purpose within the competency of the State"[126] as the test deployed to determine the constitutionality of the Oregon law[127] that effectively criminalized parents for not sending their children to public school. The holding, however, may be better understood as a categorical prohibition against "standardizing children" by precluding them from attending private institutions.[128]

The scope of parental liberty interests outside of the context of education was first raised in *Prince v. Massachusetts* in 1944.[129] Mrs. Prince, accused and convicted of

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[116] I characterize parental and marital protections as a type of broader "familial right" for the purposes of this paper.
[117] 381 U.S. 479, 483 (1965).
[118] 262 U.S. 390 (1923).
[119] *See id*. at 402.
[120] *Id*. at 400.
[121] *Id*.
[122] *See id*. at 402.
[123] *Id*.
[124] 268 U.S. 510 (1925).
[125] *See id*. at 534-35.
[126] *Id*. at 535.
[127] *Id*.
[128] *See id*.; Moore v. City of E. Cleveland, 431 U.S. 494, 504-507 (citing Meyer v. Nebraska, 262 U.S. 390 (1923), and holding that the zoning ordinance was unconstitutional because the state lacks general power to standardize children).
[129] Prince v. Massachusetts, 321 U.S. 158, 159 (1944).

violating state child labor laws,[130] challenged the constitutionality of the statutes on the grounds that they infringed on her First Amendment right to freedom of religion and her Fourteenth Amendment parental right.[131] Notably, the majority opinion completely omitted the "reasonable relation" language and instead noted the "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[132] The Court's inconsistent language affords government actors less or more discretion over children, depending on the circumstances. While such an approach is reasonable, its indirect application makes it difficult to determine how future cases will be reviewed.

2. Right to Privacy

After the notion of parental rights was developed throughout the early-to-mid 1900s, the Supreme Court continued to use the Due Process Clause of the Fourteenth Amendment to limit state action in spaces and relationships that had been traditionally understood as private, including the marital relationship. *Griswold v. Connecticut*,[133] best known as establishing a fundamental right to privacy,[134] simultaneously established the specific right to marital privacy. Justice Frankfurter used the Court's holdings in *Meyer* and *Pierce*[135] to bolster his theory that attached to the guarantees in the Bill of Rights are "penumbral rights" which create zones of privacy.[136] On this line of reasoning, the Court struck down the Connecticut statute forbidding the sale of contraceptives as unconstitutional on the grounds that the regulation swept "unnecessarily broadly and thereby invade[d] the area of protected freedoms" understood as privacy in the marriage relationship.[137]

3. Family Life

In 1974, the Supreme Court addressed the constitutionality of a New York village ordinance limiting one-family dwellings to "traditional families" or to groups of two unrelated persons in the *Village of Belle Terre v. Boraas*.[138] The ordinance defined family as "one or more persons related by blood, adoption, or marriage."[139] The Court held the

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[130] *Id*.; Mass. Ann. Laws Ch. 149 §§ 80-81 (2019) (enforcing provisions of Massachusetts' child labor law prohibiting boys and girls under 12 from selling newspapers).
[131] *See Prince*, 321 U.S. at 164.
[132] *Id*. at 167.
[133] Griswold v. Connecticut, 381 U.S. 479, 483 (1965).
[134] *See generally* David Helscher, *Griswold v. Connecticut and the Unenumerated Right to Privacy*, 15 N. ILL. U.L. REV. 33 (1994).
[135] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).
[136] *See Griswold*, 381 U.S. at 482–83 ("The association of people is not mentioned in the Constitution nor is the Bill of Rights. The Right to Educate a child in a school of the parents' choice – whether private or parochial—is also not mentioned. Nor is the right to study any particular subject or foreign language. Yet the First Amendment has been construed to include certain of those rights... without those peripheral rights the specific rights would be less secure. And so we affirm the principle of the Pierce and Mayer case.").
[137] *Id*. at 485.
[138] Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). Note that ordinances are considered "economic and social legislation" which are upheld as long as the legislation is "reasonable, not arbitrary," and bears a "rational relationship to a permissible state objective."
[139] *Id*. at 2.

ordinance to be constitutional because it did not ban forms of association because it permitted residents to entertain whomever they liked.[140] In contrast, three years later, in *Moore v. City of East Cleveland, Ohio,*[141] the Court overturned East Cleveland's zoning ordinance. The Court reasoned that limiting occupancy of dwellings to members of a single family violated due process where family was defined in a manner that "intrudes on choices concerning family living arrangements."[142] In *Moore,* a grandmother was convicted of violating the ordinance because she lived with her son and two grandsons—who were first cousins rather than siblings.[143] The majority reasoned the "strong constitutional protection of the sanctity of the family established in numerous decisions of th[e] Court extends to the family choice involved in th[e] case and is not confined within an arbitrary boundary drawn at the limits of the nuclear family."[144] In short, because the ordinance intruded upon choices concerning one's family life, the usual judicial deference afforded to legislatures was replaced with a more searching inquiry into the importance of the governmental interests served and the extent to which the regulation served these interests.[145] The Court's reasoning in *Moore* seems straightforward in light of the cases previously discussed. The Court was more concerned with governmental interference with personal decisions regarding one's marital or family choices.[146]

B. Right to Marriage

Despite recognizing the right to marital privacy in 1965[147] and the importance of the marital union in American society long before that,[148] the Court did not recognize a fundamental right to marry until 2015 in *Obergefell v. Hodges*.[149] The Court offered four principles to support its holding: (1) that the concept of individual autonomy encompasses the right to make personal choices concerning marriage; (2) that the right of intimate association accompanying marriage must be afforded to both same-sex couples and opposite-sex couples; (3) that the right to marriage protects children and families already afforded constitutional protection in private matters; and (4) that marriage should be understood as the "keystone of the Nation's social order."[150]

While *Obergefell* is widely celebrated by many for recognizing discrimination on the basis of sexual-orientation is contrary to American values, the decision complicates

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[140] *See id.* at 17.
[141] Moore v. City of E. Cleveland, 431 U.S. 494 (1977).
[142] *Id*. at 499.
[143] *Id*. at 496–97.
[144] *Id*. at 494.
[145] *See id*. at 499.
[146] *Id*. at 498–99 ("distinguishing the ordinance in *Belle Terre* from that in Moore because the former "expressly allowed all who were related by "blood, adoption, or marriage to live together" while the latter "has chosen to regulate the occupancy of its housing by slicing deeply into the family itself." The Court's lack of judicial review and general approach to protecting the "sanctity of the family" has been far less stable and more problematic in cases concerning public housing policies banning ex-felons and similar classes of people).
[147] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).
[148] *See generally* Maynard v. Hill, 125 U.S. 190 (1988); Skinner v. Oklahoma, 316 U.S. 535 (1942).
[149] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
[150] *See id*. at 2589-2590.

the jurisprudence surrounding familial rights.[151] Many components of family life are still left unprotected from state interference under the Court's approach to the fundamental right to marriage in *Obergefell*, despite the recognition of a right to marital privacy and right to parental liberty decades earlier.

Although there is a general consensus that *Obergefell* established a fundamental right to marriage, some scholars argue otherwise.[152] The success of the argument that *Obergefell* provides additional constitutional safeguards from government interference in familial spaces turns on this point of tension. As such, this Note first demonstrates that *Obergefell* does in fact establish a constitutional right to marriage under the Substantive Due Process Clause (SDP).[153] Afterwards, this Note addresses the question of how the right to marriage should be interpreted.

1. Substantive Due Process & The Right to Marriage

While there is significant jurisprudential uncertainty around the SDP broadly, the fundamental right to marriage articulated in *Obergefell* remains good law. The concept of substantive due process exists because the Supreme Court reasoned that the word "liberty" in the due process clause is not "define[d] with exactness."[154] As a result, the Court must determine what individual "rights" are "liberty interests" that trigger heightened constitutional protection.[155] Challenges to *Obergefell's* legitimacy may be more attributable to the conflicting state of our substantive due process jurisprudence, outlined below, than the highly political debate over marriage equality itself. The conflict exists, in part, because the Court has relied upon conflicting theories to identify substantive due process rights.[156]

The most restrictive theory only extends constitutional protection to "liberties that are 'deeply rooted in this Nation's history and tradition.'"[157] Justices ascribing to the "deeply rooted" theory of substantive due process normally require a "'careful

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[151] *See generally Obergefell*, 135 S.Ct. 2584.

[152] *See* Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm_term=.60c28dfb88e2 (critiquing Justice Kennedy's legal analysis for failure to "clearly conclude that either the Due Process Clause or the Equal Protection Clause by itself creates a right to same-sex marriage" because "if a sufficient important right (Due Process Clause) is denied for discriminatory reasons (Equal Protection), then the Fourteenth Amendment has been violated. However, both the criteria for what makes the right important enough and the criteria for proving discrimination seem extremely vague.").

[153] *Loving v. Virginia* held that classifications on the grounds of race or sexual orientation in marital statutes are unconstitutional. 388 U.S. 1, 9–12 (1967). Since *Loving* addressed discriminatory classifications, it is most appropriately characterized as an equal protection case. *Obergefell* is distinguishable from *Loving* because Justice Kennedy, writing for the majority, relied heavily on the due process clause. *Id*. By interpreting the right to marriage as a fundamental liberty interest protected under the due process clause, Justice Kennedy ensured *any* governmental action infringing on the right to marriage would be subjected to heightened judicial protection. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1502 (1999) ("Substantive means the government must show a compelling reason that would demonstrate an adequate justification for [interfering with a fundamental liberty interest].").

[154] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[155] *See* Conkle, *supra* note 7, at 66.

[156] *See generally id.*

[157] *Id*. at 66 (quoting Bowers v. Hardwick, 478 U.S. 186, 192 (1986)).

description' of the asserted fundamental liberty interest."[158] A second theory, referred to as the theory of "reasoned judgement," permits the Court to evaluate the liberty interest in question and weigh it against competing governmental concerns to determine whether the substantive due process clause is implicated.[159] This theory is most explicitly applied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[160] where the Court reaffirmed women's right to abortion on the basis of "reasoned judgement" in addition to the principle of precedent.[161] A third and final theory was introduced in *Lawrence v. Texas*,[162] which overturned *Bowers v. Hardwick*[163] on the grounds that consenting adults have a liberty interest in sexual relations. Justice Kennedy, writing for the majority in *Lawrence*, reasoned that evolving national values, rather than history alone, are relevant in identifying liberty interests because the Framers "[k]new times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[164]

While the stability of substantive due process jurisprudence generally may be unstable because of conflicting approaches, surely Justice Kennedy's reliance on substantive due process in *Obergefell* is not meritless. In other words, *Obergefell* is no more likely to be overturned than other controversial substantive due process cases.[165] Though the validity of the substantive due process doctrine is beyond the scope of this Note, the relevant takeaway for present purposes is that the fundamental right to marriage articulated in *Obergefell* remains good law. The pivotal question is whether the right to marriage may be extended to preserve family unity.

C. Getting to a Shared Household

The right to marriage should be interpreted broadly. Justice Douglas addressed the problems inherent in adopting a formalistic approach to protecting constitutional rights in *Griswold v. Connecticut*.[166] Justice Douglas reasoned that "without . . . those peripheral rights the specific rights would be less secure."[167] As a result, the principle of penumbras was born.[168] The principle protects rights by preventing unduly narrow interpretations from "deny[ing] force and often meaning" of the rights.[169] Under the principle of

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[158] Kenji Yoshino, *A New Birth of Freedom?*: *Obergefell v. Hodges*, 129 HARV. L. REV. 147, 154 (2015).
[159] *See* Conkle, *supra* note 7, at 63.
[160] 505 U.S. 833 (1992).
[161] Conkle, *supra* note 7, at 67.
[162] 539 U.S. 558 (2003).
[163] 478 U.S. 186 (1986) (upholding a Georgia statute criminalizing consensual sodomy).
[164] *Lawrence*, 539 U.S. at 579.
[165] The ongoing debate over the constitutionally of abortion after Roe v. Wade, 410 U.S. 113 (1973), and the Court's holding in Planned Parenthood v. Casey, 505 U.S. 833 (1992), demonstrate this reality.
[166] 381 U.S. 479 (1965).
[167] *Id.* at 482–83.
[168] Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PENN L. REV. 1333, 1335 (1992) (quoting Justice Douglas in *Griswold*, 381 U.S. at 482-83: "The association of people is not mentioned in the Constitution nor the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.").
[169] *Id. at* 1344.

penumbras, state regulation cannot arbitrarily encroach upon a specific right and emancipations that "help give [that right] life and substance."[170]

Applying the controversial principle of penumbras in the unsettled substantive due process context is complex because the doctrine varies greatly from the Bill of Rights, but the need to ensure rights are given their full force and meaning exists whether the right is enumerated or unenumerated.[171] The weaknesses within the substantive due process doctrine should not justify departure from principled constitutional norms. The right to get married serves little purpose if the government is then free to interfere with critical areas of the marital union, such as cohabitation.

Kerry v. Din provides helpful insight into whether the Supreme Court may be receptive to interpreting the right to marriage as encompassing interconnected interests, like cohabitation.[172] In *Din*, an American citizen reasoned the government's denial of her husband's visa application deprived her of her constitutional right to live with her spouse.[173] The dissent, signed on by four Justices, reasoned that the "institution of marriage, which encompasses the right of spouses to live together" is the kind of constitutional interest afforded procedural protections under the due process clause.[174] The plurality assumed that Din had a protected liberty interest for the purposes of the case, which was decided according to immigration principles.[175] Since normal constitutional norms are not applied in immigration, the most important takeaway from *Din* is that at least four, and possibly six, Justices believe the right to marriage encompasses ancillary rights, one of which could be cohabitation.[176]

D. Leveraging the Penumbras Principle to Combat Public Housing Bans

Applying the penumbras principle to public housing bans impacting married persons requires: (1) identifying which right(s) are peripheral to the right to marriage; and (2) determining whether a public housing policy sweeps unnecessarily broadly and invades an area of protected freedoms.[177]

Justice Kennedy's summary of the principles and traditions that demonstrate marriage is a "fundamental" right under the Constitution similarly support the notion that living in the same household as one's spouse should be understood as peripheral to the right to marry. Particularly relevant are: (1) the principle in the Supreme Court's jurisprudence that marriage is a "two-person union unlike any other in its importance to the committed individuals" and (2) the tradition of using marriage as a means of safeguarding children and families.[178] On this point, Kennedy reasons that marriage offers stability and predictability that protects children raised by married parents from an

[170] *See Griswold*, 381 U.S. at 484–85.
[171] *Id*.
[172] 135 S. Ct. 2128 (2015).
[173] *See id*. at 2131, 2133.
[174] *Id*. at 2142 (Breyer, J., dissenting) (comparing procedural due process to substantive due process).
[175] *See id*. at 2128.
[176] *See generally Kerry*, 135 S. Ct. 2128 (and note that Justice Kennedy and Alito concurred in the judgment while Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's dissent).
[177] *See generally* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
[178] Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015).

"uncertain family life."[179] This language reflects society's understanding of marriage as a proxy for a two-parent shared household.[180]

As a result, the constitutionality of public housing policies that infringe upon the right of married persons to cohabitate—a fundamental right—turns on whether the policy is "necessary to further a compelling interest" and narrowly tailored to this goal.[181] As discussed, the "compelling interest" requirement is a more stringent standard than the "legitimate government interest" standard courts have consistently held housing bans satisfy.[182] However, it seems unlikely that courts will hold PHAs' interest in decreasing drugs and crimes in complexes known for being dangerous as not "compelling." The constitutionality of the public housing bans, then, will likely turn on the scope of a particular ban under this framework. Policies sweeping unnecessarily broadly, like those banning applicants due to arrests not resulting in convictions or those that impose unduly long lengths of time for when bans apply, would presumably be unable to pass constitutional muster in the proposed approach.

III. ASPIRATIONS FOR THE FUTURE: A RIGHT TO FAMILY SANCTITY UNCONNECTED TO MARRIAGE

The proposed pathway to subjecting public housing bans to heightened scrutiny by expanding the penumbra's principle to encompass fundamental liberty interests is only the first step in the right direction—not the finish line. The goal is a fundamental right to family sanctity detached from marital status. It is clear that *Obergefell* does not get us here, but it may get us closer.

Importantly, Justice Kennedy's view of marriage as "reflecting the ideals of family and central to social order,"[183] implicitly endorses society's problematic tendency of ostracizing non-marital families.[184] Since marriage rates are declining, the practical effect of expanding constitutional protections for marital unions will be minimal.[185] This is

[179] *Id*. at 2590. Of course, this language is also problematic in that it perpetuates the stereotype that two-parent households led by unmarried parents and single-parent households are inherently less stable. As discussed in Part III, however, this stereotypical evidence can strengthen the equal protection claim nonmarital families launch in response to differential treatment on the basis of marital status.
[180] *See* David C. Ribar, *Why Marriage Matters for Child Wellbeing*, 25 THE FUTURE OF CHILDREN 11, 11 (2015) ("Marriage between two parents, compared to other *living* arrangements. . .") (emphasis added).
[181] *Id*. (emphasis added).
[182] Thompson v. Ashe, 250 F.3d 399, 405 (6th Cir. 2001) ("no-trespass" policy is rationally related to the legitimate governmental interest in providing a safe housing to the tenants. . .").
[183] *See* Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 23 Fordham L. Rev. 23, 29 (2015).
[184]Some critics have even voiced their concern that by exalting marriage, the *Obergefell* Court may have weakened future claims of sexual and family liberty outside of marriage. *See* Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 641 (2018). Other scholars suggest the much-needed legal reforms for non-marital families will be further delayed or curtailed if "*Obergefell's* praise of marriage. . . encourage[s] courts to interpret statutory terms like "family" or "kinship" to require marriage rather than broadly to include non-marital families. *Id*. (referring to Melissa Murry, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1249, 1252 (2016)).
[185] *See generally* Shelly Lundberg et al., *Family Inequality: Diverging Patterns in Marriage, Cohabitation, & Childbearing*, 30 J. ECON. PERSP. 79 (2016).

especially true in public housing, where marital rates are likely substantially lower.[186] This reality illustrates the limitations inherent in placing marriage at the core of the right to family sanctity.

However, in the United States, expanding individual rights is often achieved through an "incremental process."[187] So, while acknowledging *Obergefell's* flaws we must also recognize its flaws may be the very reason nonmarital families have greater constitutional protection in the future.

Griswold and *Eisenstadt* illustrate this phenomenon well. In 1965, in *Griswold*, the Court held that a Connecticut law forbidding the use of contraceptives unconstitutionally intruded upon the "right of marital privacy."[188] Seven years later, in *Eisenstadt*, the Court reasoned that a Massachusetts statute permitting married persons to obtain contraceptives while prohibiting single persons to do the same violated the equal protection clause.[189] Currently, *Obergefell* has the potential to be the *Griswold* that leads to the "new" *Eisenstadt*.

My hope is that advocates recognize the power in potential, even where it manifests in an unorthodox manner, and capitalize upon potential as the battle for the right to family sanctity continues. After all, the tools are limited, and the stakes are high.

[186] *Id*. at 81 ("For less-educated, lower-income couples. . . commitment and, hence, marriage has less value relative to cohabitation.").
[187] *See generally* Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago; University of Chicago Press, 1998 (positing that "judicial attention and approval for individual rights grows out of "deliberate, strategic organizing by rights advocates.")
[188] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).
[189] Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).