IS THE INABILITY TO MARRY A MARITAL STATUS? *LEVIN V. YESHIVA UNIVERSITY* AND THE INTERSECTION OF SEXUAL ORIENTATION AND MARITAL STATUS IN HOUSING DISCRIMINATION

ANDREW KRAVIS*

Imagine that you are a lesbian attending graduate school in a state that has not legalized same-sex marriage. Your school offers university housing, but it has a policy that restricts housing to students, their spouses, and their children. You apply for couples' housing for yourself and your partner of five years. The school rejects your application, stating that you and your partner are not eligible for married couples' housing because you are not married to each other.

Do you have a legal claim of housing discrimination? And if so, on what theory?

The answers to these questions are still unsettled. This Article defines marital status discrimination and sexual orientation discrimination in the housing context, and it explores how courts have applied two inconsistent and philosophically distinct standards in determining whether such discrimination has occurred. While analysis of marital status and sexual orientation in the housing context is highly fact-specific, the judicial approach to these issues has led to the confusion and conflation of sexual orientation discrimination and marital status discrimination. In their attempts to disentangle the intersection of sexual orientation and marital status, courts have all but admitted that refusing gay and lesbian couples the right to marry constitutes sexual orientation discrimination under a disparate impact theory.

This Article also posits that when an unmarried same-sex couple is denied a housing opportunity, the discriminator's motivation is not always clear. The discriminator may simply deny discriminating altogether, or alternatively may justify his or her actions in one of two ways: either he or she discriminated because the couple was unmarried or because they were presumably not heterosexual. Where state law provides protections for only one of these classes (either unmarried persons or non-heterosexuals) or for neither, unmarried

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same-sex couples are subject to the whims of discriminatory pretext. Because the Fair Housing Act does not protect against either sexual orientation housing discrimination or marital status housing discrimination, state law governs these cases, and thus housing providers in the thirty-five states that protect only one or neither of these statuses avoid legal consequences for their discrimination by recharacterizing the facts to fit the permissible form of discrimination.

Next, this Article briefly examines the most recent attempts to provide federal protections against both sexual orientation housing discrimination and marital status housing discrimination, and it discusses the implications of those protections. Finally, the Article is supplemented with an appended table that illustrates two original fifty-state surveys, detailing which state housing laws protect against marital status discrimination and which states protect against sexual orientation discrimination, complete with citations to the relevant provisions in each state's housing code. The table also provides information on which states issue marriage licenses to same-sex couples, which states recognize out-of-state same-sex marriages, which states grant the rights and benefits of marriage to in-state domestic partnerships and civil unions, and which states grant the rights and benefits of marriage to out-of-state domestic partnerships and civil unions. Analysis of how those rules of recognition affect this intersection is beyond the scope of this Article—although it is an important observation that only the exceptional same-sex couple would seek a marriage, a domestic partnership, or a civil union solely to foreclose any potential housing discrimination against them.

I. Key Terms: Defining the Intersection Between Marital Status Discrimination and Sexual Orientation Discrimination

To better understand how sexual orientation discrimination and marital status discrimination intersect, it is helpful first to provide some context and answer some basic overarching questions.

A. What Is Marital Status Housing Discrimination?

Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) does not protect against housing discrimination on the basis of marital status.[1] Twenty-one states and the District of

1 *See* Fair Housing Act, 42 U.S.C. § 3604 (2011) (omitting marital status from the list of protected characteristics). Title VIII does protect on the basis of "familial status," which is defined as "one or more individuals (who have not attained the age of eighteen years) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person." 42 U.S.C. § 3602(k)

Columbia have amended their state housing laws to explicitly protect against marital status discrimination,[2] as have a number of cities and municipalities. But what constitutes marital status discrimination varies widely across jurisdictions, even those using the same common law modes of statutory interpretation. Two main theories of marital status discrimination have more or less crystallized: what scholar John Beattie calls the "narrow view" and the "broad view."[3]

Under the narrow view, marital status discrimination occurs only when an individual is treated differently because of his or her individual status as single, married, divorced, separated, or widowed.[4] Courts adopting the narrow view, then, only strike down a policy if it would disadvantage every individual of a particular marital status. State courts have adopted the narrow view in non-housing contexts, including anti-nepotism policies in employment. Responding to a challenge of Pizza Hut's policy preventing spouses from working together, the New York Court of Appeals took the narrow view of New York state law's protection against marital status discrimination, writing:

> The plain and ordinary meaning of "marital status" [in Executive Law § 296] is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage . . . . [W]hen one is queried about one's "marital status", the usual and complete answer would be expected to be a choice among "married", "single", etc., but would not be expected to include an identification of one's present or former spouse and certainly not the spouse's occupation.[5]

The court used that definition to uphold Pizza Hut's decision to fire an employee whose husband also worked there, under the rationale that the decision was made not on the basis of the employee's "marital status" (i.e., that she was married) but rather *to whom* the employee was married (i.e., that she was married to an employee of Pizza Hut).[6] Had the

(2011). This provision is meant to protect pregnant women and parents of children under eighteen and, counterintuitively, contains no mention of marriage.

2 *See infra* Table 1.

3 John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1417–28 (1991).

4 *Id.* at 1419.

5 Manhattan Pizza Hut, Inc. v. State Human Rights Appeal Bd., 51 N.Y.2d 506, 511–12 (N.Y. 1980).

6 *Id.* at 513. *See also* Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783 (Alaska 1996) (holding that the Alaska Human Rights Act's prohibition of marital status discrimination does not prevent an employer from

basis of the discharge been solely her status as married, or so the argument goes, then all married employees would have been affected by the policy.

While a minority of courts limit the narrow interpretation to anti-nepotism cases,[7] most courts that adopt the narrow view apply it to the housing context as well. These cases may involve, for example, unmarried couples being turned down for housing that is available (sometimes exclusively) to married couples,[8] or a tenant being evicted when he or she seeks to live with someone to whom he or she is not married.[9] The narrow view holds that housing discrimination occurs only when an individual is denied a housing opportunity because of his or her status as single, married, etc. So when an unmarried couple is turned down for couples' housing, a narrow-view court will view the couple as two individuals with the status "single" or "unmarried." This premise allows the court to conclude that the applicants were not discriminated against because the challenged policy does not affect all unmarried applicants, just the unmarried applicants who choose to live with someone outside of marriage.[10]

As Beattie notes, if narrow-view courts were to consider the unmarried couple a family unit carrying its own marital status, "they would have to conclude that 'married-only' housing . . . [constitutes] marital status discrimination because it disadvantages all couples having a particular marital status."[11] Instead, courts adopting this approach focus only on the individual unmarried plaintiff, declining to compare similarly situated married and unmarried couples. As a consequence, under this interpretation the prohibition against marital status housing discrimination provides protection in only one scenario: an individual denied housing for the sole reason that the individual is married or unmarried.

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discriminating against an employee based on the identity of that employee's spouse, as the statute is limited to preventing employers from discriminating based on the status of being married).

7 *See, e.g.*, Miller v. C.A. Muer Corp., 362 N.W.2d 650, 652 (Mich. 1984) (holding that anti-nepotism policies are not facially discriminatory, but that they may operate as masks or pretexts for impermissible discrimination based on marital status or some other protected characteristic).

8 *See* N.D. Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 562 (N.D. 2001); Cnty. of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993).

9 *See* Hudson View Props. v. Weiss, 450 N.E.2d 234 (N.Y. 1983).

10 *See* Prince George's Cnty. v. Greenbelt Homes, Inc., 431 A.2d 745, 748 (Md. Ct. Spec. App. 1981) (treating unmarried applicants for cooperative housing as single individuals after holding that Maryland law did not recognize their common-law marriage as granting them a "marital status").

11 Beattie, *supra* note 3, at 1423.

Under the broad view, however, a court will find marital status discrimination if the decision in question was based even in part on a person's marital status.[12] Courts adopting the broad view likewise hold that the identity of one's partner may be considered when deciding if a policy is unlawfully discriminatory.[13] This leads to broad-view courts scrutinizing policies that implicate marital status, such as anti-nepotism policies, more closely, invalidating those policies if they affect even a portion of the class.

For example, in *Ross v. Stouffer Hotel Co.*,[14] the plaintiff was discharged from his job as a resort's massage therapist after he married a coworker (the head massage therapist at the resort).[15] The Supreme Court of Hawaii found that implicit in its state's protection against marital status discrimination is a guarantee of protection from discrimination based on *whom* one marries:

> [W]hen a person marries, it is always to a particular person with a particular "identity." One does not "marry" in some generic sense, but marries a *specific person*. Thus, the "identity" of one's spouse (and all of his or her attributes, including his or her occupation) is implicitly subsumed within the definition of "being married." The two cannot be separated. It makes no sense, therefore, to conclude, as the dissent does, that an employer who discriminates based on the "identity and occupation" of a person's spouse is not also discriminating against that person because he or she is married. An employer can't do one without the other. Stated otherwise, a no-spouse [anti-nepotism] policy, by definition, applies only to the class of married persons. Consequently, when an employer discharges an employee pursuant to such a policy, it necessarily discriminates "because of . . . [the employee's] marital status."[16]

An anti-nepotism policy, then, under the broad view, is impermissible because it treats some individuals differently from others because they decide to marry their partners.[17]

12 *Id.* at 1419.

13 *Id.* at 1424.

14 879 P.2d 1037, 1039 (Haw. 1994).

15 *Id.* at 1038.

16 *Id.* at 1041 (emphasis in original).

17 Beattie, *supra* note 3, at 1425; *see also, e.g.*, Kraft, Inc. v. State 284 N.W.2d 386 (Minn. 1979); Thompson v. Bd. of Trustees, 627 P.2d 1229 (Mont. 1981); Wash. Water Power Co. v. State Human Rights Comm'n, 586 P.2d 1149 (Wash. 1978) (en banc) (all striking down anti-nepotism policies on the ground that they penalized

Broad-view courts have applied the same standard in the context of housing discrimination. The court in *Markham v. Colonial Mortgage Service Co.*[18] explains this standard simply. The plaintiffs in *Markham* were an unmarried (engaged) couple seeking a joint mortgage loan. The couple's application was denied because the individuals' separate incomes would not be sufficient to secure the loan, and the defendant lender refused to combine their incomes on the grounds that the couple was not married.[19] The *Markham* Court rejected the lender's reasoning, stating that the plain meaning of the law's marital status discrimination protection[20] was to forbid discrimination "on the basis of a person's marital status, that is, to [forbid] treat[ing] persons differently, all other facts being the same, because of their marital status."[21] And, as the Court noted, the Defendant admitted it would have approved the mortgage loan had the couple been married at the time they applied.[22]

Broad-view courts, unlike narrow-view courts, are willing to compare married and unmarried couples to determine whether marital status discrimination has occurred; sometimes, as *Ross* demonstrates, a person's choice of *whom* to marry is protected on top of the choice of *whether* to marry.[23] However, a court that generally takes the broad view may adopt the narrow view in certain circumstances when it decides that the broad view would frustrate legislative intent. In *McFadden v. Elma Country Club*,[24] for example, a Washington appellate court rejected the broad view of marital status discrimination

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the status of marriage).

18 605 F.2d 566 (D.C. Cir. 1979).

19 *Id.* at 568–69.

20 *Id.* Note that *Markham* was decided under the Truth In Lending Act, § 705(b) (as amended 15 U.S.C. § 1691(a)(1) (2011)), one of the few federal laws that protects unmarried couples from any type of housing discrimination. *See* Matthew J. Smith, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1068–69 (1992).

21 *Markham*, 605 F.2d at 569 (internal citation omitted).

22 *Id.*

23 A notable exception in the employment context for political beliefs of a spouse was proffered in Cybyske v. Indep. Sch. Dist. No. 196, 347 N.W.2d 256 (Minn. 1984), *cert. denied*, 469 U.S. 933 (1984). *Cybyske* stated that the employer's decision to fire plaintiff based on the political beliefs of her spouse was not unlawful marital status discrimination under the Minnesota Human Rights Act (MHRA). *Id.* The decision has since been superseded by the redefinition of marital status discrimination under the MHRA as "discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse." MINN. STAT. § 363A.03, subd. 24 (2010). *See* Taylor v. LSI Corp. of Am., 796 N.W.2d 153, 155 (Minn. 2011).

24 613 P.2d 146 (Wash. Ct. App. 1980).

adopted by prior Washington courts in the employment context when asked to decide whether a country club could refuse membership to an unmarried couple living on its property because they were unmarried and living together.[25] The *McFadden* Court ruled in favor of Defendant: because cohabitation with a non-spouse was criminalized at the time the marital status protection was passed,[26] the Court said, the legislature could not have intended marital status discrimination to include discrimination against cohabiting unmarried couples.[27]

The schism between broad-view and narrow-view jurisdictions makes the result of a housing discrimination case fairly predictable for unmarried couples: a narrow-view court will uphold a policy or decision unless it affects all persons of a certain marital status, while a broad-view court will strike down such a policy or decision if it adversely affects anyone in the class, barring a conflict with legislative intent. But when the couple in question is non-heterosexual, another layer of analysis is required.

B. What Is Sexual Orientation Housing Discrimination?

The Fair Housing Act does not protect against discrimination on the basis of sexual orientation.[28] Currently, nineteen states and the District of Columbia protect individuals from housing discrimination based on sexual orientation.[29]

Sexual orientation discrimination in housing rarely takes the obvious forms that marital status discrimination does: that is to say, explicit "married-only" housing policies seem to be much more common than "heterosexual-only" housing policies. That is not to say, however, that the latter type does not exist. A recent study and series of tests conducted by a collaboration of fair justice housing centers in Michigan turned up one Detroit landlord who issued the explicit prohibition, "No drugs, prostitution, homosexuality, one-night stands . . . ."[30]

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25 *Id.* at 148.

26 Under the since-invalidated WASH. REV. CODE § 9.79.120 (1975) (repealed 1976).

27 *McFadden*, 613 P.2d at 148–50.

28 *See* 42 U.S.C. § 3604 (2011) (omitting sexual orientation from classes protected by section regarding discrimination in sale or rental of housing).

29 *See infra* Table 1.

30 MICHIGAN FAIR HOUSING CENTERS, SEXUAL ORIENTATION AND HOUSING DISCRIMINATION IN MICHIGAN 13 (2007), www.fhcmichigan.org/images/Arcus_web1.pdf (omission in original).

More often, sexual orientation discrimination goes unnoticed without paired testing. Examples from the above-cited Michigan tests, in which opposite-sex couples were compared against same-sex couples who presented themselves as "life partners," include:

- *Microaggressions and microinequities:* "In a Detroit suburb two women stood for 15 minutes while a real estate agent printed out listings for them. The heterosexual couple was offered a seat while the same agent worked with them."
- *Sexual harassment:*

> Two women, posing as a lesbian couple were told by a male agent in a small town in Washtenaw County: "Two women don't bother me; it[']s two men I don't understand, I think it's gross. I have no problem with you girls. I kind of like it. I can totally get into that." He proceeded to inform the testers that if they moved in they could call him anytime to fix anything they needed.[31]

- *Price discrimination:* "In Ypsilanti (Washtenaw County), testers also posing as a lesbian couple were quoted a rent of $625/month, while for the same property, the female tester posing as married to a man was told the rent was $600/month."[32]
- *False representation that no housing is available:* "In a rural area of Washtenaw County, straight testers were given an application and told 'we'd love to have you.' The same agent failed to give the lesbian couple an application."[33]
- *Misrepresentation of the extent of available housing or of the terms of purchase or lease:*

> In Calhoun County, a lesbian couple was shown one apartment, available at the end of the month. The heterosexual couple was told about two apartments available for immediate occupancy.
> . . .
> In Battle Creek, a lesbian couple was shown one apartment. The heterosexual couple saw two units and was offered $200 off the first month's rent as an incentive to move in.[34]

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

The Michigan tests also found evidence of discrimination when same-sex couples sought mortgage loans, despite the same-sex couples being assigned higher gross income, better credit, and a larger down payment.[35] In states where sexual orientation is not a protected status for the purposes of housing discrimination, none of the above discriminatory practices are unlawful,[36] and the above is by no means an exhaustive list of possible vectors of housing discrimination leveled against non-heterosexuals.

The Michigan tests raise some interesting questions about documenting sexual orientation housing discrimination. In the initial purchasing or leasing phase of seeking housing, same-sex couples are more likely than single applicants to face discrimination purely because their sexual orientation is more likely to be clear to their interlocutor (e.g., the landlord, the super, the building owner, the mortgage lender), or, at the very least, they will more likely be perceived as non-heterosexual. A single gay or lesbian housing applicant will have a better chance of going through the entire application process without being "discovered" as non-heterosexual than will a gay or lesbian couple. And since fair housing tests can most easily ascertain discrimination at the initial phase of the housing search, testing for sexual orientation discrimination is most likely to document cases in which same-sex couples (who openly avow their status as life partners) face discrimination based on sexual orientation, or on perceived sexual orientation.

For the purposes of this Article, it should suffice to point out that there are ample opportunities for single gay men and lesbians to face housing discrimination based on sexual orientation after they have already purchased or begun to lease housing. Such scenarios might also implicate marital status (e.g., being denied the opportunity to add a same-sex partner to a lease), or they might not (e.g., a landlord seeking to evict a tenant after seeing a same-sex sex partner leaving the premises, or after overhearing a conversation revealing the tenant's non-heterosexuality). In a situation in which marital status is not implicated

35 SEXUAL ORIENTATION AND HOUSING DISCRIMINATION IN MICHIGAN, *supra* note 30, at 3, 23–29.

36 With the exception of sexual harassment, which may be brought (some might say "disguised") as a sex discrimination claim under federal and most state fair housing laws. *See* NATIONAL CENTER FOR TRANSGENDER EQUALITY, KNOW YOUR RIGHTS: FAIR HOUSING AND TRANSGENDER PEOPLE (2012), www.transequality.org/Resources/FairHousing_March2012.pdf. In the federal context, see 42 U.S.C. §§ 3604(a), (b), (d); 42 U.S.C. § 3617 (2011). For more on sexual harassment in housing, see, for example, Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993) (applying breach of the covenant of quiet enjoyment to sexual harassment and housing); Shellhammer v. Lewallen, 1 Fair Hous. Fair Lending 15472 (W.D. Ohio Nov. 22, 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985) (outlining the *quid pro quo* theory of sexual harassment in housing); Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995) (outlining the hostile environment theory of sexual harassment in housing); Regina Cahan, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061 (1987); Deborah Dubroff, *Sexual Harassment, Fair Housing, and Remedies: Expanding Statutory Remedies into a Common Law Framework*, 19 T. JEFFERSON L. REV. 215 (1997).

and sexual orientation is not a protected characteristic under the state's fair housing law, then the discrimination in question is not unlawful.

But in the Michigan test scenarios and in the hypothetical scenarios described above, both marital status and sexual orientation housing discrimination occur. How the law classifies this sort of discrimination is highly state-dependent.

II. *Levin v. Yeshiva University* and the Intersection of Sexual Orientation and Marital Status Housing Discrimination

The facts from the hypothetical posed in the introduction are drawn from the 2001 New York Court of Appeals case *Levin v. Yeshiva University*.[37] The plaintiff in that case, Sara Levin, was a student at Yeshiva's Albert Einstein College of Medicine (AECOM) in the Bronx.[38] Yeshiva owned apartments near AECOM that it used exclusively for medical student housing, but AECOM's housing policy restricted university-owned housing to medical students, their spouses, and their children.[39] Married couples could receive housing priority if they provided Yeshiva's housing office with proof of marriage; Levin requested housing for her and her partner of five years, but, unable to provide proof of marriage,[40] she instead accepted university housing with two other AECOM students.[41] After Levin reapplied for couples' housing the following year and was again denied, she and her partner moved into an off-campus apartment in Brooklyn.[42]

Levin sued, claiming discrimination on two counts. The first was that Yeshiva's housing policy discriminated on the basis of marital status in violation of the New York State and City Human Rights Laws.[43] The second was that Yeshiva's policy had a disparate

37 754 N.E.2d 1099 (N.Y. 2001).

38 *Id.* at 1101.

39 *Id.*

40 New York did not allow same-sex marriages until 2011. *See* Marriage Equality Act, 2011 N.Y. Laws, ch. 95 (codified as amended at N.Y. DOM. REL. §§ 10-a, 10-b, 11, 13 (McKinney 2011)).

41 *Levin*, 754 N.E.2d at 1101.

42 *Id.*

43 *Id.* In 1998, when Levin brought the claim, New York State's housing laws, see N.Y. EXEC. LAW § 296 (McKinney 2011), protected against marital status discrimination but not sexual orientation discrimination. The state Human Rights Law currently protects against marital status and sexual orientation discrimination, but sexual orientation was not added to the law until the passage of the Sexual Orientation Non-Discrimination Act on January 16, 2003. *See* 2002 N.Y. Laws, ch. 2. However, New York City's Human Rights Act, *see* N.Y. ADC

impact on lesbians and gay men in violation of the City Human Rights Law.[44] The Supreme Court granted Yeshiva's motion to dismiss, and the Appellate Division affirmed, agreeing that there was no marital status discrimination, nor was there discrimination or disparate impact on gays and lesbians since Yeshiva's policy "had the same impact on non-married, heterosexual medical students as it had on non-married homosexual medical students."[45]

A. *Levin* and Marital Status Discrimination

As noted above, New York courts have taken the narrow view of marital status discrimination.[46] Consequently, Levin's claim of marital status discrimination hardly stood a chance in front of a New York court. Judge Ciparick, writing for the majority, stated that "a distinction must be made between the complainant's marital status as such, and the existence of the complainant's disqualifying relationship—or absence thereof—with another person."[47] The majority then analogized the fact of the instant case to those in *Hudson View Properties v. Weiss*,[48] in which the court found that a lease restricting use of the premises to immediate family members did not discriminate on the basis of marital status because the restriction was applicable to the tenant regardless of her marital status (even if it would have affected her differently had she been married).[49] Just as the lease provision in *Hudson View* did not turn on the marital status of the tenant, the majority said, neither did AECOM's housing policy turn on the student's marital status.[50] Judge Kaye, in her partial dissent, disagreed with the court's summary dismissal of Levin's marital status discrimination claim. Taking a broader view of marital status discrimination, Judge Kaye

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LAW § 8-107(5) (2012), included protections against both sexual orientation housing discrimination and marital status housing discrimination. It also allowed plaintiffs to prove that a practice was unlawfully discriminatory if it resulted in a disparate impact to the detriment of any group protected (including gays and lesbians). *See* N.Y. ADC LAW § 8-107(17) (2012). It should also be noted that §§ 8-107(5) and (17) applied to both public and private housing providers, so Yeshiva's status as a private institution would not have exempted it from liability. *See* N.Y. ADC LAW §§ 8-107(5), (17).

44 *Levin*, 754 N.E.2d at 1101.

45 *Id.* (quoting Levin v. Yeshiva Univ., 709 N.Y.S.2d 392 (N.Y. App. Div. 2000)).

46 *See* discussion of Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd., *supra* Part I.

47 *Levin*, 754 N.E.2d at 1102.

48 450 N.E.2d 234 (N.Y. 1983). Plaintiff wanted her long-time boyfriend, to whom she was not married, to move in with her. *Id.* at 235.

49 *Levin*, 754 N.E.2d at 1102.

50 *Id.*

first argued that *Hudson View* was inapplicable, stating that while the *Hudson View* court found that a landlord does not discriminate on the basis of marital status by denying housing to someone outside of the tenant's immediate family, it was at least a triable question whether Levin and her partner "share the same level of commitment with their partners as married persons share with their spouses—[i.e.,] that [they] are members of [each other's] immediate families."[51]

Judge Kaye also argued against the majority's reliance on *Pizza Hut*.[52] In contrast to *Pizza Hut*, in which the court concluded that the plaintiff had been fired not for being married but for her choice of whom to marry (namely, her supervisor), Judge Kaye argued that Levin and her partner "were denied partner housing merely because they were unmarried. Indeed, *Pizza Hut* itself states that the Human Rights Law bars decisions from being made on the basis of whether a person is 'single, married, divorced, separated or the like.' That is exactly what happened here."[53]

Judge Kaye's argument here would necessarily lead to the conclusion that, in New York, any "married couples only" restriction on housing unlawfully discriminates on the basis of marital status. The decision whether two people could purchase or lease that housing would always be made on the basis of whether the two people were or were not married, and *Pizza Hut*, as read by Judge Kaye, interpreted the Human Rights Law as barring such decision-making.

Judge Kaye's reasoning is typical of broad-view judges: she found that the plain meaning of the marital status discrimination protection is to forbid treating people differently on the sole basis of their status as single, married, and so on. The tacit assumptions Judge Kaye made here are ones necessary under the broad view of marital status discrimination: that couples may have a marital status qua couples, and that unmarried couples are to be compared against similarly-situated married couples to determine whether marital status discrimination is occurring.[54]

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51 *Id.* at 1110 (Kaye, C.J., dissenting). *See also* Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (N.Y. 1989), which held that a tenant's same-sex life partner qualified as "family" under the non-eviction protection provisions of the New York City rent control law, and which stated that the term "family" includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."

52 *Levin*, 754 N.E.2d at 1110. *See* Manhattan Pizza Hut, Inc. v. State Human Rights Appeal Bd., 51 N.Y.2d 506, 511–12 (N.Y. 1980).

53 *Levin*, 754 N.E.2d at 1110 (internal citation omitted).

54 *Id.*

These assumptions do not square with those of the majority. The majority opinion in *Levin* essentially held that Yeshiva's housing policy applies with equal force to all students regardless of marital status: just as married students may only live with partners to whom they are married, so too may single students only live with partners to whom they are married. The dissent's rebutting argument calls to mind the argument put forth in *Markham* against "treat[ing] persons differently, all other facts being the same, because of their marital status."[55] When a policy treats two couples differently who, apart from being married or unmarried, are identical, then marital status discrimination must be at work.

B. *Levin* and Sexual Orientation Discrimination

Levin's claim of sexual orientation discrimination was stated under New York City Administrative Code § 8–107(17)(a)(1)–(2), under which a plaintiff must show "that a defendant's policy or practice 'results in a disparate impact to the detriment of any group protected' under the City Human Rights Law."[56] The lower court ruled that Yeshiva's policy was nondiscriminatory on the basis of sexual orientation because it "had the same impact on non-married, heterosexual medical students as it had on non-married homosexual medical students,"[57] also ruling as a matter of law that "married students had to be excluded from consideration for purposes of comparison between the benefited and excluded classes."[58] The Court of Appeals, however, questioned the lower court's choice of comparator class.

Judge Ciparick, for the majority, first discussed the origins of the disparate impact analysis in *Griggs v. Duke Power Co.*,[59] in which the Supreme Court found an employer's policy requiring employees either to pass a standardized test or to have obtained a high school diploma to be unlawfully discriminatory on the basis that "statistically, it disqualified African Americans at a higher rate than white candidates."[60] Judge Ciparick then explained, by analogy to *Griggs*, why the exclusion of married students from the lower court's disparate impact analysis was improper:

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55 Markham v. Colonial Mortgage Service Co., 605 F.2d 566, 569 (D.C. Cir. 1979).

56 *Levin*, 754 N.E.2d at 1102 (quoting N.Y. ADC LAW § 8-107(17) (2012)).

57 *Id.* at 1101 (quoting Levin v. Yeshiva Univ., 709 N.Y.S.2d 392 (N.Y. App. Div. 2000)).

58 *Id.* at 1103.

59 401 U.S. 424 (1971).

60 *Levin*, 754 N.E.2d at 1103.

> [M]arried students make up a significant portion of the very class of persons made eligible by AECOM's policy for the substantial economic and social benefits of cohabiting with non-students in university-owned housing . . . . Excluding a large portion of the class benefitted by this policy from the disparate impact comparison group would render the disparate impact analysis articulated in *Griggs* . . . meaningless. To illustrate, the result in *Griggs* would have been entirely different had the plaintiffs been prevented from analyzing the racial composition of those actually offered employment . . . . [J]ust as in the Appellate Division's ruling here, the only comparison would have been between those African–Americans and white persons without high school diplomas or passing test scores. And, since 100% of both classes were not the recipients of favorable treatment, no disparate impact would have been established, thereby frustrating congressional policy . . . .[61]

Similarly, since nearly all non-married students were unable to live with a non-student, to search for disparate impact within the class of non-married students would be fruitless.

Yeshiva also attempted to argue that "because State law limits marriage to a union between a man and a woman,[62] marriage-based requirements, by their very terms, *facially discriminate* on the basis of sexual orientation" and that "[b]ecause being married is not a facially neutral criterion as to [a]ppellants' claims of discrimination on the basis of sexual orientation, the courts below were correct in excluding married students from the composition of the similarly-situated groups to be compared."[63]

Judge Ciparick found this argument uncompelling. AECOM's policy, she said, could not possibly have been facially discriminatory on the basis of sexual orientation, as couples housing was open to anyone with dependent children or a spouse regardless of sexual orientation, and it was denied to both heterosexuals and homosexuals.[64] In the alternative, Judge Ciparick argued, if it were assumed that AECOM's policy was not facially neutral on the basis of sexual orientation, AECOM would then be forced to admit that the policy facially discriminated on the basis of sexual orientation in violation of New York City's

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61 *Id.* at 1103–04.

62 Or, rather, limited at the time the case was argued. *See supra* note 41.

63 *Levin*, 754 N.E.2d at 1104–05.

64 *Id.* at 1105.

Human Rights Law.[65]

Ultimately, Yeshiva's argument boiled down to this: married students and unmarried students were non-similarly-situated groups, homosexual students were contained entirely within the latter group, and AECOM's policy distinguished lawfully between them.[66] To illustrate the fallacy of that argument, Judge Ciparick drew a useful analogy to *General Electric v. Gilbert* and its subsequent overruling by Congress as explained in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.[67]

At issue in *Gilbert* was a company employee disability plan that gave its workers benefits for all disabilities *except pregnancy* not caused by the job. The majority concurred with the employer's argument that the disability plan created two separate and dissimilar groups—(1) pregnant people (this classification was based on physical condition and not gender, despite the reality that all people in this classification were women) and (2) nonpregnant men and women—who were treated equally for benefit eligibility.[68]

The dissenters in *Gilbert* found the argument sophistic. Instead, they argued that the Court ought to compare the total coverage afforded men with the total coverage afforded women; under this new framework, the plan was discriminatory based upon gender because it insured against all disability risks except the single risk unique to women, namely pregnancy.[69] Congress agreed with the dissenters, expressly adopting their view of the disparate impact analysis in 1978.[70]

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65 *Id.*

66 *See id.*

67 *Id.* (citing General Electric v. Gilbert, 429 U.S. 125 (1976); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)).

68 *Id.* (citing *Gilbert*, 429 U.S. at 134–35).

69 *Gilbert*, 429 U.S. at 155, 160 (Brennan, J., dissenting).

70 *Newport News*, 462 U.S. at 678–79 ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision. . . . The House Report stated, 'It is the Committee's view that the dissenting Justices correctly interpreted the Act.' Similarly, the Senate Report quoted passages from the two dissenting opinions, stating that they 'correctly express both the principle and the meaning of Title VII.' Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted Congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision. Many of them expressly agreed with the views of the dissenting Justices.") (footnotes omitted). *See* 42 U.S.C. § 2002e-2, e-(k) (1976 ed., Supp. V.); *see also* H.R. REP. No. 95-948, 95th Cong., 2d Sess. 2 (1978), Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), Ser. No. 96-2, p. 148 (1979); S. REP. No. 95-331, 95th Cong., 1st Sess. 2–3 (1977).

Judge Ciparick found it sufficient to note summarily the similarity between *Gilbert* and *Levin*:

> Just as in *Gilbert*, the attempt here is to extract married medical students—the very group benefitted by AECOM's housing policy—from consideration in any disparate impact analysis thereby obscuring any realistic examination of the discriminatory effects of that policy.
>
> In order to determine whether AECOM's housing policy has a disparate impact that falls along the impermissible lines of sexual orientation, there must be a comparison that includes consideration of the full composition of the class actually benefitted under the challenged policy . . . .[71]

But Judge Ciparick's analysis stopped short of stating the logical conclusion: that a married-couples-only housing policy necessarily discriminates on the basis of sexual orientation because the institution of marriage discriminates on the basis of sexual orientation.

Let us, for the purposes of elucidating this point, imagine the facts of *Levin* plugged into the *Gilbert* analysis. At issue in *Levin* was a university housing policy that gave preference to married couples, at the purported expense of non-heterosexuals. The *Gilbert* majority would have concurred with Yeshiva's argument that the policy distinguished two separate and dissimilar groups—(1) married couples (a classification ostensibly based on a legal relationship, despite the fact that the class in question was comprised wholly of heterosexuals) and (2) unmarried heterosexuals and homosexuals—who were treated equally for housing eligibility.

The dissenters in *Gilbert* (and later Congress) would have argued that the Court ought to compare the total housing offered to heterosexual couples against the total housing offered to homosexual couples. Under that framework, AECOM's policy could be found discriminatory based upon sexual orientation if it were found to offer housing to heterosexual couples at a distinctly higher rate than homosexual couples (or if it were found to deny it to homosexual couples categorically).

Levin held that when unmarried gays and lesbians are excluded from married housing, they may make a claim of sexual orientation discrimination and not a claim of marital status discrimination. Yet throughout *Levin*, the court and Yeshiva University both stated that the homosexual couples in question would have been afforded the housing they sought had they been married. The logical leap to be made here—and it is not a giant leap—is that where unmarried gays and lesbians are denied housing benefits because they cannot

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71 *Levin*, 754 N.E.2d at 1106.

get married, the law recognizes that they are being discriminated against if the policy in question has a disparate impact on non-heterosexuals. Thus, the inevitable conclusion of *Levin* is that the inability of same-sex couples to legally marry constitutes sexual orientation discrimination, at least in the context of housing.

Judge Smith's concurring opinion in *Levin* points toward this conclusion. The Supreme Court in *Griggs* held that, under the Civil Rights Act, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory . . . practices."[72] Smith rejected the majority's use of *Griggs* to define disparate impact, because

> [i]n order to apply *Griggs v. Duke Power Co.* to the facts here, this Court must conclude that the traditional practice of private universities of granting housing preferences to married couples is unlawful discrimination, as well as being unlawful in its discriminatory impact. I am unable to draw that conclusion, particularly when marriage is a fundamental constitutional right (*see Loving v. Virginia*, 388 U.S. 1; *Zablocki v. Redhail*, 434 U.S. 374) and the State has sought to recognize and support marriage as a positive institution.[73]

Smith's hesitancy to call this privileging system "unlawful discrimination" explicitly rests at least in part on the belief that married couples should be rewarded for exercising a "fundamental constitutional right" and participating in a system that the State supports. This misses the point. By way of example, let's say a landlord wishes to grant housing preferences to renters who vote regularly, perhaps because the landlord believes that voters should be rewarded for their participation in civic life. But let's also say that the state in which the landlord is renting has, through a series of poll taxes and literacy requirements, effectively disenfranchised Black voters. It seems clear to me that (a) the landlord's voter preference system would have a disparate impact on Black renters but also, and more importantly, (b) the root of the problem would not be that the landlord wished to reward voters, but that access *to the fundamental Constitutional right in question was being granted discriminately on the basis of race.*

Similarly, the problem with Yeshiva's policy is not that it seeks to reward couples who enter into marriage, but that access to marriage was (and still is in most parts of the

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72 *Griggs*, 401 U.S. at 430.

73 *Levin*, 754 N.E.2d at 1108 (Smith, J., concurring).

country) granted to couples discriminately on the basis of sexual orientation.[74] The upshot of all of this is that, rather than acknowledge that marriage-preferential housing policies have a disparate impact on same-sex couples, Judge Smith would instead uphold Yeshiva's policy so as to reward those couples who both can and do get married—that is, were it not for the following proposal:

> [T]here is another interpretation of section 8–107(17) that supports plaintiffs' position. It is that the legislation is designed to secure for unmarried, committed couples the same benefits as those enjoyed by married persons. Thus, under the legislation, same-sex couples who are in committed relationships would be able to secure housing and other benefits on the same basis as married couples.[75]

One glaring problem with Smith's proposal is the difficulty in defining and proving "commitment" without a universally recognized system of memorialization such as marriage. But even if "commitment" could be read as an objective term with quantifiable markers, the proposal suffers from a larger problem: the policy of restricting marriage to opposite-sex couples cannot be maintained because it "operate[s] to 'freeze' the status quo of prior discriminatory . . . practices"[76] including, but by no means limited to, housing discrimination, against those in the sexual minority. Annulling these discriminatory practices on a case-by-case basis is not only an intolerably slow process, but it is also insufficient to grant same-sex couples the non-legal benefits of marriage.

III. State of the Law

In total, twenty-one states and the District of Columbia protect against housing discrimination based on marital status, while nineteen states and the District of Columbia protect individuals from housing discrimination based on sexual orientation. The table at the end of this Article shows whether each state's housing laws contain protections against sexual orientation discrimination, marital status discrimination, both, or neither. For the purposes of illustrating the significance of each scenario, imagine an unmarried, same-sex

74 I should note that while in this Article I often characterize same-sex marriage bans as sexual orientation discrimination, there is an extremely strong case for characterizing these bans instead as sex discrimination. The above analogy makes that case particularly apparent. For an in-depth look at the strategic and theoretical advantages of the sex discrimination claim, see Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010).

75 *Id.* at 1109 (Smith, J., concurring).

76 *Griggs*, 401 U.S. at 430.

couple seeking privately-owned housing in each of these four types of states (protecting against sexual orientation only, marital status only, both, and neither).

Six states only protect against marital status housing discrimination.[77] Two unmarried partners of the same sex seeking housing in one of these states would have recourse if they suffered discrimination because they were unmarried. So would two same-sex platonic roommates.[78] So would two married people, were they discriminated against because they were married. As discussed in Part I *supra*, however, in some states, provisions against marital status housing discrimination do not protect a person's decision of *whom* to marry. So, while a landlord in one of these states definitively may not discriminate against the same-sex couple because they are not married, in some states a landlord would not be prohibited from denying housing to the very same individuals because they chose to live with someone of the same sex, regardless of their marital status.[79] To boot, the landlord could lawfully discriminate against either or both of the partners on the ground that they are gay, lesbian, or bisexual.

While none of these six states yet issues marriage licenses to same-sex couples, one, Delaware, grants civil unions—which are given all the state rights and benefits of marriage—to same-sex couples.[80] It is not difficult to see that the confluence of the marriage and housing discrimination laws in Delaware[81] leads to an absurd result: two people of the same sex in a civil union or domestic partnership—a relationship which the State claims is nominally equivalent to marriage—can still be disfavored in the housing application process (as compared to a similarly-situated cross-sex married couple) solely because of sexual orientation, while a similarly-situated cross-sex married couple cannot.[82]

77 These states are Alaska, Colorado, Delaware, Michigan, Montana, and North Dakota. For state-specific citations, see *infra* Table 1.

78 For more on the unmarried roommates problem generally, see Beattie, *supra* note 3.

79 While I could find no directly relevant data addressing the issue, I surmise that (1) this type of discrimination affects unmarried same-sex couples more than it affects unmarried cross-sex couples, and (2) this type of discrimination affects unmarried same-sex couples more than it affects platonic same-sex roommates.

80 *See infra* Table 1.

81 Currently, Delaware is the only state with this particular set of laws, but the same would be true of any state which, in the future, grants the rights of marriage to same-sex couples (by granting marriage licenses to same-sex couples or imbuing same-sex civil unions or domestic partnerships with the rights of marriage) without also prohibiting housing discrimination on the basis of sexual orientation.

82 (a) To be fair (or, rather, logically exhaustive), in the same legal scenario, a landlord could also theoretically deny a cross-sex married couple housing because of their heterosexuality, i.e., not because they are married but because they are married to someone of the opposite sex. The unlikelihood of such an occurrence (I am being

Stated differently, a landlord in Delaware may discriminate against a same-sex couple in a marriage-like relationship *not because they are in the relationship, but because they are in the relationship with someone of the same sex.*

Four states protect only against sexual orientation housing discrimination.[83] Two unmarried partners of the same sex seeking housing in one of these states would have recourse if they suffered housing discrimination because they were gay, lesbian, or bisexual. So would a single gay, lesbian, or bisexual applicant turned away for the same reason. The state that presents the strangest case among these four is Iowa. Iowa grants marriage licenses to same-sex couples. So a same-sex couple in Iowa could get married, and their marriage might actually *facilitate* housing discrimination against them because it would serve as evidence to a housing provider of their sexual orientation.

Fifteen states and the District of Columbia have state housing discrimination laws protecting against both sexual orientation and marital status discrimination.[84] The remaining twenty-five states protect against neither marital status housing discrimination nor sexual orientation housing discrimination.[85]

IV. A Federal Remedy?

The greatest contributing factor to states' schisms in sexual orientation and marital status housing discrimination protections is the federal law's deficient protection of both statuses. As mentioned above, the federal Fair Housing Act does not protect against either sexual orientation discrimination or marital status discrimination.[86] The federal legislative and administrative trend, however, is headed in the right direction.

Within the past year, the Department of Housing and Urban Development (HUD) has

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generous—this has almost assuredly never happened) underscores the importance of the disparate impact analysis proffered in *Levin*.
(b) This would be true even if Delaware granted marriage licenses to same-sex couples.

83 These states are Iowa, Maine, Nevada, and New Mexico. *See infra* Table 1.

84 California, Connecticut, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *See infra* Table 1.

85 Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. *See infra* Table 1.

86 42 U.S.C.A. § 3604 (2011).

proposed and enacted a regulation stating that housing assisted or insured by HUD must be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.[87] The new HUD regulation also states that no recipient or subrecipient of HUD funds "may inquire about the sexual orientation or gender identity of an applicant for, or occupant of, HUD-assisted housing or housing whose financing is insured by HUD . . . ."[88] In a press conference in Detroit, HUD Secretary Shaun Donovan said that the new rule "says clearly and unequivocally that LGBT individuals and couples have the right to live where they choose."[89]

Not exactly. The HUD regulation only applies to HUD-funded housing. Granted, the regulation helps LGBT individuals and couples most in need. But even though the Federal Housing Administration has insured millions of home mortgages and more than seven million families live in HUD-supported public housing,[90] if LGBT people want to live in privately owned and insured dwellings, they still do not necessarily have "the right to live where they choose."[91]

Furthermore, in the debate leading up to the rule's instatement, HUD responded to one commenter's suggestion to define "marital status" as "the state of being unmarried, married, or separated, as defined by applicable state law" by stating, "The term 'marital status' is not currently defined in HUD regulations and HUD does not find that the focus of this rule calls for a definition of 'marital status.'"[92] Because HUD declined to clarify what constitutes marital status discrimination, it remains to be seen whether administrative proceedings will take the broad view or the narrow view of marital status discrimination. Under the narrow view,[93] HUD-funded housing providers may still discriminate against unmarried couples by stating that their decision to deny housing was not based on the individuals' status as

87 Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662-01 (first proposed Jan. 2011, finalized Feb. 3, 2012) (codified at 24 C.F.R. § 5.105(a)(2)(i) *et seq.* (2012)) [hereinafter Equal Access to Housing in HUD Programs].

88 24 C.F.R. § 5.105(a)(2)(ii) (2012).

89 Mike Householder, *Shaun Donovan On LGBT Housing Discrimination: "You Are Breaking The Law, And You Will Be Held Accountable,"* THE HUFFINGTON POST, Mar. 9, 2012, http://www.huffingtonpost.com/2012/03/09/shaun-donovan-lgbt-housing_n_1335003.html.

90 Questions and Answers About HUD, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/about/qaintro.

91 Householder, *supra* note 89 (quoting Shaun Donovan).

92 Equal Access to Housing in HUD Programs, at 5665–66.

93 *See* discussion *supra* Part I, "*What is marital status housing discrimination?*"

unmarried, but rather that the decision was made because each unmarried individual chose to live with another person outside of marriage. And, as illuminated by the court in *Levin*, this sort of discrimination has a seemingly obvious disparate impact on LGBT couples in states where they may not legally marry. Even if HUD had accepted the commenter's suggestion, the regulation would still suffer from the same problem. Defining "marital status" is not the same as defining "marital status discrimination."

The HUD regulation is exemplary, however, in that it grants protection against sexual orientation housing discrimination and marital status housing discrimination in the same stroke. Following HUD's lead, in September of 2011, Senator John Kerry (D-MA) and Representative Jerrold Nadler (D-NY) introduced bills in the Senate and House of Representatives called the Housing Opportunities Made Equal (HOME) Act.[94] The bills would amend the Fair Housing Act to include protections on the basis of marital status and sexual orientation, as well as gender identity and source of income.[95] Kerry was quoted as saying, "It's hard to believe that in 2011, any law-abiding, tax-paying American who can pay the rent can't live somewhere just because of who they are. Housing discrimination against LGBT Americans is wrong, but today in most states there isn't a thing you can do about it."[96]

That the bill contains both sexual orientation and marital status protections is commendable. And to be sure, if the bill were enacted into law, unmarried and non-heterosexual residents of nearly three-fifths of states would suddenly have access to a housing discrimination remedy.[97] But there is reason to be skeptical that the remedy will pass at all. Legislators have attempted to expand the Fair Housing Act to include sexual orientation as a protected class on numerous occasions and have never succeeded,[98] and the inclusion of gender identity protections has proven to polarize legislators (and sometimes

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94 Chris Johnson, *New Bills Target LGBT Discrimination in Housing*, WASHINGTON BLADE, Sept. 22, 2011, http://www.washingtonblade.com/2011/09/22/new-bills-target-lgbt-discrimination-in-housing/.

95 *Id.*

96 *Id.*

97 *See infra* Table 1.

98 *See, e.g.*, H.R. 4820, 111th Cong. § 2 (2010); H.R. 288, 109th Cong. § 1 (2005); H.R. 214, 108th Cong. § 1 (2003); H.R. 217, 107th Cong. § 1 (2001); H.R. 311, 106th Cong. (1999); H.R. 423, 103d Cong. § 2(f) (1993); H.R. 1430, 102d Cong. § 3 (1991), reprinted in 137 CONG. REC. H1728–29 (daily ed. Mar. 13, 1991); S. 47, 101st Cong. §§ 7–8 (1989), reprinted in 135 CONG. REC. S340-41 (daily ed. Jan. 25, 1989); H.R. 655, 101st Cong. (1989). *See* Dennis M. Teravainen, *Federal Law's Indifference to Housing Discrimination Based on Sexual Orientation*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 11, 37 (2002).

sink legislation entirely) in the context of employment discrimination.[99] Additionally, even where such protections already exist on a local level, they are vastly underutilized:[100] they serve only as a weak deterrent to preventing housing discrimination from occurring in the first place, partly due to lax enforcement.[101]

However, and more importantly, the passage of the HOME Act would be a small victory in the absence of federal marriage equality for essentially the same reason that the HUD regulation falls short—if federal courts take the narrow view of marital status, then housing providers will still be free to justify denying housing to unmarried couples on the basis that they are cohabiting with persons to whom they are not married, and this manner of justification disproportionately affects LGBT couples in jurisdictions where they cannot get married.[102]

CONCLUSION

When and if federal marriage equality is enacted, having dual protections for sexual orientation and marital status will reduce or negate the disparate impact created by many courts' narrow-view analysis of marital status discrimination. The logic is fairly simple: as more LGBT couples get married, the percentage of total unmarried couples that are LGBT should decrease.

But as long as sexual orientation discrimination and marital status discrimination are thought of as separate and distinct vectors of discrimination, such as they are in the current drafting of the HOME Act, courts will continue to miss the various contexts in which the two operate simultaneously to freeze the status quo—a society which treats unmarried homosexual couples worse than their married and heterosexual counterparts. To achieve real progress, federal legislators first must pass federal marriage equality, and second must define marital status discrimination to comport with the "broad view" taken by many state courts. Otherwise, housing providers will be free to deny unmarried couples housing, and that practice will continue to have a disparate negative impact on LGBT couples in jurisdictions where they are not allowed to marry.

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99 This polarization was most evident in the debate surrounding, and eventual demise of, the proposed Employment Non-Discrimination Act of 2007 (H.R. 2015) and Employment Non-Discrimination Act of 2009 (H.R. 2981, H.R. 3017, S. 1584).

100 SEXUAL ORIENTATION AND HOUSING DISCRIMINATION IN MICHIGAN, *supra* note 30, at 14.

101 *Id.* at 16–17.

102 Furthermore, it is unclear what effect DOMA would have on federal courts' recognition of same-sex marriages for the purposes of the HOME Act, but that analysis is beyond the scope of this Article.

Table 1: State Law Housing Discrimination Provisions

State	State housing law contains marital status protection[1]	State housing law contains sexual orientation protection[2]	Issues marriage licenses to same-sex couples[3]	Recognizes same-sex marriages performed in other states[4]	In-state DPs[5] or CUs[6] given all or nearly all state rights and benefits of marriage[7]
Alabama					
Alaska	X				
Arizona					
Arkansas					
California	X	X	*	X	X (DP)
Colorado	X				
Connecticut	X	X	X		
Delaware	X				X (CU)
District of Columbia	X	X	X		
Florida					
Georgia					
Hawaii	X	X			X (CU)
Idaho					
Illinois	X	X		X	X (CU)
Indiana					
Iowa		X	X		
Kansas					
Kentucky					
Louisiana					
Maine		X	**(See comment)		
Maryland	X	X	***	X	X (DP)
Massachusetts	X	X	X		
Michigan	X				
Minnesota	X	X	****		
Mississippi					
Missouri					
Montana	X				
Nebraska					

State	State housing law contains marital status protection[1]	State housing law contains sexual orientation protection[2]	Issues marriage licenses to same-sex couples[3]	Recognizes same-sex marriages performed in other states[4]	In-state DPs[5] or CUs[6] given all or nearly all state rights and benefits of marriage[7]
New Hampshire	X	X	X		
Nevada		X			X (DP)
New Jersey	X	X		X	X (CU)
New Mexico		X		X	
New York	X	X	X		
North Carolina					
North Dakota	X				
Ohio					
Oklahoma					
Oregon	X	X			X (DP)
Pennsylvania					
Rhode Island	X	X		X	
South Carolina					
South Dakota					
Tennessee					
Texas					
Utah					
Vermont	X	X	X		X (CU)
Virginia					
Washington	X	X	***		
West Virginia					
Wisconsin	X	X			
Wyoming					

1 *Marital Status Discrimination Protections in Housing*: Alaska, ALASKA STAT. ANN. § 18.80.240 (West 2011) (also protecting against discrimination because of "change in marital status"); California, CAL. GOV'T CODE §§ 12920–12921 (West 2011); Colorado, COLO. REV. STAT. ANN. § 24-34-502 (West 2011); Connecticut, CONN. GEN. STAT. ANN. § 46a-64c (West 2011); Delaware, DEL. CODE ANN. tit. 6, § 4603 (West 2011); District of Columbia, D.C. CODE § 2-1402.21 (2001); Hawaii, HAW. REV. STAT. §§ 368-1, 515-3 (West 2011); Illinois, ILL. COMP. STAT. ANN. 775 §§ 5/1-103(Q), 3-102 (West 2011); Maryland, MD. CODE ANN., STATE GOV'T § 20-705 (West 2011); Massachusetts, MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2011); Michigan, MICH. COMP. LAWS ANN. § 37.2502 (West 2011); Minnesota, MINN. STAT. ANN. § 363A.09 (West 2011); Montana, MONT. CODE ANN. § 49-2-305 (West 2011); New Hampshire, N.H. REV. STAT. ANN. § 354-A:10 (West 2011); New Jersey, N.J. STAT. ANN. §§ 10:5-12(g)–(o) (West 2011); New York, N.Y. EXEC. LAW § 296 (McKinney 2011); North Dakota, N.D. CENT. CODE ANN. § 14-02.5-02 (West 2011) (protecting against discrimination based on "status with respect to marriage"); Oregon, OR. REV. STAT. ANN. § 659A.421 (West 2011); Rhode Island, R.I. GEN. LAWS ANN. § 34-37-1 (West 2011); Vermont, VT. STAT. ANN. tit. 9, § 4503 (West 2011); Washington, WASH. REV. CODE ANN. § 49.60.222 (West 2011); Wisconsin, WIS. STAT. ANN. § 106.50 (West 2011).

2 *Sexual Orientation Discrimination Protections in Housing*: California, CAL. GOV'T CODE §§ 12920, 12955 (West 2011); Connecticut, CONN. GEN. STAT. ANN. § 46a-81e (West 2011); District of Columbia, D.C. CODE § 2-1402.21 (2001); Hawaii, HAW. REV. STAT. §§ 368-1, 515-3 (West 2011); Illinois, ILL. COMP. STAT. ANN. 775 §§ 5/1-103(Q), 3-102 (West 2011); Iowa, IOWA CODE ANN. § 216.8 (West 2011); Maine, ME. REV. STAT. ANN. tit. 5, § 4582 (2011); Maryland, MD. CODE ANN., STATE GOV'T § 20-705 (West 2011); Massachusetts, MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2011); Minnesota, MINN. STAT. ANN. § 363A.09 (West 2011); Nevada, NEV. REV. STAT. ANN. § 118.020, as amended by 2011 Nev. Laws Ch. 191 (S.B. 368) (West 2011)); New Hampshire, N.H. REV. STAT. ANN. § 354-A:10 (West 2011); New Jersey, N.J. STAT. ANN. §§ 10:5-12(g)–(o) (West 2011) (protecting "affectational orientation" as well as sexual orientation); New Mexico, N.M. STAT. ANN. § 28-1-7 (West 2011); New York, N.Y. EXEC. LAW § 296 (McKinney 2011); Oregon, OR. REV. STAT. ANN. § 659A.421 (West 2011); Rhode Island, R.I. GEN. LAWS ANN. § 34-37-1 (West 2011); Vermont, VT. STAT. ANN. tit. 9, § 4503 (West 2011); Washington, WASH. REV. CODE ANN. § 49.60.222 (West 2011); Wisconsin, WIS. STAT. ANN. § 106.50 (West 2011).

3 *States That Issue Marriage Licenses to Same-Sex Couples/Afford All the Rights and Benefits of Marriage*: Connecticut, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); 2009 Conn. Legis. Serv. P.A. 09-13 (S.B. 899) (West); District of Columbia, Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 2009 District

of Columbia Laws 18-110 (Act 18-248); Iowa, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Massachusetts, Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003); New Hampshire, N.H. REV. STAT. ANN. § 457:1-a (West 2011); New York, Marriage Equality Act, 2011 N.Y. Laws ch. 95 (codified as amended at N.Y. Dom. Rel. §§ 10-a, 10-b, 11, 13 (McKinney 2011); Vermont, Civil Marriage, 2009 Vermont Laws No. 3 (S. 115); Washington, Same-Sex Marriage, 2012 Wash. Sess. Laws, http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202012/6239-S.SL.pdf.

* The Ninth Circuit opinion in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), means that same-sex marriages will be allowed in California unless a higher court (or the Ninth Circuit sitting en banc) reverses that decision.

** In 2009, the Maine Legislature had passed legalized a bill legalizing same-sex marriage, which Governor John Baldacci signed into law, but a Maine referendum passed 53% to 47% to repeal the law. Maine will have another referendum in November 2012 to determine whether to legalize same-sex marriage once again. Katharine Q. Seelye, *Gay Marriage Again on Ballot in Maine*, N.Y. TIMES, June 24, 2012, http://www.nytimes.com/2012/06/25/us/politics/second-time-around-hope-for-gay-marriage-in-maine.html.

*** Washington Governor Christine Gregoire signed legislation legalizing same-sex marriage in Washington, which would take effect 90 days after the legislative session ends. *Washington: Gay Marriage Legalized*, National Briefing, N.Y. TIMES (Feb. 13, 2012), http://www.nytimes.com/2012/02/14/us/washington-gay-marriage-legalized.html. Maryland Governor Martin O'Malley signed a same-sex marriage bill on March 1, 2012, which would go into effect in 2013 at the earliest. Annie Linsky, *Governor signs Maryland same-sex marriage bill*, BALT. SUN (Mar. 1, 2012), http://www.baltimoresun.com/news/maryland/politics/bs-md-marriage-signing-20120224,0,40369.story. However, voters in Maryland and Washington State will decide in the November 2012 election whether to repeal their newly passed same-sex marriage laws. Katharine Q. Seelye, *Gay Marriage Again on Ballot in Maine*, N.Y. TIMES (June 24, 2012), http://www.nytimes.com/2012/06/25/us/politics/second-time-around-hope-for-gay-marriage-in-maine.html.

**** Voters in Minnesota will decide in the November 2012 election whether to amend the state Constitution to ban same-sex marriage categorically. Katharine Q. Seelye, *Gay Marriage Again on Ballot in Maine*, N.Y. TIMES (June 24, 2012), http://www.nytimes.com/2012/06/25/us/politics/second-time-around-hope-for-gay-marriage-in-maine.html.

4 *States that Respect Out-of-State-Marriages of Same-Sex Couples*: California (by statute, pre-November 5, 2008, marriages honored as marriages and later out-of-state marriages treated as registered domestic partnerships); Illinois (out-of-state marriages treated as civil unions); Maryland (attorney general opined that out-of-state same-sex marriage should be recognized in Maryland); New Jersey (out-of-state marriages treated as civil unions); New Mexico (per Attorney General opinion but not confirmed by court); Rhode Island (likely for some purposes but not divorce). *See* LAMBDA LEGAL, STATUS OF SAME-SEX RELATIONSHIPS NATIONWIDE, http://www.lambdalegal.org/publications/nationwide-status-same-sex-relationships; ROBERT J. BRYM & JOHN LIE, SOCIOLOGY: POP CULTURE TO SOCIAL STRUCTURE 246 (3d ed. 2012); *see also* Todd A. Solomon, Joseph S. Adams, & Brett R. Johnson, *How Conflicting Same-Sex Union Laws Are Impacting Employee Benefits*, BENEFITS MAGAZINE 16, at 20.

5 Domestic partnerships.

6 Civil unions.

7 Defined by the Nat'l Gay & Lesbian Task Force as giving "all or nearly all the rights and responsibilities extended to married couples under state law" whether CU or DP. *See* ROBERT J. BRYM & JOHN LIE, SOCIOLOGY: POP CULTURE TO SOCIAL STRUCTURE 246 (3d ed. 2012).