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Notes

Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples

by JOHN C. BEATTIE*

The institution of marriage, for those who choose to enter it, affords special legal and social advantages.\(^1\) The United States Supreme Court recognizes a fundamental right to marry,\(^2\) and courts carefully scrutinize state actions that may impinge on that right.\(^3\) Thus, married couples can be secure in the knowledge that the legal system supports and encourages their relationships.

But what of unmarried couples? In the last ten years a growing minority has chosen to enter into intimate relationships, often making homes together, sharing living expenses, and having children without the legal bond of marriage.\(^4\) Many lesbians and gay men,

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1. One commentator notes:
   "[T]he marriage relationship confers upon its participants preferential tax treatment, a right of action with regard to a fatal accident of the spouse, social security benefits, and the protection of the law of intestate succession. Moreover, the married couple benefits from innumerable nongovernmental benefits such as employee family health care, group insurance, lower automobile insurance, family memberships in various organizations, and the ability to hold real estate by the entirety."


3. Loving, 388 U.S. at 12 (Virginia's statute preventing marriages between persons based on racial classifications held to violate the fourteenth amendment's equal protection and due process clauses).

who cannot legally marry their partners in any state, also are involved in long-term, intimate relationships. What rights, if any, do these unmarried couples have by virtue of their choice to make a family together? Statutory and case law recognizing and protecting unmarried couples is sparse but growing. Because the Constitution and federal statutes offer little protection, unmarried couples primarily have asserted their rights in state courts.

This Note discusses the role that state prohibitions against marital status discrimination have played in protecting the rights of unmarried couples. It argues that, by prohibiting marital status discrimination in employment, housing, public accommodations, and credit, state legislators intended to forbid certain businesses from differentiating among individuals on the basis of their choice to be married or unmarried. Furthermore, this Note argues, because some commonly accepted practices disadvantage unmarried couples, including lesbians and gay men, these practices should fall within the proscription against marital status discrimination.

Part I surveys marital status discrimination cases, pointing out the two prevalent interpretations of marital status discrimination adopted by state courts. This Part also considers theoretical problems implicit in the courts’ application of a “marital status discrimination” test. Part II argues that using a rule in marital status discrimination cases that considers the identity or position of one’s partner is consistent with the legislative purpose of most states’ antidiscrimination laws. To resolve the theoretical problems left unanswered by most judicial opinions, Part II also formulates a refined test for determining when marital status discrimination has occurred.

Finally, Part III discusses some innovative ways courts apply marital status discrimination provisions and suggests other protec-


6. The word family is used in this Note to describe any relationship between two or more individuals of either sex who function as a supportive and nurturing unit, regardless of whether the family “figureheads” are married.


tions such provisions might offer to unmarried couples. Specifically, this Part suggests that prohibitions against marital status discrimination can provide protection for lesbians and gay men in some of their familial choices.

I. The History of Marital Status Discrimination Law

Beginning in the mid to late 1970s, many states enacted or amended civil rights laws to include prohibitions against marital status discrimination. Protections against such discrimination vary by jurisdiction. For instance, states have outlawed marital status discrimination in housing, employment, public accommodations, and credit transactions. In 1974, Congress enacted the Federal Equal


Credit Opportunity Act, which prohibits discrimination on the basis of marital status in all credit transactions. Most of these legislative enactments, however, fail to define the term “marital status” or to provide guidance as to what constitutes marital status discrimination. Therefore, it has been left up to the courts in each jurisdiction to define this term and decide when it applies.

To define marital status discrimination courts first examine the words of the applicable statute. A typical state statute prohibiting marital status discrimination in employment provides:

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, . . .

. . . [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.
Courts often invoke common law rules of interpretation to determine the meaning of the term "marital status." Under the "common intelligence test," one court held that people of normal intelligence "commonly relate the term 'marital status' to the existence or absence of a marital bond." Another jurisdiction, using the same test, defined marital status as "the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage." In applying these definitions, however, the courts have reached vastly different conclusions about what constitutes unlawful marital status discrimination. Some courts have adopted a narrow view of marital status discrimination, holding that discrimination occurs only when an individual is treated differently solely because of her individual marital status. Other courts, adopting a broader view, find illegal discrimination when marital status is among the determining factors in the challenged decisionmaking. The following sections explain these two prevailing theories of marital status discrimination and set forth the most common scenarios in which courts address the issue. They also point out some unresolved theoretical problems inherent in the established tests for marital status discrimination.

A. The "Narrow View" of Marital Status Discrimination: The All-or-None Rule

Under the "narrow view" of marital status discrimination, courts find unlawful marital status discrimination only when a person is treated differently on the sole basis of her status as single, married, divorced, separated, or widowed. These courts, therefore, will strike

20. Under this test, a court either determines how a person of normal intelligence would understand the statutory provision in question, Loveland, 21 Wash. App. at 87, 583 P.2d at 666, or relies on the "fundamental rule of construction that words of common usage are to be given their ordinary meaning," Manhattan Pizza Hut, 51 N.Y.2d at 511, 415 N.E.2d at 953, 434 N.Y.S.2d at 964.
21. Loveland, 21 Wash. App. at 87, 583 P.2d at 666. In Loveland, the court found that the statutory prohibition against marital status discrimination in housing was not unconstitutionally vague because the statute provided fair notice of the prohibited discrimination. Id. at 86, 583 P.2d at 666.
23. See infra Part I.A.
24. See infra Part I.B.
25. Manhattan Pizza Hut, 51 N.Y.2d at 512, 415 N.E.2d at 953, 434 N.Y.S.2d at 964; see also Miller v. C.A. Muer Corp., 420 Mich. 355, 364, 362 N.W.2d 650, 655 (1984) (antinepotism policies do not amount to discrimination on the basis of marital status because their focus is on the relationship between the employees, not on the marital status of an
down a policy based on marital status only if the policy uniformly disadvantages every individual within a particular marital status classification.

The New York Court of Appeals first promulgated this rule in *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board.*26 *Pizza Hut* presents a typical example of marital status discrimination in the employment context.27 The case involved a married couple who had been employed at the same restaurant for four years. Invoking a corporate policy prohibiting spouses from working together, an area manager fired the wife.28 She filed a complaint with the State Human Rights Division,29 which found that her termination

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27. Almost all of the states that have interpreted prohibitions against marital status discrimination in employment have done so in the context of a challenge to an antinepotism policy. See, e.g., infra notes 28-38 and 48-54.
28. The policy stated:
I. Employee[s] are not permitted to work in a position where their supervisor or their supervisor's supervisor is a relative. II. The term 'relative' shall apply, but not be limited to, the following relationships, whether established by blood, marriage, or other legal actions: Father, Mother, Brother, Sister, Husband, Wife, Son, Daughter, Grandfather, Grandmother, Grandson, Granddaughter. III. Where such situations exist through promotion, transfer or marriage, action will be taken to transfer or to terminate one of the employees within a two (2) month period after the relationship is determined or established. No capable and conscientious employee should be terminated if transfer is possible.

*Manhattan Pizza Hut,* 51 N.Y.2d at 509 n.2, 415 N.E.2d at 952 n.2, 434 N.Y.S.2d at 962-63 n.2.

This factual scenario also exemplifies the recurring problem of women bearing the brunt of antinepotism policies. No-spouse policies typically exclude the second applicant-spouse. Because women historically have entered the labor market after men, these policies have penalized women more than men. See Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules,* 62 B.U.L. Rev. 75, 79 (1982); see also Kleiman, *Anti-Nepotism Rules Losing Grip on the Workplace,* Chicago Tribune, Feb. 22, 1988, at C6, col. 4.

For example, in Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977), two female plaintiffs challenged an employer's no-spouse policy as sex discrimination under Title VII of the 1964 Civil Rights Act. The plaintiffs showed that seventy-one women were denied employment under the policy, compared to three men during the same time period. *Id.* at 497. The court found that the plaintiffs established a prima facie case of sex discrimination under the statute, *id.* at 498, but held that the employer had adequate justification for refusing to hire spouses of current employees. *Id.* at 499-500. *But see Wexler,* supra, at 78 (criticizing employer justifications for prophylactic antinepotism policies).

29. In many cases enforcement of the civil rights law is delegated to state or local human rights commissions, who have the administrative power to issue complaints and adjudicate disputes. These agencies are given the primary responsibility to interpret and apply antidiscrimination law. See, e.g., *Cal. Gov't Code* §§ 12930-35 (West 1980) (empowering a Fair Employment and Housing Commission to enforce California's antidiscrimination laws); *N.Y. Exec. Law* §§ 293-95 (McKinney 1982) (empowering a Human Rights Division
violated the state's prohibition against marital status discrimination in employment and ordered her reinstated with back pay.\textsuperscript{30} The court of appeals reversed, however, finding that no illegal discrimination had occurred.\textsuperscript{31}

Relying on common usage of the term "marital status," the Pizza Hut court found that "when 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."\textsuperscript{32} The court used this construction of the term "marital status" to conclude that the legislature only meant to proscribe actions based solely on the applicant's individual marital status.\textsuperscript{33} Since Pizza Hut's decision to terminate the plaintiff was based on a factor not included in the court's definition of "marital status," the court reasoned that marital status was not the sole reason for the termination and thus no prohibited discrimination had occurred.

In justifying its interpretation of the statute, the Pizza Hut court discussed the benefits of antinepotism rules, citing both actual and perceived problems arising when closely related individuals work together. Because it recognized these problems as strong justifications for prohibiting spouses from working together,\textsuperscript{34} the court concluded that the legislature did not intend to prohibit such policies.\textsuperscript{35} The court opined that:

\begin{quote}
[E]mployers may no longer decide whether to hire, fire, or promote someone because he or she is single, married, divorced, separated or the like. Had the Legislature desired to enlarge the scope of its proscription to prohibit discrimination based on an individual's marital relationships—rather than simply on an individual's marital status—surely it would have said so.\textsuperscript{36}
\end{quote}

Other courts have followed a similar rationale when reconciling prohibitions against marital status discrimination and antinepotism pol-
One court distinguished antinepotism policies by finding that prohibitions against marital status discrimination were "not designed to prohibit employment discrimination based upon specific family relationships, albeit the relationship . . . exists by reason of . . . marriage." 37

The "narrow view" approach emphasizes that discrimination occurs only when marital status is the sole basis for the adverse employment decision. In the context of the antinepotism policy, it is clear that marital status is not the sole reason for the decision because, if it were, every married applicant would be affected. Instead, an antinepotism policy only disadvantages a subclass of married applicants: those who have spouses already working for the employer. Implicit in this "narrow view" approach, therefore, is the notion that if the challenged policy does not disadvantage all married people, none may invoke the state prohibition against marital status discrimination to challenge it.

This narrow "all-or-none" rule of marital status discrimination also is applied by the same jurisdictions in challenges to housing policies. Allegations of marital status discrimination in housing most often arise when an unmarried couple is refused housing that is available to married couples. 39 For example, in Prince George's County v. Greenbelt Homes, Inc., 40 an unmarried couple applied for admission to a cooperative housing development but was refused because they were not married. 41

The plaintiffs in Prince George's County argued that since they would not have been denied admission if they were married, the cooperative's policy discriminated against them on the basis of their marital status. 42 The state court, however, found that neither complainant (each of whom was 'single,' 'unmarried') was denied membership individually because of his or her individual marital status. While each separately had a marital status, collectively they did not. Only marriage as prescribed by law can change the marital status of an individual to a new legal entity of husband and wife. The law of Maryland does not recognize common law marriages, or other unions of two or more persons—such as con-

38. Id. at 561, 382 A.2d at 56.
41. Id. at 315, 431 A.2d at 746.
42. Id. at 316, 431 A.2d at 746.
cubinage, syneisaktism, relationships of homosexuals or lesbians—as legally bestowing upon two people a legally cognizable marital status. Such relationships are simple illegitimate unions unrecognized, or in some instances condemned, by the law.  

Similarly, the New York Court of Appeals refused to hold that a lease restriction, permitting only members of a tenant’s immediate family to live in a leased unit, discriminated on the basis of marital status. The court found that under the lease agreement the tenant’s boyfriend could not live in the apartment. The plaintiff argued that the housing policy acted to her detriment because of her marital status. The court rejected the plaintiff’s argument and concluded, “Whether or not [the plaintiff’s boyfriend] could by marriage or otherwise become a part of her immediate family is not at issue.” Instead, the court focused on the landlord’s right to place restrictions on the plaintiff’s tenancy and suggested that since the plaintiff could be prohibited from living with a legally unrelated female roommate, the rule should be the same for a legally unrelated male roommate.  

When applying the all-or-none rule of marital status discrimination to housing cases, the courts do not consider the unmarried couple a family unit carrying its own marital status. Were the courts to acknowledge the unmarried couple as such a unit, they would have to conclude that “married-only” housing violates the prohibition of marital status discrimination because it disadvantages all couples having a particular marital status. Instead, these courts limit their analysis by considering only whether each unmarried plaintiff is discriminated against as compared to a married couple. In this common factual situation courts find that the challenged housing policies discriminate against an unmarried individual who wishes to live with a nonspousal partner, not against a person solely because she is single. Here, courts using the all-or-none rule find that the unmarried plaintiffs have no protection because the challenged policies do not affect all unmarried applicants, only those who choose to live with an intimate partner outside the bounds of marriage.

In sum, under the all-or-none rule, challenges to housing and employment policies fail when the disputed policy considers the plaintiff’s marital status in conjunction with some other factor, such
as whether the plaintiff’s spouse works at the same job, or whether the plaintiff and her unmarried partner will live together. Moreover, courts adopting the all-or-none rule refuse to compare similarly situated married and unmarried couples and instead focus only on the individual unmarried plaintiff. Under this interpretation, the prohibition against marital status discrimination provides protection in only one circumstance: an individual denied housing or employment for no other reason than the fact that the individual is married (or unmarried). On the other hand, any policy that attaches additional considerations to the marital status classification will affect only a portion of the protected class and thereby escape the legal prohibition.

B. The “Broad View” of Marital Status Discrimination: The Inclusive Rule

Unlike the narrow all-or-none rule discussed above, courts adopting a broader view of marital status discrimination hold that the identity or position of one’s partner may be considered when deciding if a policy is unlawfully discriminatory. The rule under this interpretation is inclusive; it protects plaintiffs from policies that use marital status classifications, even when those policies affect only a portion of the protected class. In *Thompson v. Board of Trustees*, the plaintiff challenged a newly approved school board policy “[t]hat all school administrators of the Harlem Public Schools shall not have a spouse employed in any capacity in the Harlem school system.” Because the plaintiff was married to another employee of the school system at the time the policy came into effect, he was fired. The court held that the policy violated the state’s marital status discrimination laws. It reasoned that Montana’s antidiscrimination laws “are strongly worded directives from the legislature prohibiting employment discrimination and encouraging public employers to hire, promote and dismiss employees solely on merit.” Comparing the position of the married couple to a similarly situated unmarried couple, the court concluded that “a narrow interpretation of the term ‘marital status’ is unreasonable, and could lead to an absurd result . . . if [the] plaintiff and his wife were simply to dissolve their mar-

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49. *Id.* at 268, 627 P.2d at 1230.
50. *Id.*
51. *Id.* at 270, 627 P.2d at 1231.
riage, both could keep their jobs. But for the fact this plaintiff is married, he would still be working."

One court has suggested that antinepotism policies may impinge on state and federal constitutional protections. In Kraft, Inc. v. State, a Minnesota court found that antinepotism policies are not permitted under the state's prohibition against marital status discrimination because they discriminate against married couples, who enjoy special constitutional and state protection. The court found that antinepotism policies impermissibly interfere with the right to marry and reasoned that the legislature must have meant to include such interference within its prohibition against marital status discrimination. The court concluded, furthermore, that condoning such a policy would "ignore the broad prohibition against arbitrary classifications embodied in the Human Rights Act and would elevate form over substance."

In those courts adopting this broad, inclusive rule, a finding of illegal marital status discrimination is not limited to employment policies that affect all members of a marital status class. An antinepotism policy is impermissible because it uses an explicit marital status classification, treating some individuals differently from others on the basis of their decision to marry or refrain from marrying their partners.

The inclusive rule of marital status discrimination, as applied to housing policies, has been explained in Atkisson v. Kern Housing Authority. In Atkisson, a divorced mother with six children challenged a local public housing policy prohibiting her boyfriend from living with her. The court held that the policy, which prohibited low income housing tenants from living with anyone of the opposite sex not related to the tenant by blood, marriage, or adoption, illegally discriminated on the basis of marital status. The court found that the policy "automatically exclude[d] all unmarried cohabiting adults; a class of persons defined by their marital status."

52. Id.
53. 284 N.W.2d 386 (Minn. 1979).
54. Id. at 388; see also Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 51 N.Y.2d 506, 514, 415 N.E.2d 950, 954, 434 N.Y.S.2d 961, 965 (1980) (Cooke, C.J., dissenting) (antinepotism statute is discriminatory in that it applies to marital partners but not to persons who are otherwise intimately related or living together).
56. Atkisson, 59 Cal. App. 3d at 96, 130 Cal. Rptr. at 379 (emphasis added).
Markham v. Colonial Mortgage Service Co., 57 a federal court struck down a mortgage company's policy of refusing to aggregate the incomes of unmarried couples applying for a joint mortgage while permitting income aggregation for married couples. 58 The court concluded that the company's policy impermissibly treated couples differently solely on the basis of their marital status. 59 Courts adopting the inclusive rule analyze the challenged policy to determine whether the same decision would have been made if the plaintiffs had a different marital status. Significantly, these courts are willing to compare the positions of married and unmarried couples to determine whether marital status discrimination has occurred. As a result, in some situations, the plaintiff's choice of a specific partner, whether or not a spouse, is protected by the prohibition against marital status discrimination.

Some courts, however, limit the application of the inclusive rule. For instance, in Cybyske v. Independent School District No. 196, 60 a teacher was terminated because the local school board disliked her husband's political views. The court reasoned that the termination of the plaintiff was not prohibited because the employer did not invoke an invidious classification to accomplish its goal. 61 Instead, the court reasoned, the school board's decision represented its displeasure with the husband's "political posture," a kind of discrimination the legislature did not intend to proscribe. 62 In Cybyske, therefore, the Minnesota court took a step back from the established inclusive rule analysis. Instead of focusing on whether marital status played a significant role in the employer's decision, the court drew an arbitrary line, holding that employment discrimination on the basis of a spouse's political posture is not proscribed by the prohibition against marital status discrimination. 63

57. 605 F.2d 566 (D.C. Cir. 1979). Although this case was decided under the Federal Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (1988), the court's rationale is illustrative of how some state courts have interpreted the prohibition against marital status discrimination. See, e.g., Atkisson, 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976) (using Markham as support for the conclusion that an unmarried mother could not be prohibited from living with her boyfriend in public housing).
58. Markham 605 F.2d at 569-70.
59. Id. at 570.
60. 347 N.W.2d 256 (Minn.), cert denied, 469 U.S. 933 (1984).
61. Id. at 261.
62. Id.
In *McFadden v. Elma Country Club*, a Washington court refused to apply the inclusive rule of marital status discrimination in the housing context, creating an inconsistency within the jurisdiction because the inclusive rule had been applied in the employment context. In *McFadden*, an unmarried couple applied for admission to a private housing development. The couple’s application was denied because they were not married. The Washington court found that the state’s marital status discrimination statute did not protect the couple because another Washington statute prohibited unmarried couples from cohabiting. The court reasoned that the legislature did not intend to protect unmarried couples in housing because unmarried cohabitation was illegal at the time the antidiscrimination law was enacted. The court concluded that there was no public policy supporting the protection of cohabiting adults and, therefore, refused to construe the antidiscrimination law so as to protect unmarried cohabitation.

Unlike the all-or-none rule of marital status discrimination, the inclusive rule does not limit a court’s inquiry to the question whether every member of a marital status class would be affected equally by the challenged policy. Instead, courts applying the inclusive rule find that the prohibition of marital status discrimination includes any policy that uses a marital status classification as a determining factor. To effectuate this analysis, many courts that use the inclusive rule compare similarly situated married and unmarried couples. If the comparison shows disparate treatment based on a marital status classification, the marital status discrimination law is violated. These courts, however, also have suggested that in some cases they may refuse to apply the inclusive rule analysis if they believe that application would lead to a result unintended by the legislature.

The following section points out some theoretical problems inherent in the inclusive and all-or-none rules of marital status dis-

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65. Id. at 197-98, 613 P.2d at 148.
69. Id.
71. *See supra* notes 48-59 and accompanying text.
crimination—problems that courts have neither addressed fully nor attempted to resolve.

C. The Problems Presented by Current Definitions and Applications of Marital Status Discrimination

As the above cases show, defining and applying a test for marital status discrimination has led different jurisdictions to reach substantially different conclusions about who is protected by antidiscrimination laws. Both the courts that use the inclusive rule and those that use the all-or-none rule base their analysis on legislative intent. Significantly, however, not one marital status discrimination case has cited the legislative history and debate surrounding the addition of the term "marital status" to existing antidiscrimination statutes. In fact, such documented history appears to be largely unavailable. Thus, the courts' only guide in discerning the legislative purpose behind the prohibition of marital status discrimination is the language of the statute itself.

The question of legislative intent is complicated by the fact that prohibitions against marital status discrimination have created a protected class that is manifestly different from the other classes covered by the same antidiscrimination statutes.

Unlike sex, race, or disability, for instance, a person can change her marital status with relative ease. It is not uncommon for some individuals to be single, then marry, later divorce, and then marry again. Therefore, a person's marital status may change several times, whereas for most people race, sex, and disability are immutable characteristics.

Moreover, the ability to choose and change one's marital status is complicated by the state's interest in marriage. Such an interest

72. In Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 51 N.Y.2d 506, 511-12, 415 N.E.2d 950, 953, 434 N.Y.S.2d 901, 964 (1980), the court examined a "legislative attachment" to N.Y. Exec. Law § 296 (McKinney 1982), and concluded the "attachment" supported adherence to an all-or-none rule. This "attachment," however, merely defined "marital status"; it did not state that the law should apply only when marital status is the "sole" basis for a discriminatory action.

73. This statement is less true for homosexual people who may not marry their partner in any state. See Rivera, supra note 1, at 874-78; see also Sexual Orientation and the Law, supra note 5. A gay person, however, may choose to enter into a heterosexual marriage, thus changing her marital status.

74. Religion is another mutable characteristic protected under most antidiscrimination laws. See 8A Fair Empl. Prac. Cas., supra note 11. Only a small minority of individuals, however, are likely to change their religion as often or as easily as individuals change their marital status.
suggests that being married is considered the most desirable marital status. To confirm this suggestion, the state has granted married individuals certain legal rights unavailable to single people. Thus, on the one hand, state legislatures have decided that certain business entities should make no distinction between individuals based on their marital status; yet, on the other hand, these same legislatures have granted married individuals significant preferential treatment.

(1) The Apparent Conflict Between the Prohibition of Marital Status Discrimination and the State's Interest in Marriage

The apparent conflict between the public policy of nondiscrimination and the state's interest in promoting marriage has led to inconsistent results in employment and housing cases in which the plaintiffs invoked the prohibition of marital status discrimination. For example, courts that apply the all-or-none rule sometimes rely on the state's interest in promoting marriage when they deny unmarried couples access to housing that is available to married couples. Those courts suggest that granting relief to unmarried couples would be tantamount to ignoring the special status granted to marital unions.

In employment cases, however, courts applying the same rule are willing to uphold antinepotism policies that clearly disadvantage married couples when compared to their unmarried counterparts. For instance, a couple involved in a serious relationship and engaged to be married is not prohibited from working together under most antinepotism policies (even if one fiancé supervises the other). The day

75. See, e.g., Prince George's County v. Greenbelt Homes, Inc., 49 Md. App. 314, 431 A.2d 745 (1981). The fact that the state prefers the status of marriage further distinguishes classes defined by their marital status from classes defined by their race or sex. Few would question that the state is prohibited constitutionally from creating laws or policies which expressly advantage one race or sex over another, outside of the limited exception for affirmative action programs.

76. See Rivera, supra note 1, at 874 (discussing marital benefits such as preferential tax treatment, wrongful death standing, social security benefits, intestate succession, and other nongovernmental benefits).

77. See infra text accompanying notes 40-43.

78. Prince George's County, 49 Md. App. at 319-20, 431 A.2d at 748. Taken to its extreme, the reasoning in Prince George's County could support the conclusion that Maryland's prohibition against marital status discrimination would not, for instance, protect a divorced woman who is denied housing because she is divorced. The court could reason that protecting the plaintiff under the antidiscrimination measure might encourage divorce, and thereby undermine the state's interest in marriage.

79. See supra notes 27-38 and accompanying text.

80. But see Espinoza v. Thoma, 580 F.2d 346, 349 (8th Cir. 1978) (holding that an employer's antinepotism policy that prohibited spouses from working together could apply to an unmarried couple in a marriage-like relationship).
after the couple marries, however, one spouse can expect a termination or transfer notice when returning to work.\(^8\) The only change worked by the wedding is in the couple's marital status, yet a court applying the all-or-none rule in this scenario would find no marital status discrimination in the spouse's instant termination.\(^8\) One judge has argued that such a rule might induce a couple to forego or even dissolve a marriage, especially in a small town where one company is the primary employer.\(^8\) Such a result clearly would derogate the state's interest in promoting marriage. Yet courts applying the all-or-none rule offer no explanation why the state's interest in marriage is controlling in housing cases but not in employment cases.

This conflict is no less a problem for those courts adopting the inclusive rule of marital status discrimination. At least one inclusive rule jurisdiction has invoked the state's interest in marriage as a basis for striking down antinepotism policies.\(^8\) The same jurisdiction, however, subsequently held that the protection against marital status discrimination extends to a plaintiff whose employment is terminated because she lives with a nonspousal lover.\(^8\) If, as the first court reasoned, the antidiscrimination statute was designed to protect the status of marriage, there is little justification for extending its provisions to protect unmarried couples.

This apparent analytical conflict between the states' interest in marriage and their prohibition of marital status discrimination has not been resolved by any court. As a result, there is a significant gap in the framework of marital status discrimination law leading to inconsistent judicial application.

(2) Protection for the Couple Versus Protection for the Individual—How Should the Issue be Framed?

The conflicting rules applied in marital status discrimination cases suggest a common analytical problem: is the prohibition against marital status discrimination meant to protect individuals or couples? Courts applying the all-or-none rule implicitly criticize the inclusive

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81. See, e.g., Miller v. C.A. Muer Corp., 420 Mich. 355, 358-59, 362 N.W.2d 650, 651 (1984) (plaintiff, a restaurant waiter engaged to another employee, was told that after his marriage he would have to quit, accept a transfer, or be discharged).

82. Id. at 364, 362 N.W.2d at 654 (antinepotism policy was not discriminatory on its face).


84. Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979), discussed supra text accompanying notes 53-54.

rule because it appears to protect unmarried relationships rather than an individual’s marital status. The all-or-none rule is thus an analytical tool used by these courts to severely restrict the protection provided by prohibitions against marital status discrimination, a goal they claim to be consistent with the legislative intent.

Courts applying the inclusive rule, on the other hand, refuse to accept the all-or-none rule because it is underinclusive—allowing some landlord, employer, or creditor policies to survive court challenge despite their explicit, partial reliance on the plaintiff’s marital status. To be sure, when the inclusive rule is used to invalidate a housing policy that forbids two unmarried individuals from living together, the unmarried couple gains protection from the prohibition against marital status discrimination. At the same time, however, the defendant landlord is sanctioned for using a policy which includes a prohibited classification, an important goal of antidiscrimination measures.6 This “broad view” suggests that although the primary purpose of marital status discrimination laws is to protect the individual from arbitrary classification, a secondary effect may be the protection of unmarried couples’ interests. Even though courts applying the all-or-none rule have rejected the analytical tool of comparing married and unmarried couples, the analysis could be framed differently to avoid the perceived problem of treating two unmarried people as a family unit. In the employment setting, for instance, one can make a strong argument that antinepotism policies place additional burdens on an applicant on the basis of her marital status. If she is married, additional restrictions apply to her employment eligibility that do not apply to the similarly situated unmarried individual. Likewise, the unmarried person applying for housing only made available to married couples faces restrictions on her use of the property that are not placed on a similarly situated married applicant. Therefore, even though courts applying the all-or-none rule refuse to use an analysis that compares married and unmarried couples, it is unavoidable that the policies in question draw distinctions between classes of people on the basis of marital status, burdening some classes more than others.

II. Marital Status Discrimination: A Doctrine that Ought to Protect Unmarried Couples

Part I of this Note has shown that given virtually identical facts and substantially similar legislative directives, state courts have de-
developed two very different analyses of marital status discrimination. The divergence of views begins when the court frames the issue: The all-or-none rule courts find that cases challenging antinepotism rules and housing policies prohibiting unmarried couples from living together are about a plaintiff's choice of partner and the position of that partner with respect to the plaintiff. To the inclusive rule courts, on the other hand, those same cases are about whether the challenged policy creates categories of individuals based on a protected status.

Part II of this Note argues that for a court to choose between these two conflicting views of the issue it must examine: the express intent of the legislature, the goals of civil rights statutes, and the traditional discrimination doctrine formulated in other contexts. This Part concludes that such an examination should lead state courts to frame the marital status issue along the lines of the inclusive rule. It suggests, however, that in order not to offend the strong policy against arbitrary classifications embodied in prohibitions against marital status discrimination, the inclusive rule must be refined. This Part proposes a rule modeled on the traditional discrimination analysis formulated under the federal Constitution and Title VII of the Civil Rights Act of 1964 and explains how the conflict between a state's interest in fostering marriage and its interest in prohibiting marital status discrimination can be resolved.

A. The Inclusive Rule: An Approach Supported by Traditional Discrimination Law

The right to be free from marital status discrimination is granted statutorily by state legislatures. Thus, the meaning of that right must be determined in light of the legislative intent behind the enactment. As stated earlier, the legislative history of marital status discrimination provisions has not been used to justify the adoption of the inclusive rule or the all-or-none rule. If a court cannot find support for its interpretation of a prohibition in that provision's own record of enactment, therefore, the court should construe the prohibition in the light of the antidiscrimination statute as a whole.

87. See supra notes 9-13 and accompanying text.
(1) The Legislative Intent Behind Antidiscrimination Statutes

In most states the prohibition against marital status discrimination has been added to existing human or civil rights laws that already protected individuals from discrimination based on race, sex, and national origin. These legislative directives instruct that employment, housing, and other business decisions must be based on merit rather than arbitrary classifications.

Many states consider the right to be free from discrimination on the basis of statutorily specified classifications a civil right. The statutes themselves often contain descriptions of the legislative policy and purpose behind their antidiscrimination measures. For instance, Alaska’s legislature states:

"It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, marital status, changes in marital status, pregnancy, or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety and general welfare of the state and its inhabitants."

The California legislature concluded that discrimination based on race, religious creed, color, national origin, marital status, sex or age "foments domestic strife and unrest, [and] deprives the state of the fullest utilization of its capacities for development and advance."

Similarly, the New York legislature declared:

"[T]he state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and . . . its inhabitants."

In light of the explicit purposes of these civil rights laws, the addition of marital status discrimination provisions is most reason-

89. See supra notes 9-13 and accompanying text.
90. See Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979); Thompson v. Board of Trustees, School Dist. No. 12, 192 Mont. 266, 270, 627 P.2d 1229, 1231 (1981).
94. N.Y. Exec. Law § 290(3) (McKinney 1982).
ably understood as the manifestation of legislative determination that marital status discrimination is against public policy and dangerous to the welfare of the state.95 Moreover, these policy statements are strong reminders to landlords, employers, certain businesses, and the courts that significant harm is caused by policies that burden a protected class.96

Despite such strong legislative statements condemning marital status classifications, courts evaluating marital status cases under the all-or-none rule allow employers to deny employment to an applicant when her husband is employed by the company.97 Although the challenged policy does not discriminate against all married persons, it creates a subclass of individuals who cannot be employed because they are married.98 Thus, the employer's action infringes upon a protected classification and arguably was meant to be prohibited by the legislature.99 A similar infringement occurs when a subclass of unmarried individuals wishing to live with a partner are denied access to housing made available to married couples.100

95. For other state legislative pronouncements on the importance of eliminating marital status discrimination see ALASKA STAT. § 18.60.010 (1986); CAL. GOV'T CODE § 12920 (West 1989); HAW. REV. STAT. § 368-1 (1985); ME. REV. STAT. ANN. tit. 5, § 4552 (1989); MD. ANN. CODE art. 49B, § 14 (1979); NEV. REV. STAT. ANN. § 598B.020 (Michie 1986); N.J. STAT. ANN. § 10:5-3 (West 1976); N.Y. EXEC. LAW § 290 (McKinney 1982); R.I. GEN. LAWS § 34-37-1 (1990); VA. CODE ANN. § 2.1-715 (1987); WASH. REV. CODE ANN. § 49.60.010 (1990); WIS. STAT. ANN. § 111.31 (West 1989).
96. See Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979) (an employment policy that discriminates on the basis of marital status must withstand strict scrutiny).
97. See supra notes 26-38 and accompanying text.
98. Id.

Significantly, the majority of state agencies charged with interpreting and applying the states' civil rights laws, see supra note 29, have interpreted marital status discrimination prohibitions under the inclusive theory. See, e.g., Atkinson v. Kern County Hous. Auth., 59 Cal. App. 3d 89, 96, 130 Cal. Rptr. 375, 379 (1976) (a HUD circular sent to local housing authority prohibited policy that automatically excluded unmarried cohabiting adults); Prince George's County v. Greenbelt Homes, Inc., 49 Md. App. 314, 315-17, 431 A.2d 745, 746 (1981) (Human Relations Commission of Prince George County argued that cooperative's policy denying membership to unmarried couples violated local marital status discrimination ordinance); Thompson v. Sanborn's Motor Express, Inc., 154 N.J. Super. 555, 559, 382 A.2d 53, 55 (1977) (Civil Rights Division found that antinepotism policy unlawfully discriminated on the basis of marital status); Manhattan Pizza Hut, 51 N.Y.2d at 511, 415 N.E.2d at 952, 434 N.Y.S.2d at 903 (Human Rights Division argued that "marital status" includes the identity or situation of an individual's spouse); Washington Water Power Co. v. Washington State Human Rights Comm'n., 91 Wash. 2d 62, 69, 586 P.2d 1149, 1153 (1978) (State Human Rights Commission argued that the legislature did not intend to restrict coverage to situations in which employer refuses to hire a person solely because she is married or unmarried).
100. See supra notes 39-47 and accompanying text.
By allowing employers and landlords to use explicit marital status classifications, all-or-none jurisdictions permit the use of stereotypes and arbitrary prejudices as a part of the business decisionmaking process. For instance, an employer might choose to use marital status as an indicator to determine how likely it is an employee will remain in the same geographical location, if an employee will be able to take long business trips away from home, what relationship the employee will have with other employees, or if the employee will be “committed” and “stable.”101 Landlords might be interested in a prospective tenant’s marital status to discover the number of people who will occupy the residence, the level of noise and the possibility of numerous guests at the residence, the likelihood that the rent will be paid regularly, the possibility of children living in the residence, or the morality or immorality of the applicant’s lifestyle.102 But the information prospective landlords and employers supposedly glean from inquiring about an applicant’s marital status could be learned more accurately through other, more specific, questions.103 Implicit in the use of marital status as a shorthand method of determining a person’s lifestyle and personality is the notion that all married people or all single people behave or think in a certain way. Reliance on stereotypes is exactly what the state legislatures expressly intended to prohibit by enacting human rights laws: “Civil rights acts seek to prevent discrimination against a person because of stereotyped impressions about the characteristics of a class to which the person belongs . . . . [Such legislation] seeks to eliminate the effects of offensive or demeaning stereotypes . . . .”104

Policies that treat married and unmarried couples differently also are demeaning to unmarried, lesbian, and gay couples.105 Such

101. See, e.g., Bradsher, Young Men Pressed To Wed for Success, N.Y. Times, Dec. 13, 1989, at 1, col. 4 (suggesting that employers “tend to perceive married men as more stable, more dedicated to their careers, better able to get along with others, and less likely to cost the company money by changing jobs!” and that single women are perceived as being more able to “concentrate fully on their work”).

102. See Bayer, Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws, 45 WASH. & LEE L. REV. 1, 93-94 (1988) (arguing that inquiries about marital status may result in decisions based on “personal distaste, misinformed stereotyping or both”).

103. In some cases, inquiries about marital status might be used to discriminate against individuals on some other basis. For instance, an employer wishing to avoid hiring a woman who may become pregnant might use the woman’s marital status as an indicator of the likelihood that she will become pregnant. A person’s marital status also might be used to help the employer decide if the applicant is homosexual. See, e.g., Bradsher, supra note 103 at 1, col. 4 (“[M]anagers sometimes have prejudices against hiring or promoting homosexuals, and assume that married men are heterosexual, career counselors said.”).


105. This problem is shown when courts apply the all-or-none rule in discrimination cases.
policies lend credence to the stereotype that nonmarital relationships are transitory, frivolous, morally reprehensible, or simply unimportant.\textsuperscript{106} These stereotypes are grounded in marital status classifications that arbitrarily define relationships in purely legal, as opposed to factual, terms. As more individuals develop significant and stable bonds without the marriage label, marital status classifications will be an increasingly inaccurate means of categorizing relationships. The inclusive rule therefore, best effectuates the strong public policy against the use of arbitrary classifications because it forces employers and landlords to base their decisions on an applicant’s qualifications, rather than on preconceived notions about how married or single persons act.

\textit{(2) Traditional Discrimination Analysis}

The previous section of this Note showed that prohibitions of marital status discrimination occur most often within statutes prohibiting discrimination based on other classifications, such as race, sex, and national origin.\textsuperscript{107} Although the application of the prohibition against marital status discrimination is relatively new, there is a rich case history in the areas of race and sex discrimination that is instructive on how prohibitions against discrimination should be analyzed. In this section, antinepotism policies prohibiting spouses from working for the same employer will be compared to hypothetical and actual employment discrimination cases based on race and gender.

For the purposes of this comparison it is important to understand how the employer constructs and applies an antinepotism policy. The typical antinepotism policy or no-spouse rule, as exemplified in \textit{Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeals Board},\textsuperscript{108} is used to terminate or deny employment when two criteria are satisfied. First, the applicant must be married; second, her partner (in this case her spouse) must be employed by the employer promulgating the policy.\textsuperscript{109} The justification for such a policy

\textsuperscript{106} For an example of judicial stereotyping regarding the value of nonmarital relationships, see Prince George's County v. Greenbelt Homes, Inc., 49 Md. App. 314 \textit{passim}, 431 A.2d 745 \textit{passim} (1981).

\textsuperscript{107} \textit{See supra} notes 89-96 and accompanying text; \textit{see also supra} notes 9-13 (cataloging state marital status discrimination provisions).


\textsuperscript{109} For the purposes of this section the construction of the second criteria has been altered slightly from that used by the New York court in \textit{Manhattan Pizza Hut}. In that case, the court stated that the second half of the policy worked to deny employment when
is the employer's belief that two people who are involved in an intimate, long-term relationship and who work together may favor each other for promotion or other employment benefits and may bring domestic disputes into the workplace.

**EXHIBIT A**

**Employment Policies That Use Protected Classifications to Limit Employment Opportunities**

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prohibited Classification</strong></td>
<td><strong>Nonprohibited Additional Factor</strong></td>
<td><strong>Stated Reason for Policy</strong></td>
</tr>
<tr>
<td>1. Married applicants</td>
<td>whose spouse works for the same employer</td>
<td>eliminate favoritism in the workplace</td>
</tr>
<tr>
<td>2. African American applicants</td>
<td>who are applying on an odd-numbered day of the month</td>
<td>reduce influx of applicants</td>
</tr>
<tr>
<td>3. Female applicants</td>
<td>who are married</td>
<td>reduce marital tension created by long absences</td>
</tr>
</tbody>
</table>

Exhibit A illustrates the antinepotism policy at line one. As the Exhibit shows, the criteria in column A represent classifications protected by state law. The criteria in column B, applied only to the protected class, are not prohibited by state law. If the criteria in column B were applied to all employees, therefore, they still would be legally permissible.

In courts adopting the all-or-none rule, employers have successfully argued that only those applicants who have spouses working for the same employer are burdened by the policy and therefore no marital status discrimination has occurred. In adopting this conclusion, the court considers only the criterion in line 1, column B, of the Exhibit determinative in the employment decision. The court's conclusion is bolstered by the close fit between the policy's non-prohibited criterion and its legitimate justification. In this analysis, the applicant's spouse worked for the same employer. Id. at 514, 415 N.E.2d at 954, 434 N.Y.S.2d at 965. By using the word "spouse" to describe the identity of the employee, the court and the employer imported a marital status classification into the second criteria of the policy. The employer's stated justification for the rule, however, was "[t]o prohibit employment relationships which can cause problems for the Company or for individuals." Id. at 513, 415 N.E.2d at 954, 434 N.Y.S.2d at 965. Based on this explicit justification, and to make the strongest case on behalf of the employer, the wording of the second criteria has been changed to remove the prohibited classification.

110. See supra text following note 38.

111. See, e.g., Manhattan Pizza Hut, 51 N.Y.2d at 513, 415 N.E.2d at 954, 434 N.Y.S.2d at 965.
the court dismisses the first column criterion, which is expressly a marital status classification, reasoning that since not all married applicants are affected the classification is permissible. Thus, these courts have concluded that since the policy, if applied to all employees, would not be prohibited under state law, it is not discriminatory to apply that policy to only a portion of a protected class. Such an extraordinary analysis stands alone against the great weight of authority in other employment discrimination cases.

a. A Comparison to Employment Discrimination Based on Race and Sex

A hypothetical employment policy with the same characteristics as the antinepotism rule discussed above is created easily. Suppose, for example, that a large manufacturing employer regularly receives a deluge of employment applications for a relatively small number of regularly available positions. To ease the strain on employees who must review these applications, the employer institutes a two-pronged policy, illustrated at line two of Exhibit A. The policy states that applications received from African Americans will be accepted only on odd-numbered days of the month. The first prong of the policy clearly invokes a racial classification prohibited by state and federal law. The second prong is not legally prohibited, and the stated justification for the policy clearly fits with the policy's second criterion. A court applying the all-or-none rule would find that the policy is not racially discriminatory because it does not burden all African Americans, only those applying on certain days. Given such an analysis, the court would conclude that the employer made its adverse decision based on the date the application was tendered, not on the race of the applicant. Of course, under established race discrimination jurisprudence, no modern-day court would be so bold as to make such a suggestion.

In Loving v. Virginia, the United States Supreme Court ruled that antimiscegenation statutes violated the equal protection clause of the fourteenth amendment. The state of Virginia argued that

113. An employer could implement a legitimate policy limiting the number of days it would consider employment applications.
114. In Thomson v. Sanborn's Motor Express, Inc., 154 N.J. Super. 555, 561, 382 A.2d 53, 56 (1977), the court upheld the challenged antinepotism policy, concluding: "Her employment was terminated because of her relationship to another employee, not because of her marital status."
116. Id. at 12.
because the statute equally burdened both spouses of the interracial marriage, the statute did not discriminate on the basis of race.\textsuperscript{117} Rejecting this argument, the Court focused on the specific racial classification contained in the statute and strictly scrutinized the state's justification for the classification.\textsuperscript{118} The state might have argued that the challenged law did not burden all white or black people, but only those individuals \textit{who chose to enter an interracial marriage}. Such an argument clearly would not have affected the Court's decision, however, because the Court made clear that it could not ignore the statute's explicit racial classification.\textsuperscript{119} In relation to column A of Exhibit A, therefore, the Court clarified that a crucial factor in analyzing allegedly discriminatory policies is whether the policy explicitly uses a prohibited classification.

Interpretations of statutory prohibitions against race discrimination reach the same conclusion. For instance, in \textit{McDonnell Douglas Corp. v. Green},\textsuperscript{120} the Supreme Court created the now well-established test for proving unlawful disparate treatment based on race under Title VII of the Civil Rights Act of 1964.\textsuperscript{121} To make out a prima facie case of racial discrimination, the plaintiff must show: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\textsuperscript{122} An African American plaintiff bringing suit against an employer that had instituted the policy in line two of Exhibit A would have little trouble meeting her burden under the \textit{McDonnell Douglas} test, despite the fact that not all African Americans are affected by the policy. Likewise, if a similar test were used under a state antidiscrimination law, a qualified married plaintiff challenging an antinepotism policy would be able to establish a prima facie case of illegal discrimination, despite the fact that the policy did not burden all married applicants.

A special class of sex-discrimination cases under Title VII also provides a telling criticism of the all-or-none rule. In \textit{Phillips v. Martin Marietta Corp.},\textsuperscript{123} the United States Supreme Court reviewed an

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 8.
\item \textsuperscript{118} \textit{Id.} at 8-9.
\item \textsuperscript{119} \textit{Id.} at 10-11.
\item \textsuperscript{120} 411 U.S. 792 (1973).
\item \textsuperscript{121} 42 U.S.C. § 2000-e (1988).
\item \textsuperscript{122} \textit{McDonnell Douglas}, 411 U.S. at 802.
\item \textsuperscript{123} 400 U.S. 542 (1970).
\end{itemize}
employer's policy that denied employment to women with preschool age children but not to similarly situated men. The Court held that Title VII did not permit employers to implement different hiring criteria for men and women unless the employer could show that the differing criteria were based on a bona fide occupational qualification.\textsuperscript{124} The \textit{Phillips} decision has been used by several courts to invalidate policies that impose additional requirements on female applicants.\textsuperscript{125} The rationale behind this decision was explored further in \textit{Sprogis v. United Air Lines, Inc.},\textsuperscript{126} in which a female plaintiff challenged an airline policy requiring that all female stewardesses remain unmarried. This policy is illustrated in line three of Exhibit A. As with the previous two examples, the policy combined a prohibited and a permitted classification.\textsuperscript{127} In \textit{Sprogis}, the Seventh Circuit held that although only a subclass of women was affected by the policy, it violated the prohibition against sex discrimination. The court concluded, "'It does not seem to us relevant that the rule is not directed against all females, but only against married females, for \textit{so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex}."\textsuperscript{128} Moreover, the court rejected the argument that Title VII should apply only when explicit discrimination is based "solely" on sex.\textsuperscript{129} As Exhibit A illustrates, antinepotism policies that rely on marital status classifications are no different in their construction or application from "sex-plus" employment policies which have been struck down under Title VII. Both policies use an impermissible classification coupled with a permissible one to discriminate against a subclass of the protected group. The \textit{Phillips} and \textit{Sprogis} decisions, and their progeny, flatly

\textsuperscript{124} \textit{Id.} at 544.

\textsuperscript{125} These decisions have become known as "sex-plus" discrimination cases. See B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW ch. 12, § VI, at 403 & n.169 (2d ed. 1983).

\textsuperscript{126} 444 F.2d 1194 (7th Cir. 1971).

\textsuperscript{127} In comparing United's policy to the other policies shown in Exhibit A, it is important to note that marital status is considered a nonprohibited classification in cases brought solely under Title VII. See 42 U.S.C. § 2000e-2 (1988).

\textsuperscript{128} \textit{Sprogis}, 444 F.2d at 1198 (quoting 29 C.F.R. § 1604.3(a) (1970)) (emphasis added).

\textsuperscript{129} \textit{Id.} The Court noted that Congress explicitly rejected the addition of the word "solely" when it enacted Title VII and, therefore, concluded that such a restrictive interpretation of the statute would be contrary to Congress' intent. \textit{Id.} at 1198 & n.4 (citing 110 CONG. REC. 2728, 13,825 (1964)).

Notably, the courts adopting the all-or-none rule in marital status cases have interpreted the antidiscrimination measures to apply to discrimination based "solely" on marital status, despite the conspicuous absence of the word "solely" in the text of the statute. See supra notes 24-37 and accompanying text.
reject the notion that every member of a protected class must be burdened before the policy will be held discriminatory.\textsuperscript{130}

b. A Comparison to Mixed-Motive Discrimination

The antinepotism policy and the other policies discussed above share a common characteristic: each involves a combination of legally legitimate and illegitimate elements. In this way, they are analogous to the mixed-motive discharge analyzed by the Supreme Court in \textit{Price Waterhouse v. Hopkins}.\textsuperscript{131} In that case, the plaintiff alleged that she was denied a partnership at Price Waterhouse in violation of Title VII's prohibition against sex discrimination.\textsuperscript{132} The Court concluded, however, that Price Waterhouse had both a permissible and an impermissible reason for denying the partnership to Ms. Hopkins. The Court held that the company legitimately could deny partnership because Hopkins had difficulty getting along with her co-workers but could not deny partnership because she did not behave in a stereotypically female way.\textsuperscript{133} The Court concluded that both reasons were factors in the decision and remanded the case for further hearings.\textsuperscript{134} The partnership decision in \textit{Hopkins} involved a mixture of legitimate and illegitimate criteria. Similarly, an antinepotism policy may mix impermissible marital status classifications with permissible efforts to eliminate family favoritism from the workplace.

The Court's analysis in \textit{Hopkins} strongly affirmed the purpose of Title VII "to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."\textsuperscript{135} As in \textit{Sprogis v. United Airlines, Inc.},\textsuperscript{136} the \textit{Hopkins} Court emphasized that Title VII provides relief even when the use of a prohibited classification is not the "sole" reason for the adverse employment decision.\textsuperscript{137} For the plaintiff to establish wrongful discrimination by the employer, she only need prove that a prohibited classification was a "motivating" factor in the challenged decision.\textsuperscript{138} Assuming the employer does not

\begin{itemize}
  \item \textsuperscript{130} Citing two unpublished EEOC decisions, Schlei and Grossman note that the analysis in "sex-plus" cases also is applied in race discrimination cases. \textit{See} B. SCHLEI \& P. GROSSMAN, \textit{supra} note 125, at 290 \& nn.3 \& 7.
  \item \textsuperscript{131} 490 U.S. 228 (1989).
  \item \textsuperscript{132} \textit{Id.} at 231-32.
  \item \textsuperscript{133} \textit{Id.} at 250-52.
  \item \textsuperscript{134} \textit{Id.} at 258.
  \item \textsuperscript{135} \textit{Id.} at 241.
  \item \textsuperscript{136} 444 F.2d 1194 (7th Cir. 1971).
  \item \textsuperscript{137} \textit{Hopkins}, 490 U.S. at 241.
  \item \textsuperscript{138} \textit{Id.} at 249-50.
\end{itemize}
argue that the adverse decision was based on a bona fide occupational qualification, it can only avoid liability if it can prove that the same decision would have been made absent the discriminatory motive.\textsuperscript{139} Throughout the Hopkins opinion, the Court reiterated the important role of Title VII in eliminating the use of certain bases for distinguishing among employees, even when prohibited and legitimate considerations are mixed.\textsuperscript{140}

Federal courts' analyses of what properly is considered discrimination on the basis of a prohibited classification offer important guidance to state courts. State antidiscrimination laws often parallel the wording of Title VII,\textsuperscript{141} and state courts routinely have looked to federal interpretations of Title VII in construing the meaning and application of state law.\textsuperscript{142} The federal cases leave no doubt that the all-or-none rule pioneered by the New York Court of Appeals in Manhattan Pizza Hut\textsuperscript{143} is unacceptably narrow and dangerously emasculatory of antidiscrimination measures. Furthermore, singling out marital status discrimination for more restrictive interpretation than race or sex discrimination makes no sense in light of the fact that most state legislatures have included their prohibition of marital status discrimination within the same sentence as their provisions prohibiting race and sex discrimination.\textsuperscript{144} The fact that a legislature has added "marital status" to an existing statute with a specific case history and application shows that it intended that marital status be considered in the same manner as the other prohibited classifications.

B. A Refined Formulation of Marital Status Discrimination

The following section proposes a refined inclusive rule of marital status discrimination consistent with traditional discrimination anal-

\textsuperscript{139} Id. at 242.

\textsuperscript{140} See, e.g., id. at 239-41.


\textsuperscript{142} See, e.g., Alaska State Comm'n for Human Rights v. Yellow Cab, 611 P.2d 487, 490 (1980) (using the McDonnell Douglas disparate treatment test developed under Title VII to interpret Alaska's prohibition against race discrimination in employment); New York Div. of Human Rights v. Killian Mfg., 35 N.Y.2d 201, 209 (1974) (relying on disparate impact and treatment models developed under Title VII to interpret employment discrimination provisions of New York state law); Dept' of Fair Employment and Hous., v. Church's Fried Chicken, Inc., No. 90-11 (Cal. Dept' of Fair Employment & Hous., Aug. 16, 1990) (decision of state agency comparing state equal opportunity laws with the provisions of Title VII to develop a more liberal analysis than that adopted under Title VII in employment discrimination cases.)

\textsuperscript{143} 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980).

\textsuperscript{144} See supra notes 9-13 and accompanying text; supra notes 89-96 and accompanying text.
ysis. It also proposes a resolution to the perceived conflict between the state’s interest in marriage and the prohibition against marital status discrimination.

(1) The Protected Class and a Sine Qua Non Test

Antidiscrimination statutes attempt to prohibit the use of certain classifications as a factor in business decisions. Thus, laws prohibiting marital status discrimination should apply whenever a statutorily protected class of persons is defined by marital status for decisionmaking purposes. If marital status is a factor considered under the challenged policy, and the aggrieved person would not have been harmed but for her marital status, the policy should be found invalid as marital status discrimination.

It is important to emphasize that the court should apply this proposed "but-for" test to decide whether marital status was a motivating factor in the challenged decisionmaking; the plaintiff should not be required to prove that marital status was the sole reason for the challenged decision. Although the analysis under a state prohibition of marital status discrimination should be similar to the analysis under the state’s race and sex discrimination provisions, the state courts also ought to consider the Supreme Court’s discrimination jurisprudence for guidance. Specifically, once the plaintiff has made a prima facia case that marital status was a motivating factor in the adverse decision, the defendant should have the burden of proving that the same decision would have been made absent consideration of the plaintiff’s marital status. If the defendant cannot meet that burden, the plaintiff will effectively have shown the necessary "but-for" causation. Paralleling traditional race and sex discrimination analysis, this test is designed to prevent decisionmakers from using an arbitrary marital status classification to distinguish among individuals.


146. For similar tests, see Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566, 569 (D.C. Cir. 1979) (marital status discrimination occurs when persons are treated differently, "‘all other facts being the same, because of their marital status . . . .’") (quoting Brief for Defendant); Thompson v. Board of Trustees, School Dist. No. 12, 192 Mont. 266, 270, 627 P.2d 1229, 1231 (1981) (using a sine qua non rationale to find marital status discrimination).


148. Id. at 249.

149. See id.
This refined test presents a clear and well-established method for determining whether a challenged policy uses an impermissible, invidious classification based on marital status. As such, it puts to rest the debate over whether or not the courts should compare similarly situated married and unmarried couples. Any action taken by a landlord or employer that disadvantages a couple on the basis of their marital status, also disadvantages each individual in the couple by imposing additional restrictions or requirements because of the individual's decision to be married or unmarried. Such a policy creates a class of people defined, in part, by their choice of marital status. Whether or not a court chooses to compare the couples or the individuals in a class, the result must be the same—a finding of marital status discrimination. By adopting this test, therefore, the courts correctly would be opening the door for unmarried couples to challenge certain actions taken against them by private employers, landlords, creditors, and owners of public accommodations.

(2) Reconciling State's interest in Marriage with Prohibitions Against Marital Status Discrimination

The question remains what balance this refined analysis strikes between the human rights goal of prohibiting marital status discrimination and the state's interest in promoting marriage. The answer to this question must lie in the explicit prohibition adopted by the state legislatures.

By enacting human rights laws to prevent marital status discrimination, legislators have limited the ability of certain individuals to use marital status to differentiate among people. Of course, the state may pass legislation that disproportionately benefits married couples because it has a legally cognizable interest in promoting marriage. Since marriage is a legally created union, lawmakers should decide what benefits and obligations to confer on married couples. The state, through its legislature, is in the best position to define the scope and effect of its interest in marriage.

Conversely, employers, landlords, and owners of public accommodations (depending on the scope of a state's legislation) have not

150. See generally Rivera, supra note 1; see also Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 16, 663 P.2d 904, 914, 192 Cal. Rptr. 134, 144 (1983) (Broussard, J., dissenting) ("when the Legislature intends to deny benefits to nonmarital partners, it does so expressly."); Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 527, 213 Cal. Rptr. 410, 417 (1985) ("The state's public policy favoring marriage is promoted by conferring statutory rights upon married persons which are not afforded unmarried partners.").
been entrusted with the authority to define the scope of or benefits derived from the state’s interest in marriage. In fact, prohibitions against marital status discrimination explicitly limit the ability of business entities to reward or penalize people based on their marital status. State legislatures enacted human rights laws to prevent such entities from imposing arbitrary and sometimes moralistic policies on individuals and to require those entities to base their decisions on merit and legitimate business concerns.  

III. Application of the Modified Inclusive Rule

The proposed modified inclusive rule departs significantly from the traditional all-or-none rule of marital status discrimination. It also offers greater protection than that provided by the established inclusive rule. This Part illustrates how the new test should operate. It points out a few cases that appear to have adopted this test and defines the scope of protection the new test affords unmarried couples.

A. Employment Policies

The most often litigated employment policy under marital status discrimination law is the antinepotism or no-relatives policy. Some antidiscrimination statutes provide an exception for policies that use a protected classification when the classification is considered a bona fide occupational qualification (BFOQ). This exception provides the employer with an opportunity to justify the antinepotism policy as reasonably necessary to the business. In a number of jurisdictions, where antinepotism policies are held not to be a BFOQ or no BFOQ is allowed, employers would be required to reformulate their policies under the refined inclusive test to eliminate marital status discrimination.

151. See Thompson v. Board of Trustees, School Dist. No. 12, 192 Mont. 266, 270, 627 P.2d 1229, 1231 (1981); see also Ziegler, Beliefs No Basis to Turn Down Renters, Panel Says, L.A. Daily J., Aug. 21, 1989, at 4, col. 2 (California Fair Employment and Housing Commission ruled that landlords may not refuse to rent to unmarried couples because of a religious belief that nonmarital sex is sinful).

152. See supra notes 26-38 and accompanying text.

153. See supra note 18 and accompanying text.

154. See, e.g., Kraft, Inc. v. State, 284 N.W.2d 386, 388-89 (Minn. 1979) (holding antinepotism policy presumptively invalid, but remanding case for factual determination of whether the policy might fall under the statutory exception for a BFOQ); Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 51 N.Y.2d 506, 516, 415 N.E.2d 950, 955, 434 N.Y.S.2d 961, 966 (1979) (Cooke, C.J. dissenting) (arguing that an antinepotism policy violates marital status discrimination provision unless employer can justify policy as a BFOQ).
discrimination.\textsuperscript{155} Most antinepotism policies first define a class of people who are married and then act to discriminate against a sub-group of that class.\textsuperscript{156} Because such a policy uses a protected classification, it would violate the prohibition against marital status discrimination. Although such a policy would be found illegal under the refined inclusive rule, the employer could still create a policy that proscribes certain kinds of relationships that interfere with the productivity or morale of employees.\textsuperscript{157} The employer still would be able to prevent employees involved in intimate relationships from working together. To survive a challenge of marital status discrimination, however, the employer’s policy would have to apply equally to married and unmarried employees.

Other employer policies also are subject to attack under the proposed test. For instance, employers often extend more fringe benefits to married employees than to unmarried employees. A poignant example of this is the common practice of allowing a married employee funeral leave in the event her spouse dies but disallowing an unmarried employee funeral leave when her unmarried partner dies. In fact, the unmarried employee might be terminated for taking time off to attend her loved one’s funeral if she chooses to leave without claiming to be sick or on vacation.\textsuperscript{158} Such policies would be invalidated under the proposed test since married employees receive a benefit unavailable to unmarried employees.\textsuperscript{159}

\begin{itemize}
  \item 155. Certainly the mixture of close personal relationships and the supervisor-supervisor role may create friction between the persons involved and resentment among co-workers. The addition of “marital status” to the categories of proscribed discrimination \ldots\ did not declare concern about such potential conflicts to be unfounded. The amendment did, however, place bounds on the methods that could be used to limit or prevent such conflicts \ldots\ An employer should be free to prevent personal relationships between supervisors and other employees from disrupting the work environment through rules focused on such a problem, not by unwarranted interference with a protected status.
  \item 156. \textit{See supra} notes 108-111 and accompanying text.
  \item 157. A simple example of an antinepotism policy that would not offend the proposed marital status discrimination law would be a prohibition against a supervisor and a subordinate living together in the same household. Because the policy does not use a marital status classification, it is unlikely that applying the proposed “but-for” test would result in a finding that marital status discrimination had occurred. Whether or not the two people are involved in an intimate relationship, the fact that they live together might indicate a high likelihood of nepotism.
  \item 158. In an attempt to remedy this problem, several cities have enacted or attempted to enact domestic partnership laws that require employers to provide equal bereavement leave to married employees and unmarried domestic partners. \textit{See, e.g., Domestic Partner is New Addition to the ‘Family:’ California Cities Set Trend,} L.A. Daily J., July 11, 1989, at 1, col. 2 (noting that such laws exist in West Hollywood and Berkeley, California).
  \item 159. A simple solution to this problem is to allow every employee the opportunity to
The application of prohibitions against marital status discrimination to the administration of health plans is more controversial. Arguably, married employees who have spousal coverage through a company medical plan are more highly compensated than single employees. A married employee is given the benefit of a group rate for medical coverage for herself and her spouse, whereas an unmarried employee receives group medical coverage only for herself. Moreover, the employer usually pays the premium for both the employee and the spouse. Because spousal health coverage has real economic value that only is given to married employees, they are compensated at a higher rate than unmarried employees based on a prohibited classification unrelated to their work performance. Such unequal compensation would appear to violate the prohibition against marital status discrimination.

Under the proposed marital status discrimination test, many employer health benefit plans would be invalid. Unless legislatures amend the marital status discrimination statutes to exempt health plans, employers face two alternatives. They could choose to stop offering spousal benefits to married employees, thus equally failing to compensate married and unmarried employees providing for another's health care. Or the employer could implement a policy that compensates married and unmarried couples equally by offering optional coverage for one other person in the employee's household and the employee's children.

name one person with whom they have special, emotional ties. If the named person should die, funeral leave would be granted.

160. See Bowen & Wadley, Designing a Strategic Benefits Program, 21 COMPENSATION & BENEFITS REV. 44, 44-47 (1989) (arguing that an employer's contribution to an employee's medical and disability insurance plan is an integral part of that employee's compensation and therefore, married employees are compensated at a higher rate than single employees).

161. California, however, has directly addressed this issue by specifically exempting the award of spousal benefits from the prohibition of marital status discrimination. See CAL. GOV'T CODE § 12940(a)(3) (West Supp. 1989) ("Nothing in this part relating to discrimination on account of marital status shall . . . prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents."); see also CAL. ADMIN. CODE, tit. 2, § 7292.6 (1990) (regulations of Fair Employment and Housing Commission).

The fact that the legislature added this proviso indicates two important points. First, the legislature recognized that without the exception the prohibition of marital status discrimination in employment could be interpreted as forbidding the extension of benefits to an employee's spouse. Second, the explicit exception of health plans supports the argument that the legislature expressly delineates when married couples may be treated differently in employment. Thus, legislative silence should be interpreted as a directive that individuals shall not be treated differently based on their marital status.

162. Thus, married couples still could get spousal coverage and unmarried couples could claim benefits for their significant others. Furthermore, if the employer was concerned about frequent changes in the beneficiary, she could limit the number of times an employee could
a fundamental change in the administration of fringe benefits plans. For others, the process of removing arbitrary marital status classifications from employee benefit plans already is underway.\textsuperscript{163} Whatever its administrative costs may be, this approach is consistent with the intent of the human rights statutes that people not be treated differently on the basis of a protected classification unrelated to merit. As the types of relationships that qualified employees enter change and diversify, employers also will have an economic incentive to eliminate distinctions based on marital status.

B. Public Accommodations

A few states prohibit marital status discrimination in public accommodations such as hotels, museums, health clubs, hospitals, and airlines. One particular concern of unmarried couples is hospital policies that limit facility access to spouses or relatives of the patient’s family. Such policies allow hospital officials to exclude a patient’s partner if the couple is not married. For instance, in \textit{Whitman v. Mercy-Memorial Hospital},\textsuperscript{164} the hospital sought to deny the plaintiff admission to a delivery room during the birth of his child because he was not married to the child’s mother.\textsuperscript{165} The court, using an in-

\footnotesize{change the named beneficiary. As long as the plan does not use marital status as the criteria for categorizing relationships, the policy could not be challenged as marital status discrimination.

Alternatively, two commentators have suggested that an employer could restructure her benefits so that employees are equally compensated. See Bowen & Wadley, \textit{supra} note 162, at 44. The employer could offer a salary reflecting the maximum amount she is willing to pay the employee. This figure includes the amount of money the employer is willing to contribute to the employee’s benefits. For example, suppose that prior to reorganization, the employer paid an entry level employee $30,000 annually with a fixed benefit package worth between $6,000 and $10,000 each year. The employer would be paying a higher amount for a married employee who claimed her spouse on the company plan than for a single employee—a practice which arguably compensates the married employee at a higher rate. After reorganization of the benefit plan, the employer could offer each employee a base salary of $40,000, and allow each employee the option to “buy” certain benefits, such as health or life insurance up to a certain maximum amount (perhaps $10,000). Each employee then would be “charged” the correct actuarial amount for the coverage she needs. The choice of benefits could include health insurance for spouses, domestic partners, and single people—each employee choosing only the benefits she would like. As a result, each employee would receive the same total compensation regardless of her marital status. This reorganization, therefore, would not discriminate on the basis of marital status.


\textsuperscript{165} \textit{Id.} at 157, 339 N.W.2d at 731.
clusive rule analysis, held that the hospital's policy of excluding nonspouses from the delivery room discriminated on the basis of marital status and, therefore, was invalid.\textsuperscript{166}

There are many other possible applications of the refined inclusive rule of marital status discrimination. At least one report has documented routine marital status discrimination in a wide range of services provided by private industry.\textsuperscript{167} Marital status is used commonly in our society as a classification to grant benefits and burdens to a particular segment of the population involved in committed relationships. Such arbitrary classifications shut out a growing number of people who have chosen significant relationships outside the legal institution of marriage.\textsuperscript{168} Owners of public accommodations should be put on notice that, to comply with the prohibition against marital status discrimination, they may no longer ignore nontraditional families when offering benefits to spouses.

C. Marital Status Discrimination and Same Sex Couples

This Note has attempted to show that policies treating married and unmarried couples differently should be invalidated under state prohibitions of marital status discrimination. Another question, however, remains: are lesbian and gay couples protected by these prohibitions when they are denied benefits available to married people? The question is complicated by the fact that gays and lesbians legally may not marry in any state.\textsuperscript{169} Moreover, it may be difficult to determine whether discriminatory actions against gay people are based on marital status, sexual orientation, or both.

(1) Marital Status Discrimination Cases Involving Lesbian and Gay Couples

At least one court has held that a gay couple may not claim marital status discrimination when denied access to housing available to married couples and immediate family.\textsuperscript{170} The court found that

\textsuperscript{166} Id. at 160, 339 N.W.2d at 732.

\textsuperscript{167} OFFICE OF THE CITY ATTORNEY, CONSUMER TASK FORCE ON MARITAL STATUS DISCRIMINATION, FINAL REPORT (Los Angeles, Cal. Mar. 29, 1990) (finding marital status discrimination in housing, insurance, credit, airlines, the funeral industry, hospitals, health clubs, travel clubs, country clubs and in newspaper obituary policies) [hereinafter MARITAL STATUS REPORT].

\textsuperscript{168} Id. at 7-9.

\textsuperscript{169} See supra note 5.

any discrimination against a gay tenant "could only fairly be char-
acterized as discrimination based upon sexual or affectional pref-
erence, a status not protected [under state law]." 171

On the other hand, a few jurisdictions have held that same sex
roommates may bring a cause of action based on marital status dis-

crimination. 172 In Zahorian v. Russell Fitt Real Estate Agency, 173 a
landlord told the plaintiff that she would not rent an apartment to
two unmarried female applicants. 174 The New Jersey court found that
the plaintiff had been denied the housing opportunity based on her
sex and marital status and concluded that prohibitions against mar-
itial status discrimination were intended "inter alia, to insure the rights
of two persons of the same sex who constitute[] themselves into a
housekeeping unit." 175

A more probing analysis of the relationship between lesbian and
gay plaintiffs and the prohibition against marital status discrimi-
nation was provided in Hinman v. Department of Personnel Ad-

ministration. 176 In Hinman, a gay state employee challenged the
administration of the State Employee’s Health Care Act 177 under the
California constitution’s equal protection clause. The plaintiff con-
tended that an agency interpretation of the Health Care Act, allowing
spouses of state employees to receive dental benefits but denying the
same benefits to unmarried partners of homosexual employees, un-
lawfully discriminates against homosexual families. 178 California
marriage law prohibits same-sex couples from marrying, and the ad-

ministration of the Health Care Act only allows married couples to
receive benefits. Therefore, Hinman argued, the classification of those
benefiting under the plan was, in effect, based not only on marital
status but also on sexual orientation. 179 The state’s plan thus ad-
versely affected lesbian and gay couples.

171. Id. at 559, 458 N.Y.S.2d at 997 (quoting 420 East 80th Co. v. Chin, 115 Misc. 2d
195, 455 N.Y.S.2d 42 (N.Y. App. Term. 1982)). This case was decided in a jurisdiction
following the all-or-none rule of marital status discrimination in housing. Therefore, the
court relied on precedent holding that an unmarried heterosexual couple could not claim
marital status discrimination in a similar factual scenario.

172. See Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973);
See also Bachman v. State Div. of Human Rights, 104 A.D.2d 111, 481 N.Y.S.2d 858 (N.Y.


174. Id. at 402-03, 301 A.2d at 756.

175. Id. at 405, 301 A.2d at 757 (quoting with approval the decision of the Division on
Civil Rights).


179. Id. at 523-24, 213 Cal. Rptr. at 414-15.
The Hinman court upheld the dismissal of this claim, refusing to recognize that lesbian and gay couples can be similarly situated to married couples.\textsuperscript{180} Instead, the court concluded that all homosexuals, whether involved in long-term relationships or not, were similarly situated to other unmarried individuals. The court stated,

\begin{quote}
The negotiated terms of the [Health Care Act] limit eligibility for benefits of family members, thereby excluding all non-spouses or other unmarried non-children, of both the opposite and same sex. Homosexuals are simply a part of the larger class of unmarried persons, to which also belong the employees' filial relations and parents, for example. The terms have the same effect on the entire class of unmarried persons. Rather than discriminating on the basis of sexual orientation, therefore, the dental plans distinguish eligibility \textit{on the basis of marriage}.\textsuperscript{181}
\end{quote}

Since California law is settled that discrimination by a state agency on the basis of marital status is permissible under the California equal protection clause if it is rationally related to a legitimate state purpose, the Hinman court relied on the strong state policy favoring marriage and found no equal protection violation.\textsuperscript{182}

Having recognized that the administration of dental benefits did discriminate on the basis of marital status, however, the court went on to consider whether the plan violated the state statutory prohibition against marital status discrimination.\textsuperscript{183} Relying on a provision in California's prohibition of marital status discrimination that excludes bona fide health plans from coverage,\textsuperscript{184} the court found that the state had adopted a bona fide dental plan and held that it was not bound to offer equal benefits to married and unmarried employees.\textsuperscript{185}

Although the gay plaintiff in Hinman did not prevail on his claim, the court’s decision suggests that in the absence of an express exception, health plans that provide additional benefits for spouses of married employees but not for partners of unmarried employees would be found to violate the prohibition against marital status discrimination.

The Hinman case also makes an important point regarding the role of a lesbian or gay plaintiff in a marital status discrimination case. The court concluded that, for purposes of analysis, a gay plaintiff with a long-term, committed partner will be treated exactly the

\begin{footnotes}
\item[180] Id. at 526, 213 Cal. Rptr. at 416.
\item[181] Id. (emphasis added).
\item[182] Id. at 527-28, 213 Cal. Rptr. at 417.
\item[183] See id.
\item[184] Id. at 529, 213 Cal. Rptr. at 418.
\item[185] Id. at 530, 213 Cal. Rptr. at 419.
\end{footnotes}
same as any other unmarried plaintiff—even though he would have married his partner long ago had the laws of the state allowed him to do so.\textsuperscript{186} When bringing a challenge to marital status discrimination, therefore, the lesbian or gay plaintiff stands within the larger class of unmarried individuals.\textsuperscript{187}

(2) The Lesbian or Gay Plaintiff's Challenge under the Refined Inclusive Rule

The refined inclusive rule proposed in Part II of this Note provides a clear framework for evaluating a lesbian or gay plaintiff's challenge in marital status discrimination cases. For instance, suppose a lesbian plaintiff in a significant long-term relationship with another woman applies for admission to a housing cooperative. Suppose further, that the plaintiff is told she will not be admitted because the cooperative only accepts married applicants. To make out a prima facie case of marital status discrimination, the plaintiff would have to prove that her marital status was a motivating factor in the challenged decision. The explicit reason given for the denial, perhaps bolstered by a showing that the cooperative did, in fact, admit only married couples, would suffice to meet the plaintiff's burden. The defendant would then have the burden of proving that the same decision would have been made even if marital status had not been considered.

To meet this burden, the cooperative might argue that the same decision would have been made based solely on the fact that the plaintiff is a lesbian. Assuming the jurisdiction where the case is brought does not prohibit discrimination based on sexual orientation, it is unlikely that the plaintiff could prevail. The defendant could argue successfully that it had a legally inoffensive reason for discriminatorily denying the application. In the growing number of jurisdictions that have prohibited discrimination against lesbians and gay men,\textsuperscript{188} however, such a defense would constitute illegal dis-

\textsuperscript{186} Alternatively, given the unique position lesbians and gays hold vis-à-vis the institution of marriage, the court could have reached a different conclusion. Instead of considering the plaintiff single and completely dismissing his twelve-year relationship, the court could have adopted a test to determine when a homosexual relationship is significant enough to qualify as a truly familial relationship. See, e.g., Butcher v. Superior Court, 139 Cal. App. 3d 58, 70, 188 Cal. Rptr. 503, 512 (1983) \textit{overruled}, Elden v. Sheldon, 46 Cal. 3d 246, 250 Cal. Rptr. 267 (1985); Braschi v. Stahl Assocs., 74 N.Y.2d 201, 221, 543 N.E.2d 49, 53-54, 544 N.Y.S.2d 784, 789 (1989).


cramination based on sexual orientation and could not satisfy the burden of proving a legitimate, nondiscriminatory reason for the denial.

Conversely, in a jurisdiction where it is illegal to discriminate on the basis of sexual orientation but legal to do so on the basis of marital status, the defendant in the same hypothetical might argue that the plaintiff's application was denied not because she is a lesbian, but because she is unmarried.

Standing alone, therefore, the prohibition of marital status discrimination may not offer lesbians and gay men significant protection. When it is combined with a prohibition of sexual orientation discrimination, however, the two antidiscrimination measures ought to provide effective legal protection for lesbian and gay communities.

Conclusion

In the last twenty years, judicial application of state prohibitions of marital status discrimination has been confused. Rather than being defined and developed within the traditional framework of prohibitions against discrimination based on race, sex, age, disability, and national origin, marital status has been cut away from the very legislation wherein it resides. Though courts have struggled to create an independent doctrine of marital status discrimination, they have been bogged down by concerns about the state's interest in marriage, the political status of unmarried couples, and efforts to divine a legislative intent more attuned to supporting a specific outcome in particular cases than to aiding in the elimination of arbitrary classifications.

As our country's families grow and diversify, state prohibitions of marital status discrimination could be an important tool for the protection of nontraditional couples, both heterosexual and homosexual. For this to happen, however, the courts must reconnect marital status provisions to their roots in established state antidiscrimination law. This Note has proposed a straightforward method of analyzing marital status discrimination claims that has been strongly affirmed in both state and federal courts. The refined inclusive rule test suggested here would promote the basic goal behind all human rights legislation—that individuals be treated according to their abilities and potential, not according to offensive and demeaning stereotypes. Judicial application of this rule would show

189. See supra Part II.B.
that the law does, indeed, reflect the realities of our society and that the courts will no longer allow private enterprises arbitrarily to determine which loving relationships will be noticed and which will not.