

Marital Status Nondiscrimination and its Relationship to Marriage

Courtney G. Joslin
UC Davis School of Law

Among those who support equality for lesbian and gay people, there is an ongoing debate about the wisdom and efficacy of the marriage equality movement. Some argue that the marriage equality movement derailed earlier efforts by LGBT activists, feminists, and others to destabilize the supremacy of marriage. To support the claim that marriage was in the process of being destabilized, scholars cite a number of developments during the second half of the twentieth century, including but not limited to the emergence of newly recognized rights regarding procreative freedom; court decisions invalidating laws that discriminated against nonmarital children and their parents; no-fault divorce laws that made it easier to exit marriage; and case law protecting the property rights of nonmarital partners upon the dissolution of their relationships.

Other scholars, including Doug NeJaime and Serena Mayeri, push back against this description and present a more complex view of the role and view of marriage in earlier reform efforts. While it is surely true that attitudes about nonmarital sex and cohabitation were changing during the second half of the twentieth century, these scholars contend that marriage continued to hold a central and privileged place in the narrative. As NeJaime argues, “[e]ven if advocates wished to destabilize marriage—and certainly some did—they were constrained by a legal, policy, and cultural framework that prioritized marriage[.]”

This piece adds to this historical exploration by examining the movement to prohibit discrimination on the basis of marital status. During the 1970s and 1980s, 21 states and the federal government enacted statutes prohibiting this form of discrimination in a variety of areas. On first glance, these statutes seem to lend support to the claim that a core purpose of this earlier advocacy was to destabilize marriage. A closer look at the previously unexplored history of these statutes tells a more nuanced account both with regard to what these statutes actually do, and, critically, with regard to how advocates pressed for their enactment and how these laws were perceived by policymakers and by the public.