
THE FORMAL LIMIT ON PRIVATIZING SUPPORT

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Serena Mayeri's *Marital Privilege: Marriage, Inequality, and the Transformation of American Law* is, despite its title, not really about marriage.¹ The book is, for the most part, a comprehensive examination of a topic that is both difficult to define and nearly impossible to cabin: nonmarriage. Indeed, one of the book's recurring themes is the lack of coalition among those who have sought to improve the lives of individuals who are not married. As Mayeri spells out, the sheer "pervasiveness and stature of marriage may explain why no single social movement attacked it head-on."² Marriage, or its absence, touches on countless legal domains, including: employment, citizenship, zoning, pregnancy, welfare, same-sex equality, poverty, and parentage.³ Mayeri takes a deep dive into each area to consider the state and federal litigation addressing the privileging of marriage, the surrounding advocacy efforts, the lives of the parties that prompted the lawsuits, the personalities of the lawyers who litigated the cases, the resulting opinions, along with the justices, and their clerks, who wrote them. It is difficult to overstate the level of detail Mayeri engages in; let me just say by way of example that a lawyer wearing a turtleneck at oral argument makes a cameo.⁴

Despite the lack of a concerted movement to dethrone marriage *qua* marriage, and the heterogeneity of issues that arise in a legal system that privileges marriage so thoroughly, Mayeri highlights two consistent themes. The first is the emergence of functional approaches as an alternative to law's reliance on

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¹ The book does address marriage directly in discussing the litigation around making it a more inclusive and egalitarian institution. *See, e.g.*, SERENA MAYERI, *MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW* 73-83 (2025).

² *Id.* at 7.

³ *See id.* at 5 ("Marital status affected everything from the lawfulness of sexual intimacy and childbearing to eligibility for public assistance to the custody of children.").

⁴ *Id.* at 153-54 ("A former clerk recalled how, in the late 1960s, the judge balked at the lawyer's courtroom appearance in a turtleneck but decided not to mention this breach of 'decorum.'").

formal categories.⁵ The second is the significant role that privatizing support plays in expanding the recognition of relationships outside of marriage.⁶ These strands exist independently, but Mayeri also links them. In the context of unwed fathers, for example, Mayeri explains that “[m]arital status mattered less mostly when recognizing functional relationships between father and child secured paternal financial support.”⁷ That is, the State is more likely to “overlook marital status when doing so saved the public money.”⁸ In general, “family relationships—formal or functional—remained primary as a source of financial support and of social and economic benefits.”⁹

In this brief commentary, I seek to complicate both claims and how they connect. The move from status to function is not, I argue, as complete as Mayeri reads some of the cases to suggest. Of course, Mayeri’s claim is modest: Marital status still matters, but there are instances now where it matters *less*. And, in many of the areas she canvasses, the functional turn has securely taken hold.¹⁰ But my focus is on the constitutional unwed father cases that Mayeri offers as indicative of a more functional approach, which she contends is especially powerful when recognizing fathers outside of marriage helps secure private sources of support. My interpretation of these cases reveals instead a continued judicial reliance on form over function and exposes where privatizing support runs out as a motivating rationale.

Mayeri animates the unwed father cases in her characteristic style, drawing out stories of the litigants, litigators, and judges who wrote the opinions. *Lehr v. Roberston*¹¹ is no exception. Mayeri details the relationship between Jonathan Lehr and Lorraine Martz that began after Lorraine’s father was killed in Vietnam and Jonathan’s mother takes her in; they eventually have a child together that Lorraine wants her new husband, Richard Robertson, to adopt.¹² Mayeri discusses the various, shifting drafts of the Supreme Court opinion, making note of an article written by a family law scholar and LDS church elder that was initially quoted at length to showcase its influence on the reasoning and outcome

⁵ Doug NeJaime focused on this aspect of the argument in his invited response to Mayeri’s book. See Douglas NeJaime, *From Status to Function*, BALKINIZATION (Sep. 15, 2025), <https://balkin.blogspot.com/2025/09/from-status-to-function.html> [<https://perma.cc/UDC2-QPKA>] (“Both inside and outside marriage, to varying degrees, the law shifted away from formal, categorical, status-based regulation toward *functional* regulation.”).

⁶ MAYERI, *supra* note 1, at 189 (“The success of challenges to marital primacy often tracked their fiscal impact: the state safely could ignore marital status when doing so helped to privatize dependence in the family.”).

⁷ *Id.* at 233.

⁸ *Id.* at 318.

⁹ *Id.* at 282.

¹⁰ See Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. AM. ACAD. MATRIM. LAWS. 589, 589 (2023) (describing functional parent doctrines in nearly two-thirds of states).

¹¹ 463 U.S. 248 (1983).

¹² *Id.* at 250; MAYERI, *supra* note 1, at 238-39.

of the case, even though it was largely deleted from the final version.¹³ She further surfaces the at times conflicting feminist impulses that underlie these cases—breaking along lines that either sought to preserve a mother’s decision-making prerogative, or put an end to the stereotyping of women as natural mothers.¹⁴

Mayeri includes *Lehr* as part of the functional turn because it espoused what is now known as the “biology-plus” framework. Unlike married and divorced fathers, biological fathers who never married “had to establish a relationship with their children” in addition to a genetic connection.¹⁵ Given that Jonathan was not married to Lorraine and had not established a relationship with his child, the Court concluded he did not have the right to receive notice of the adoption.¹⁶

Lehr, however, ultimately relies on formal rather than functional markers to identify which unwed fathers merit recognition. The case, though seemingly turning on Jonathan’s lack of a relationship with his daughter—which Mayeri notes “was the subject of vigorous dispute”¹⁷—actually hinges on whether Jonathan followed a procedure set out by statute, here, mailing a postcard to a putative father registry.¹⁸ Jonathan’s claim fails because he did not adhere to the specific process established by New York for unwed fathers (he had, instead, commenced a paternity action). While the Court says the State can impose such a requirement on him because of its finding that he had no relationship to his child, the law that *Lehr* upholds affects all unwed fathers, even those fathers who have developed a relationship with their children, unless they succeed in arguing that it is unconstitutional as applied to them.¹⁹ The alleged lack of a relationship is secondary to the fact that Jonathan did not comply with the requisite rule.

Thus, the lodestar of the analysis in *Lehr*, as it is in the other unwed father cases, is whether the father followed a particular *formal procedure*, not whether he *functioned* as a father. Consider *Parham v. Hughes*,²⁰ where the unwed father had a relationship with his child, and still did not receive recognition because he did not formally legitimate him. Curtis Parham “had supported [his son] Lemuel

¹³ MAYERI, *supra* note 1, at 238-39.

¹⁴ *See, e.g., id.* at 232.

¹⁵ *Id.* at 241.

¹⁶ *Lehr*, 463 U.S. at 265, 267-68.

¹⁷ *See* MAYERI, *supra* note 1, at 238.

¹⁸ *Lehr*, 463 U.S. at 264.

¹⁹ *See* Albertina Antognini, *Unwed Parents: The Limits of the Constitution*, 35 J. AM. ACAD. MATRIM. LAWS. 425, 445 (2023) (critiquing the Court’s equal protection reasoning, noting it upholds this requirement for all unwed fathers, regardless of whether they have a relationship with their child). The New York statute had a category for recognizing an unwed father “who is holding himself out to be the child’s father,” but it also required that he be “openly living with the child and the child’s mother at the time the proceeding is initiated.” *Lehr*, 463 U.S. at 251 n.5. Meaning, there was no category that recognized a father based only on his relationship to his child.

²⁰ 441 U.S. 347 (1979) (plurality opinion).

financially, visited him daily, and taken care of him on many weekends.”²¹ He also “signed his son’s birth certificate” and “in every respect treated [Lemuel] as his own.”²² The problem was that he failed to submit to the procedure required by Georgia. Not adhering to the specific, legally-prescribed formality trumped any functional caretaking that took place.²³

Mayeri elides this tension between following form or recognizing function in describing when function matters: “[O]ften to reward fathers who seized opportunities to ‘legitimate’ and to assume legal financial responsibility for their children.”²⁴ Mayeri threads together the functional analysis with the privatization of support rationale. She explains that the Court mostly acknowledges unwed fathers “when recognizing functional relationships between father and child secure[s] paternal financial support.”²⁵ When applied to *Parham*, the logic is that because Curtis did not legitimate his child, he did not subject himself to concomitant support obligations. The functional turn matters less given that Curtis did not formally assume financial responsibility. But the facts tell an uncontested story of Curtis being a present father who provided both caretaking *and* financial support.²⁶ Moreover, Curtis was attempting to raise a wrongful death claim on behalf of his son, which would have furthered the goal of relying on family relationships to privatize support.²⁷ In other words, *Parham* provides a perfect vehicle for a functional analysis to advance the goal of privatizing support and to recognize the support that had already taken place—yet the Court declines to extend Curtis such recognition. This is because failing to formally legitimate his child, which stands in for the missing formality of marriage, rendered Curtis illegible as a father under law.²⁸

²¹ MAYERI, *supra* note 1, at 232.

²² *Id.* (alterations in original) (citation omitted).

²³ Mayeri recognizes this very point when she explains that his failure “to confer formal legal status and enable the state to impose financial responsibility doomed his claim.” *Id.* at 233.

²⁴ *Id.* at 242.

²⁵ *Id.* at 233.

²⁶ *Id.* at 232.

²⁷ In this case, recognizing Curtis as a father would not impose obligations on him to financially support his child, who is no longer living, but would allow him to access property as a result of the law recognizing his relationship to his child. See Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER, SOC. POL’Y & L. 415, 420 (2005) (defining privatization “as the transfer of public goods and services to the private sphere of the family”).

²⁸ See Albertina Antognini, *Fraudulent Families*, 15 U.C. IRVINE L. REV. 128, 134 (2024) (“Understanding that marriage is still the only relevant metric for fatherhood clarifies why the requirements are imposed only on men. It also explains why the sole way to establish paternity is through a formality, akin to the formality of marriage, thereby ignoring proof of any genetic or actual relationship between father and child.”).

The citizenship transmission cases reinforce the privileging of formality over function. Mayeri explains how the unwed fathers in *Miller v. Albright*²⁹ and *Nguyen v. INS*³⁰ developed actual relationships with their children.³¹ Charlie Miller only had one child, Lorelyn, whom he eventually lived with.³² Tuan Anh Nguyen was raised by Joseph Boulais and his new wife in Houston.³³ Nevertheless, neither man was recognized as a father—not because they failed to establish a relationship with their child, but because they failed to comply with the legal requirements set out in the Immigration and Nationality Act.³⁴

In *Miller* and *Nguyen*, the Court leans into the distinctions between men and women and the “fact” that only the latter give birth to justify the imposition of additional legitimation requirements on the former.³⁵ But even this supposedly biological basis for distinguishing between fathers and mothers obscures what is almost entirely a formal requirement. What the unwed father must do is undertake a specific legal procedure that mimics the formality of marriage.³⁶ The reliance on marriage as a measure of fatherhood is nearly imperceptible, couched as it is in the language of observable fact. As we have seen, then, these cases do not always, or inevitably, privatize support.³⁷ Recognizing unwed fathers’ rights would often inure to the benefit of the unwed mother, and of the family generally.³⁸ But courts still refuse to do so. These gaps—where privatizing

²⁹ 523 U.S. 420 (1998).

³⁰ 533 U.S. 53 (2001).

³¹ MAYERI, *supra* note 1, at 301-04.

³² *Id.* at 302.

³³ *Id.* at 304.

³⁴ I have argued in prior work that “the formal steps laid out in Section 309(a)(4) do very little to make up for the lack of birth, even by the terms set forth by the Court: They do not provide confirmation of a genetic tie, which is already required by the statute, nor do they demand proof of an actual relationship or point of contact, to be satisfied. The real function they perform is to mimic the formal requirements that establish a marriage.” Antognini, *supra* note 28, at 181 (footnotes omitted).

³⁵ *Miller v. Albright*, 523 U.S. 420, 436 (1998) (“The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record.”); *Nguyen*, 533 U.S. at 63 (“Fathers and mothers are not similarly situated with regard to the proof of biological parenthood.”).

³⁶ Antognini, *supra* note 28, at 181. The statute “gives an unwed father a choice between legitimating his child, acknowledging paternity in writing under oath, or having paternity adjudicated in court, all while the child is under eighteen years of age.” *Id.* at 174 (footnotes omitted).

³⁷ The privatization of support argument also has, as Mayeri notes, practical limits. Many of the men subject to the child support orders could not in fact pay. *See, e.g.*, MAYERI, *supra* note 1, at 321-22.

³⁸ *See id.* at 232 (describing *Parham*, among others, as “rejecting fathers’ sex discrimination claims precisely where fathers’ and mothers’ interests in sex neutrality most clearly converged. . . . [I]ndeed, depriving him of the right to sue perpetuated mothers’

support fails to carry the day—are telling. They endorse a more muscular version of Mayeri’s argument: of the singular superiority of marriage.

I will end with one final example of where a functional turn has not led to privatizing support, which is found in the state law nonmarital property distribution cases. These cases are not the focus of Mayeri’s work, nor should they be given the vast terrain she already covers, but they serve to highlight how adopting a functional approach, by moving away from status to considerations of the intimate relationship itself, still largely fails to result in any property obligations. Instead, the formal status of marriage comes in through the back door and impacts the decision of whether to distribute property at the end of a nonmarital relationship.

In most jurisdictions, the lack of marriage no longer bars property claims entirely—a functional development—but courts still rely on marriage as the benchmark.³⁹ While a few states explicitly consider how marriage-like the relationship is as a condition for distributing property, the majority view the relationship’s proximity to marriage as an impediment.⁴⁰ Washington is one of arguably two jurisdictions where functioning like a marital couple may lead courts to distribute property akin to a divorcing couple;⁴¹ in other jurisdictions being the functional equivalent of a married couple harms attempts to recoup property. For example, sharing a child, engaging in caretaking, and performing household duties all become reasons to deny a plaintiff access to property: Courts explain that “to devote time and attention to the defendant, to act as a companion, to accompany him to social events and perform household duties—are of a nature which would ordinarily be exchanged without expectation of pay.”⁴² Similarly, where a plaintiff alleges the existence of an express agreement outside of marriage, courts refuse to distribute property “not based on the bright line of status but on what sound like unassailable descriptions of the relationship itself.”⁴³ These descriptions can take many forms, including aforementioned

primary responsibility for nonmarital children by devaluing fathers’ caregiving relationships”).

³⁹ See Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 52-53 (2017) (identifying Louisiana, Mississippi, Georgia, and Illinois as exceptions to the general rule).

⁴⁰ *Id.* at 8 (canvassing cases and arguing “that courts approach nonmarital relationships in one of two ways: either by looking to marriage as a requirement for what a nonmarital relationship should be, or by distinguishing the nonmarital relationship from anything approaching marriage”).

⁴¹ Washington requires that a couple live in a “committed intimate relationship” (“CIR”) to receive the benefits of the community property rules at divorce. To establish a CIR, courts consider “continuous cohabitation, relationship duration, relationship purpose, pooling of resources and services for joint projects, and the parties’ intent.” *In re Long*, 244 P.3d 26, 29 (Wash. Ct. App. 2010). Even in Washington, however, courts interpret the requirement strictly, sometimes “arguably requir[ing] that there *be* a marriage.” Antognini, *supra* note 39, at 18.

⁴² *Tompkins v. Jackson*, No. 10474, 2009 WL 513858, at *13 (N.Y. Sup. Ct. Feb. 3, 2009).

⁴³ Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 79 (2021).

assertions about what kinds of exchanges are expected in relationships, or that domestic (and only domestic!) services are performed gratuitously.⁴⁴ These assumptions, directly informed by marriage, prevent individuals outside of marriage from accessing property as a result.⁴⁵

Together, these cases show how the functional turn is not a one-way street: It has not always coincided with the privatization of support outside of marriage. Other values prevail. Those values are informed by marriage. Marriage, despite its formal absence, affects parentage decisions as it does the legal tools available to stake out an intelligible claim for property at the conclusion of a nonmarital relationship.⁴⁶

Mayeri's sweeping history supports an eminently reasonable conclusion: marriage, now a more egalitarian institution, continues to be privileged even as its explicit hold over all intimate relationships has lessened. The cases I have raised in this commentary support, perhaps, a slightly stronger rendition of Mayeri's claim. Like a magnet, or a moon, marriage continues to distort the space outside of it, bringing all intimate relations into its pull. Importantly, however, its supremacy is selective, insofar as the benefits of marriage are not available to all on equal terms. Mayeri ends on this cautionary note. She recounts the story of Sandra Muñoz, an American citizen, who married Luis Asencio-Cordero, an undocumented immigrant from El Salvador.⁴⁷ When Luis applied for a spousal visa, the Department of State rejected it, without providing a reason. On appeal to the Supreme Court, Justice Barrett dismissed Sandra's argument that doing so infringed upon her fundamental right to marry. Justice Barrett declared that while the right to marry is fundamental, "the right to *reside with [one's] noncitizen spouse in the United States*" is not.⁴⁸

What then, is marriage, if not the right to live with one's spouse? The Court, at least for some categories of individuals, seems to be whittling it down to a mere formality, emptying it of any meaningful content.

⁴⁴ See generally *id.*

⁴⁵ See *id.* at 78 ("[C]ourts refuse to uphold contracts outside of marriage for the same reasons they refuse to do so in marriage. This is so despite the absence of the status of marriage, which is a known limit on the right to contract, and despite the general reluctance to treat unmarried couples like married ones, a central distinction courts maintain even when they distribute property outside of marriage.").

⁴⁶ See Kaiponanea T. Matsumura, *The Marital Habitus*, 99 WASH. U. L. REV. 2033, 2050 (2022) ("Judges are embedded in the marital habitus. Predictably, marriage—or its conspicuous absence—informs the courts' decisions in these cases.").

⁴⁷ MAYERI, *supra* note 1, at 336-37.

⁴⁸ Dep't of State v. Muñoz, 144 S. Ct. 1812, 1822 (2024).