

---

## INSTITUTIONAL CHALLENGES IN AN AUTHORITARIAN AGE

KATIE EYER\*

### INTRODUCTION

Serena Mayeri's newest book, *Marital Privilege*, is an engrossing and detailed account of challenges to the legal institution of marriage from the 1960s through the present.<sup>1</sup> As Mayeri describes, even as the institution of marriage evolved in response to such challenges, it largely survived them.<sup>2</sup> Part I of this Essay draws parallels between the durability of marriage that Mayeri describes, and the durability of the legal institution of sex (in both cases, even in the face of longstanding institutional reform challenges). Part II turns from the limits of institutional reform work to threats to the ability to carry out such reform work in the current authoritarian age.

#### I. LESSONS FROM THE ENDURANCE OF MARITAL PRIVILEGE

Serena Mayeri's *Marital Privilege* is a sweeping account of more than a half-century of challenges to the institution of marriage. As Mayeri uncovers, challenges to marital supremacy came from a wide variety of social movements and individuals: unmarried aid recipients seeking to avoid intrusive inquiries into their sexual and home lives, unwed fathers seeking parental rights, LGBTQ rights advocates, women's equality advocates, and more.<sup>3</sup> Those challenges included constitutional and statutory litigation, legislative reforms, contracting around marriage, and even model laws produced by the American Law Institute.<sup>4</sup>

But at the end of the day, Mayeri persuasively makes the case that much of marital supremacy survived, albeit in a toned-down form that she refers to as "marital privilege."<sup>5</sup> Some of the most obviously inegalitarian aspects of marriage (such as bans on interracial marriage and explicitly sex-differentiated responsibilities and benefits) were eliminated, through

---

\* Professor of Law, Rutgers Law School. The views expressed in this Essay are my own.

<sup>1</sup> SERENA MAYERI, *MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW* (2025).

<sup>2</sup> *Id.* at 315-25.

<sup>3</sup> *Id.* at chs. 2, 5, 7, 8, 9.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 318, 324-25.

litigation or law reform.<sup>6</sup> Same-sex couples gained access to the institution.<sup>7</sup> Formal discrimination against nonmarital children was largely deemed unconstitutional.<sup>8</sup> But marriage remained a central institution within the law, used for distributing benefits, determining parental rights, and as a justification for invasive intrusions into the lives of low-income families (often people of color).<sup>9</sup>

As Mayeri observes, this is no doubt an example of what Reva Siegel has referred to as “preservation through transformation”: oppressive institutions that are reborn in new form, even as they are subject to successful challenges.<sup>10</sup> But what is so striking about her account is that unlike many of the other circumstances in which scholars have written about “preservation through transformation”—where at least nominally, the courts repudiated the underlying institution—marriage has retained, and maybe even restored its shine through such challenges.<sup>11</sup> To the extent that more radical challengers advocated for a world reorganized around nonmarital kinship, which respected all people’s sexual and reproductive autonomy, or in which basic supports were provided by the state, they undoubtedly failed.<sup>12</sup>

For those engaged with challenges to the traditionally-defined legal institution of sex—and especially the current movement for transgender equality—it is hard not to see discouraging parallels here in the story that Mayeri tells.<sup>13</sup> Divisions within goals of the movement(s).<sup>14</sup> The failure of

---

<sup>6</sup> *Id.* at 37-38, 318-19.

<sup>7</sup> *Id.* at 327.

<sup>8</sup> *Id.* at 325.

<sup>9</sup> *Id.* at 320-21, 330-31.

<sup>10</sup> *Id.* at 324; see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997). I am happily married, and do not claim that all marriages are “oppressive.” However, as Mayeri’s book persuasively elucidates, marriage as an institution within the law has often been a vehicle for inequality and oppression.

<sup>11</sup> See MAYERI, *supra* note 1, at 325 (observing unlike other arenas scholars have written about “preservation through transformation” “no consensus emerged about the wrongfulness of elevating marriage in the law”).

<sup>12</sup> See *generally id.* ch. 9, Conclusion, Epilogue (cataloguing both successes and limitations of movements directed at legal marriage).

<sup>13</sup> Other movements that have sought to challenge the traditionally-defined legal institution of sex and its salience in legal ordering include the women’s rights movement of the 1970s, the intersex movement, advocates for sexual orientation equality, and, as in Mayeri’s description of marriage challengers, unorganized individuals who simply were harmed by the existing law or norms.

<sup>14</sup> See, e.g., Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243 (2021); J.S. Welsh, *Assimilation, Expansion, and Ambivalence: Strategic Fault Lines in the Pro-Trans Legal Movement*, 110 CALIF. L. REV. 1447 (2022).

more radical claims.<sup>15</sup> The resurgence of the institution in response to modest change.<sup>16</sup> The peeling off of parts of the movement through assimilation.<sup>17</sup> At a time when Justice Ruth Bader Ginsburg's words are being quoted prolifically by anti-trans activists, it is hard to read Mayeri's book and not be reminded that even inspired, creative activists may ultimately find their work reimagined in service of the very institutions they sought to change.<sup>18</sup>

What answers may be drawn from the lessons of marriage? It is not clear. One of the virtues of Mayeri's book is that she does not offer an oversimplified account. There are none of the "if only advocates had done X" passages that so often pervade the legal literature. The takeaways are more complex, and less hopeful. Major societal institutions are exceedingly hard to dislodge. Legal victories entail tradeoffs. People can fight for a long time—and even see important victories—and yet ultimately see only modest change. There are no pat answers here. Only a long hard road with an uncertain future.

## II. THE CHANGED LANDSCAPE FOR INSTITUTIONAL CHALLENGES TODAY

Mayeri closes the book with the case of *Department of State v. Muñoz*,<sup>19</sup> a case in which the Supreme Court refused to apply the existing "fundamental right to marry" to a woman whose noncitizen husband was permanently

---

<sup>15</sup> Indeed, we have seen even very traditional, limited, doctrinal claims fail in recent times. *See, e.g.*, *United States v. Skrmetti*, 145 S. Ct. 1816, 1829 (2025) (refusing to find sex classification in law banning gender-affirming care for transgender minors, and thus apply heightened scrutiny, even where such a classification existed on face of law); *cf.* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1433, 1437 (2023) (observing lower courts had little difficulty concluding facial sex classifications must be subject to heightened scrutiny under traditional equal protection standards, even in transgender rights context).

<sup>16</sup> *See, e.g.*, Kyle C. Velte, *Liminality, Political Psychology, and Attacks on Transgender Lives*, 54 SW. L. REV. 381, 409-12 (2025).

<sup>17</sup> Some trans-exclusionary radical feminists likely fit this description, though others may be opportunistic in their co-optation of feminist discourse in service of opposition to transgender rights. *See generally* Serena Bassi & Greta LaFleur, *TERFs, Gender-Critical Movements, and Postfascist Feminisms*, 9 TRANS STUDIES Q. 311, 311 (2022) (observing, in context of discussion of anti-trans feminist discourse, "the simplistic vignette of a clash of progressive feminist versus conservative anti-feminist ideas fails to capture the complexities of our current cultural moment, one in which much of what is under contestation is the meaning attributed to feminism itself").

<sup>18</sup> *See, e.g.*, IDAHO CODE § 33-6202(1) (quoting Justice Ruth Bader Ginsburg's opinion in *United States v. Virginia*, 518 U.S. 515, 533 (1996) for proposition that "there are 'inherent differences between men and women,'" and "those differences 'remain cause for celebration'"). This passage of Justice Ginsburg's most famous sex equality opinion has been quoted again and again in anti-trans laws and briefs in support of trans inequality.

<sup>19</sup> 602 U.S. 889 (2024).

excluded from the United States.<sup>20</sup> Instead, the Court narrowly recharacterized the right at issue as “the right to reside with her noncitizen spouse in the United States”—and found (unsurprisingly) that no such right exists.<sup>21</sup> As Mayeri rightly recognizes, *Muñoz*—though it attracted little attention—poses a serious threat to substantive due process law as we know it.<sup>22</sup> *Muñoz* is the roadmap for how the much better-known *Dobbs v. Jackson Women’s Health*<sup>23</sup> will be used to eradicate other rights: Not through open overruling (as in *Dobbs* itself), but by nickel-and-diming those rights into obscurity.<sup>24</sup>

And yet while *Muñoz* seemed like an existential threat at the time Mayeri was writing, it seems almost quaint to worry about it now. The dilemmas of a supreme court using recognized approaches to common law reasoning to undermine important precedents is a problem of liberal democracies. So too is the set of social movement obstacles and conflicts on which Mayeri’s book (and my discussion above) focuses. In a time of rising authoritarianism and challenges to the rule of law, one can be almost wistful for an era in which the biggest dilemmas were intramovement divisions, and in which the worst outcomes were bounded by the rules and norms of our “small-c” conservative legal system.

Instead, challengers to the legal institution of sex today face the slow-motion horror of watching increasingly direct threats to the safety of the transgender community and the freedom of its defenders. Even before Charlie Kirk’s death, the Trump Administration had wielded the tools of authoritarianism—targeted investigations, defunding, stripping of the ability to do business with the government—to attempt to coerce civil society and the states into the repression of trans rights.<sup>25</sup> But Kirk’s death has been the excuse for an escalation, the outer bounds of which are still unknown.

---

<sup>20</sup> MAYERI, *supra* note 1, at 336-37; *see also* Muñoz, 602 U.S. 889.

<sup>21</sup> *Muñoz*, 602 U.S. at 910.

<sup>22</sup> MAYERI, *supra* note 1, at 337.

<sup>23</sup> 597 U.S. 215 (2022).

<sup>24</sup> One need only look to *Bivens* actions, once well recognized in the law and now essentially extinct, to see how such a strategy could succeed. *See, e.g.*, Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 882 (2019) (describing strategy whereby the Court “nominally keeps a principle alive, but that leaves virtually no room for operation in new factual settings”). The Court would simply, as it does in *Muñoz*, redefine existing rights at a greater level of specificity in each new litigated context, and then demand a new assessment of whether those rights, as redefined, are consistent with its “history and tradition” test (they would not be).

<sup>25</sup> *See, e.g.*, Executive Order 14190, Ending Radical Indoctrination in K-12 Schooling, 90 Fed. Reg. 8853 § 3 (Jan. 29, 2025) (directing agencies to eliminate federal funding for schools that adopt pro-transgender positions or support trans students’ transitions); S. Baum, *Trump’s UCLA Settlement Proposal Reveals Massive Anti-Trans Attacks: Students and Faculty Fight Back*, ERIN IN THE MORNING (Sep. 16, 2025), <https://www.erininthemorning.com/p/trumps-ucla-settlement-proposal-reveals>

Most chillingly, in the wake of Kirk's killing some members of the House of Representatives called for the involuntary institutionalization of transgender people (something that Kirk himself had seemed to promote in some of his own anti-LGBTQ commentary).<sup>26</sup> While such comments are not the official policy of the federal government, they are fully consistent with beliefs already circulating within the administration and more widely on the right.<sup>27</sup> According to such beliefs, transgender people are both mentally ill and dangerous, and thus subject to the restriction of their most basic freedoms.<sup>28</sup> Indeed, shortly *before* Kirk's shooting, it was reported that the

---

[<https://perma.cc/A678-GAGG>] (discussing anti-trans requirements included in settlement proposal for UCLA to resolve federal investigations and suspension of funding); Mike Spector et al., *How Trump's Crackdown on Law Firms is Undermining Legal Defenses for the Vulnerable*, REUTERS (Aug. 3, 2025), <https://www.reuters.com/investigations/trumps-war-big-law-leads-firms-retreat-pro-bono-work-underdogs-2025-07-31> [<https://perma.cc/XN23-TEM9>] (describing how nonprofits, including those advocating for LGBTQ rights, have faced difficulties in obtaining pro bono counsel in wake of Trump Administration efforts targeting major firms and threatening to strip government contracts and/or withdraw security clearances in part because of work on transgender rights); In re Admin. Subpoena No. 25-1431-019, No. 1:25-MC-91324, 2025 WL 2607784, at \*7 (D. Mass. Sep. 9, 2025) (finding “[i]t is abundantly clear that the true purpose of issuing the subpoena is to interfere with the Commonwealth of Massachusetts’ right to protect GAC [gender-affirming care] within its borders, to harass and intimidate BCH to stop providing such care, and to dissuade patients from seeking such care” in challenge to Department of Justice (“DOJ”) subpoena of institution providing gender-affirming care).

<sup>26</sup> See Erin Reed, *Two Republican Congresspeople Call for the Institutionalization of Transgender People*, ERIN IN THE MORNING (Sep. 17, 2025), <https://www.erininthemorning.com/p/two-republican-congresspeople-call> [<https://perma.cc/FC8A-TZX9>]; see also Erin Reed, *This Must Stop: TPUSA's Charlie Kirk Calls For Anti-Trans Violence "Like In The 50s/60s,"* ERIN IN THE MORNING (Feb. 18, 2023), <https://www.erininthemorning.com/p/this-must-stop-tpusas-charlie-kirk> [<https://perma.cc/KH69-HQTA>] (reporting on and sharing video where Charlie Kirk remarks “these people are sick”—apparently referencing either trans people or their supporters—and continues to comment on trans participation in athletics stating “someone should have just took care of it the way we used to take care of things in the 1950s or 60s” in an apparent allusion to violence or institutionalization).

<sup>27</sup> See sources cited *infra* notes 28-29.

<sup>28</sup> See, e.g., Evan Perez & Hannah Rabinowitz, *Trump DOJ is Looking at Ways to Ban Transgender Americans From Owning Guns, Sources Say*, CNN (Sep. 4, 2025), <https://www.cnn.com/2025/09/04/politics/transgender-firearms-justice-department-second-amendment> [<https://perma.cc/GG9S-BWH2>] (reporting DOJ “is seriously considering whether it can use its rulemaking authority to follow on to Trump’s determination to bar military service by transgender people and declare that people who are transgender are mentally ill and can lose their Second Amendment rights to possess firearms”); Trudy Ring, *After Charlie Kirk's Death, Trump Jr. Falsely Claims Trans People More Dangerous Than Al-Qaeda*, ADVOCATE (Sep. 11, 2025), <https://www.advocate.com/news/trump-jr-transgender-terrorists>

Department of Justice (“DOJ”) was considering using its rulemaking authority to deem transgender people dangerously mentally ill and thus prohibited from owning guns.<sup>29</sup>

So too, those who merely support or ally themselves with transgender people have faced increasing risks of surveillance and repression in the aftermath of the Kirk shooting. The Trump Administration has treated honest discussion about what Charlie Kirk stood for and the harms he caused, as “hate speech” or even incitement to violence.<sup>30</sup> And the Heritage Foundation, an organization closely allied with President Trump, put out a document calling for the administration to designate a potentially broad swath of pro-transgender advocacy as terrorism.<sup>31</sup> Though it is not clear if the administration will act on the proposal (or that we would even know if they had), it is consistent with reporting by independent journalists that the FBI is considering categorizing transgender suspects as a domestic terrorism threat.<sup>32</sup>

In the Heritage Foundation document, they describe “Transgender Ideology-Inspired Violent Extremism” (“TIVE”) as a “terrorist” ideology.<sup>33</sup> What are the hallmarks of TIVE? Using terms such as “cisgender,” “deadnaming,” and “misgendering.”<sup>34</sup> A trans pride flag with “Protect Their Right to Exist” emblazoned on it.<sup>35</sup> “[L]ack of respect for genetic human realities” (i.e., believing that trans women are women, and that trans men are

---

[<https://perma.cc/ED8M-63T2>] (reporting on repeated claims by Donald Trump Jr. that “the radical transgender movement is . . . the most violent domestic terror threat” and probably more violent per capita than the Taliban and al Qaeda); THE HERITAGE FOUND. & THE OVERSIGHT PROJECT, TRANSGENER IDEOLOGY-INSPIRED VIOLENT EXTREMISM (TIVE): BACKGROUND AND FAQs ON NEED FOR AN FBI DOMESTIC TERRORISM DESIGNATION (2025) (claiming without citation that “[e]xperts estimate that 50% of all major (non-gang related) school shootings since 2015 have involved or likely involved transgender ideology”). The Oversight Project is a former Heritage Foundation subsidiary that became an independent organization in 2025 with “the strong support, partnership, and backing” of the Heritage Foundation. *Heritage Foundation Announces New Era for The Oversight Project*, HERITAGE FOUND. (Mar. 31, 2025), <https://www.heritage.org/press/heritage-foundation-announces-new-era-the-oversight-project> [<https://perma.cc/YN3A-J5D4>].

<sup>29</sup> See, e.g., Perez & Rabinowitz, *supra* note 28.

<sup>30</sup> See, e.g., Joe Walsh & Caitlin Yilek, *The Crackdown on Charlie Kirk Critics Has Ignited a Free Speech Debate. Legal Experts Say It Sets a Dangerous Precedent.*, CBS NEWS (Sep. 18, 2025, at 17:49 ET), <https://www.cbsnews.com/news/trump-charlie-kirk-free-speech-first-amendment> [<https://perma.cc/M3A3-GE5C>].

<sup>31</sup> See THE HERITAGE FOUND. & THE OVERSIGHT PROJECT, *supra* note 28.

<sup>32</sup> See Ken Klipperstein, *FBI Readies New War on Trans People*, KEN KLIPPERSTEIN (Sep. 18, 2025), <https://www.kenklipperstein.com/p/fbi-readies-new-war-on-trans-people> [<https://perma.cc/48AU-BZSV>].

<sup>33</sup> See THE HERITAGE FOUND. & THE OVERSIGHT PROJECT, *supra* note 28, at 1.

<sup>34</sup> *Id.* at 3-4.

<sup>35</sup> *Id.*

men).<sup>36</sup> Believing that anti-transgender bias “poses an imminent threat to [transgender people’s] emotional, psychological, or physical safety, including through self-harm or suicide.”<sup>37</sup>

By these criteria, I am a terrorist. Hundreds of people I know personally—and probably millions I don’t nationwide—are terrorists. We are terrorists for believing in transgender equality. For believing transgender people have a right to exist. For recognizing and speaking about the real harms that anti-transgender bigotry continues to cause.

#### CONCLUSION

Serena Mayeri’s *Marital Privilege* is an important contribution to the literature. It is a reminder of the durability of institutions, and of the resistance of legal regimes to change. But, when cast against the backdrop of the present moment, it is also a reminder of how far we have come. Marriage’s critics were not fully successful, but they were a part of the many movements that helped to create a world in which even challenges to central institutions could be fought openly, without fear.

Today this freedom is under threat. Right now, it is transgender people and their allies who are in the crosshairs. But already they are not alone.<sup>38</sup> And a government that develops a taste for the repression of dissent rarely desists voluntarily. History shows that it is up to each of us to stand up—even where there may be personal costs—if we hope to recover a world in which the freedom to seek institutional change is a reality.

---

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1. Of course, the document also assures us that this does not mean “that all transgender individuals or their allies are domestic terrorists” only those that “take or incite unlawful violent action or threats based on [their] ideology.” *Id.* at 2. But the remainder of the document defines TIVE in ways that are essentially coextensive with mainstream non-violent beliefs about transgender equality. *See, e.g., id.* at 3-4 (discussing “typical characteristics of TIVEs”).

<sup>38</sup> *See, e.g.,* Zolan Kanno-Youngs & Hamed Aleaziz, *Inside Trump’s Crackdown on Dissent: Obscure Laws, ICE Agents and Fear*, N.Y. TIMES (Mar. 12, 2025), <https://www.nytimes.com/2025/03/12/us/politics/trump-crackdown-dissent.html>; Justin Spike & Nicholas Riccardi, *Trump’s Moves Against Media Outlets Mirror Authoritarian Approaches to Silencing Dissent*, PBS NEWS (Sep. 18, 2025, at 15:22 ET), <https://www.pbs.org/newshour/politics/trumps-moves-against-media-outlets-mirror-authoritarian-approaches-to-silencing-dissent> [<https://perma.cc/8JGJ-LPBJ>].