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## THE BENEFITS OF MARRIAGE

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If you look at most Constitutional Law I syllabi in this country, you will likely find a few cases involving marriage. Most syllabi probably include *Loving v. Virginia*<sup>1</sup> and *Obergefell v. Hodges*,<sup>2</sup> and *Frontiero v. Richardson*<sup>3</sup> probably appears fairly often as well. Read together, these cases support a broadly triumphalist narrative about the legal regulation of marriage over the past seventy-five years, one that corresponds with broader popular narratives about the progressive evolution of marriage in recent generations. Civil rights, women's rights, and gay rights advocates have scored major marriage-related victories in court, and these victories have been part of a modernizing trend often celebrated in American culture. Dominant cultural narratives suggest that, over time, marriage has become more egalitarian and more inclusive—a more perfect union.

Serena Mayeri's excellent new book, *Marital Privilege: Marriage, Inequality, and the Transformation of American Law*,<sup>4</sup> provides a cogent, well-sourced account of these changes and the plaintiffs, activists, lawyers, and scholars who helped to bring them about in the last four decades of the twentieth century. What sets *Marital Privilege* apart from most other histories that recount these monumental changes is that Mayeri focuses just as much on what *did not* change—on the less examined, but no less important, features of marriage regulation that resisted reform, even as they were also challenged inside and outside of courts. As *Marital Privilege* so adroitly reveals, these unyielding, lesser-noticed features of marriage regulation are at least as important in understanding the institution of marriage, in the twentieth century and today, as the features that have recently changed. Indeed, Mayeri's book shows how substantially the popular triumphalist narrative has obscured other facets of marriage regulation that have profoundly shaped American society—frequently exacerbating inequality and decreasing social welfare—in ways that have often gone unnoticed.

*Marital Privilege* does not discount the significance of decisions such as *Loving* and *Obergefell*, which blocked powerful forms of discrimination against

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<sup>1</sup> 388 U.S. 1 (1967).

<sup>2</sup> 576 U.S. 644 (2015).

<sup>3</sup> 411 U.S. 677 (1973).

<sup>4</sup> SERENA MAYERI, *MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW* (2025).

racial minorities and gays and lesbians, or the importance of the string of decisions in the 1970s, including *Frontiero*, that made male and female spouses (at least formally) more equal. But the book uncovers, and urges us to pay attention to, a far lesser-known history as well—the history of the people left behind by these legal triumphs and the reforms they wrought. Over the course of the decades Mayeri describes, multi-racial couples, same-sex couples, and heterosexual couples who chafed against traditional sex-role enforcement in marriage scored important victories—victories that in many cases brought them greater social approbation and tangible material benefits. But *Marital Privilege* also introduces us to a different, less fortunate cast of characters: advocates, activists, scholars, and regular people who tried to change marriage in the second half of the twentieth century and failed.

What doomed the efforts of the people at the heart of Mayeri’s account is that they did not want to be let into marriage, or to be treated the same as their spouses once they entered the institution. These people sought equality outside of marriage, challenging the vast discrepancies in the rights and benefits to which married and unmarried people are entitled. *Marital Privilege* recounts some of their stories—so different from the stories we tell about the canonical Supreme Court cases involving marriage. These unmarried plaintiffs (some partnered, some parents) challenged various regulatory structures that extended benefits and privileges to married people and withheld them from the unmarried. Very occasionally, they won their cases. But, Mayeri argues, marriage-related litigation in this period succeeded only in transforming a regime of marital supremacy into a regime of marital privilege—a shift that was rather more preservative than transformative.<sup>5</sup> By the end of the century, “judges, lawmakers, administrators, and even many law reformers rarely questioned the government’s ability to promote and privilege marriage,”<sup>6</sup> and unmarried people and their children continued to face substantial discrimination and material deprivation.

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<sup>5</sup> See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2180 (1996) (developing theory of “preservation through transformation,” which posits that “[s]ocial struggle over the legitimacy of a status regime will produce changes in its formal structure” and in rhetoric used to justify it, but that such changes may allow contested regime to survive by providing progress narrative that masks deeper continuities). Mayeri argues this is what has occurred in the context of marriage regulation. Famous constitutional rulings and reforms altered marriage in various ways over the past seventy-five years, opening the institution to more people and softening some of the harshest penalties visited on the unmarried. However, Mayeri contends, “these reforms arguably legitimized marital privilege in ways that deepened structural inequalities based on gender, race, and class.” MAYERI, *supra* note 4, at 325. The progress narrative built around cases like *Loving*, *Frontiero*, and *Obergefell* casts modern marriage as egalitarian and evolved; but, Mayeri argues, it masks the enduring inequalities in this country’s treatment of married and unmarried people.

<sup>6</sup> MAYERI, *supra* note 4, at 325.

*Marital Privilege* has been published at a timely moment, amid another resurgence of the perennial marriage promotion movement that periodically gains the upper hand in United States politics, typically when the Republican Party comes to power. This movement generally frames marriage as the best solution to a plethora of social ills, and it attributes a wide array of social problems to falling marriage rates over the past three-quarters of a century.<sup>7</sup> This time around, the movement is particularly focused (at least rhetorically) on the problem of young men. There's a lot of rhetoric right now, by prominent conservatives, about the problem of young men refusing to grow up: playing video games and spending time online, shiftless and unemployed or underemployed.<sup>8</sup> Many propose marriage as the solution: It is the path that will enable these extended adolescents to become strong and independent adult men.<sup>9</sup> Marriage promoters also believe marriage is critical for young women, but for different reasons. Conservative activist Charlie Kirk recently argued that “[w]e should bring back the celebration of the Mrs. degree,” exhorting young women to deprioritize or forgo careers to stay at home and raise children;<sup>10</sup> his allies, including Vice President J.D. Vance, have vowed to advance this agenda in the wake of his death.<sup>11</sup> The argument is that this arrangement benefits everyone: It is good and healthy for women to depend on their husbands (and not the

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<sup>7</sup> In 1949, nearly four in five households in the United States were headed by a married couple. In 2024, fewer than 50% of households included a married couple. Jacob Bogage, *The Group Behind Project 2025 Wants a ‘Manhattan Project’ for More Babies*, WASH. POST (Sep. 3, 2025), <https://www.washingtonpost.com/business/2025/09/03/heritage-foundation-parents-children-birth> [https://perma.cc/J9NH-BRNE].

<sup>8</sup> See, e.g., Morgan Music, *Mike Johnson Says Men Need to Stop ‘Playing Video Games All Day’ and Get to Work: ‘They’re Draining Resources,’* LATIN TIMES (Apr. 11, 2025, at 13:28 ET), <https://www.latintimes.com/mike-johnson-says-men-need-stop-playing-video-games-all-day-get-work-theyre-draining-580534> [https://perma.cc/HP24-JTLP]; Congressman Aderholt Backs Speaker Johnson: *New Data Shows Able-Bodied Medicaid Recipients Spend Over 120 Hours a Month Watching TV and Playing Video Games Instead of Working*, Press Release, OFF. OF REP. ROBERT ADERHOLT (June 3, 2025), <https://aderholt.house.gov/media-center/press-releases/congressman-aderholt-backs-speaker-johnson-new-data-shows-able-bodied> [https://perma.cc/JL3M-J2QW] (citing recent study by American Enterprise Institute purporting to show many Medicaid recipients do not have children, are able-bodied, and choose to collect government benefits while playing video games and watching television all day).

<sup>9</sup> Caroline Kitchener, *What Charlie Kirk Could Mean for the Future of Marriage and Family*, N.Y. TIMES (Sep. 19, 2025), <https://www.nytimes.com/2025/09/19/us/politics/charlie-kirk-erika-family-marriage-children.html> [https://perma.cc/9Y3J-BG3V] (discussing centrality of marriage to Charlie Kirk's vision of renewed America and its current popularity among right-wing conservatives as antidote to perceived problems plaguing young men).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (quoting Vice President J.D. Vance who said of the conversations he had with Charlie Kirk: “We talked all the time about the most important thing you could do is not vote for a particular candidate. . . . It was to become—if you were a young man—a husband and a father”).

government) for support and protection, and this dependence is what enables men to become self-reliant masters of their homes, protecting and providing for their families.

Mayeri's history of marital regulation from 1960 to 2000 is illuminating for a host of reasons, but one that particularly struck me, reading the book in the midst of this resurgence of marriage promotion, is how completely the movement's frames obscure (or attempt to obscure) what marriage is. Marriage is not one thing, of course. But one of the things it is is a massive social welfare program run by the government. The (losing) plaintiffs Mayeri focuses on in her book asked courts and legislatures to extend to them some of the many benefits the state reserves for married people. These plaintiffs protested the unfairness of a system that denied them and their children various forms of governmental largesse that were—and still are—doled out only to married people and their children. A disproportionate number of these plaintiffs were poor Black women and other women of color, and they largely lost their cases; the legal system by and large condoned their continued exclusion from the many social welfare benefits the state funnels through marriage. Viewed through this lens, marriage promotion narratives that frame married men as independent, self-reliant types and Black women as “welfare queens,”<sup>12</sup> luxuriating in government hand-outs, seem quite remarkable—as do narratives that portray marriage as the antidote to, or antithesis of, reliance on government programs.

It is even more remarkable that these narratives persist after the battle over same-sex marriage that transpired over the past couple of decades—a battle that largely post-dates the history Mayeri recounts in her book—because that battle shone a spotlight on the government benefits that accrue to married people. In 2004, the Government Accounting Office produced a report that identified 1,138 federal statutory provisions that condition governmental benefits on marriage.<sup>13</sup> After *Obergefell*, same-sex couples who decide to marry can generally access these benefits. But people who do not marry still cannot—and the deprivation can be substantial. This brief Essay cannot describe comprehensively the voluminous and varied set of benefits the United States reserves to married

<sup>12</sup> See Anne Kim, *The Tyranny of the Welfare Queen*, WASH. MONTHLY (Oct. 29, 2024), <https://washingtonmonthly.com/2024/10/29/the-tyranny-of-the-welfare-queen> [https://perma.cc/Q9ZD-FFWP] (discussing origins and persistence of this stereotype and quoting political scientist Anne M. Whitesell, who asserts “[t]he public identity of the welfare queen—the poor, single African American woman whose poverty was caused by her own laziness and promiscuity—is still the driving force in creating welfare policy” in the United States).

<sup>13</sup> U.S. GOV'T ACCT. OFF., GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004); *see also* United States v. Windsor, 570 U.S. 744, 771-72 (2013) (discussing “over 1,000 statutes and numerous federal regulations” including “laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits” that condition benefits on marriage); Turner v. Safley, 482 U.S. 78, 96 (1987) (voiding ban on prison inmates marrying in part because “marital status often is a precondition to the receipt of government benefits”).

people, but it is worth mentioning just a few. Married people can receive Social Security retirement, disability, and survivor benefits based on their spouse's work record, even if the qualifying spouse never worked outside the home;<sup>14</sup> people married to military servicemembers can access educational, medical, housing, and insurance benefits through their military spouses;<sup>15</sup> married couples receive (often very valuable) exemptions from estate and gift taxes on property and funds transferred between themselves;<sup>16</sup> working spouses can establish tax-advantaged Individual Retirement Arrangements ("IRAs") for non-working spouses;<sup>17</sup> married people frequently obtain health, dental, and other insurance benefits through their spouse's employer;<sup>18</sup> married individuals are often eligible for family leave to care for a sick spouse and are advantaged in various ways by laws that grant parental leave;<sup>19</sup> married people may receive worker's compensation benefits for a deceased spouse;<sup>20</sup> and the list goes on. This country provides a staggering amount of social welfare benefits through the institution of marriage—indeed, "the United States is unusual among western nations in the degree to which the state channels benefits through marriage."<sup>21</sup> Marriage is one of the prime vehicles through which federal and state governments in the United States channel money and other benefits to people.

The reasons why we funnel so many benefits through marriage yet fail to recognize marriage as a social welfare program are bound up with race, gender,

<sup>14</sup> 42 U.S.C. § 402 (2025) (describing spousal old-age and survivor benefits); *see also* Soc. SEC. ADMIN., PUB. NO. 05-10029, DISABILITY BENEFITS 10 (2025), <https://www.ssa.gov/pubs/EN-05-10029.pdf> [<https://perma.cc/5GR6-9VLP>] (discussing entitlement of married people and sometimes even divorced people to their spouse's, or ex-spouse's, disability benefits).

<sup>15</sup> *See Benefits for Military Spouses: A Comprehensive Guide*, MIL. BENEFIT ASS'N. (Apr. 2025), <https://www.militarybenefit.org/get-educated/spouse> [<https://perma.cc/UD9R-2EMB>].

<sup>16</sup> *See* Benjamin Afton Cavanaugh, *Statutory Time Travel: Allow Same-Sex Couples to Recoup Tax Overpayments*, 94 UMKC L. REV. 11, 32-37 (2025) (discussing plethora of gift and estate tax advantages accorded married people, particularly upon death of one spouse).

<sup>17</sup> *See Retirement Topics—IRA Contribution Limits*, INTERNAL REVENUE SERV., <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-ira-contribution-limits> [<https://perma.cc/8Y23-93K5>] (last visited Dec. 24, 2025).

<sup>18</sup> *See 2024 Employer Health Benefits Survey*, KAISER FAM. FOUND. (Oct. 9, 2024), <https://www.kff.org/health-costs/2024-employer-health-benefits-survey/#e3efa8b3-48d2-458b-a2f7-c4d5add1983b-h-section-3-employee-coverage-eligibility-and-participation> [<https://perma.cc/Y4RT-KNV5>] (finding 96% of small firms and 99% of large firms offering employee health benefits offer coverage to spouses and many married people obtain such coverage through their spouses).

<sup>19</sup> *See, e.g.*, MAYERI, *supra* note 4, at 285-86 (describing exclusion of unmarried people from some key Family and Medical Leave Act ("FMLA") benefits and concluding "the FMLA placed a premium on marriage, shortchanged employees who lived outside of marital nuclear families, and excluded the most vulnerable workers from coverage").

<sup>20</sup> *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015).

<sup>21</sup> MAYERI, *supra* note 4, at 2.

and class. Social welfare programs that channel all or the majority of their benefits to poor Americans—especially poor women of color—are often deeply stigmatized. The fights over welfare programs and the end of the Aid to Families With Dependent Children (“AFDC”) program in the 1990s, some of which Mayeri’s book covers, showcase this phenomenon quite dramatically.<sup>22</sup> But government benefits channeled through marriage are not stigmatized, even though they can be extremely generous, especially for people at the top of the economic ladder. White widows who have never worked outside their homes can receive large checks from the government and we do not think of them as welfare queens; we do not complain that they are getting government handouts or publicly fret about what this form of dependence is doing to their character.

This social approval—generally withheld from unmarried women who receive government benefits—has a lot to do with who gets married. Wealthier people marry at higher rates than poor people.<sup>23</sup> White and Asian people marry at substantially higher rates than Black and Hispanic people.<sup>24</sup> People with greater educational attainment marry at higher rates than those with lower levels of education.<sup>25</sup> Political narratives in the United States often obscure the benefits people in these privileged groups receive from the government, portraying less privileged people as the true (and undeserving) recipients of taxpayer dollars. The Heritage Foundation will soon publish a sweeping new set of policy proposals aimed at promoting marriage (which it refers to as a “Manhattan Project to restore the nuclear family”).<sup>26</sup> One of the central arguments of this project is that the United States government needs to “Start Supporting Married

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<sup>22</sup> *Id.* at 283-301; *see also* ANNE M. WHITESELL, *LIVING OFF THE GOVERNMENT?: RACE, GENDER, AND THE POLITICS OF WELFARE* (2024).

<sup>23</sup> Claire Cain Miller, *How Did Marriage Become a Mark of Privilege?*, N.Y. TIMES (Sep. 25, 2017), <https://www.nytimes.com/2017/09/25/upshot/how-did-marriage-become-a-mark-of-privilege.html> (reporting “26 percent of poor adults, 39 percent of working-class adults and 56 percent of middle- and upper-class adults ages 18 to 55 are married”).

<sup>24</sup> Juliana Horowitz, Nikki Graf & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. 16 (Nov. 6, 2019), [https://www.pewresearch.org/wp-content/uploads/sites/20/2019/11/PSDT\\_11.06.19\\_marriage\\_cohabitation\\_FULL.final\\_.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2019/11/PSDT_11.06.19_marriage_cohabitation_FULL.final_.pdf) [<https://perma.cc/9VTJ-D3AN>] (reporting “[w]hile 57% of white adults and 63% of Asian adults are married, fewer than half of Hispanic (48%) and black adults (33%) are”).

<sup>25</sup> *Id.* (“Among people ages 25 and older, those with a bachelor’s degree or higher (66%) are more likely than those with some college experience (56%) or with a high school diploma or less education (54%) to be married.”).

<sup>26</sup> Bogage, *supra* note 7.

Families”<sup>27</sup>—as if the government hasn’t been channeling benefits to married families for a very long time.<sup>28</sup>

*Marital Privilege* is a work of legal history. But in uncovering and analyzing the persistence of marital privilege, the book also makes a valuable contribution to the important political science literature on the hidden or submerged state.<sup>29</sup> That literature focuses on the “conglomeration of federal policies that function by providing incentives, subsidies, or payments to private organizations or households to encourage or reimburse them for conducting activities deemed to serve a public purpose.”<sup>30</sup> Two hallmarks of these kinds of policies are that “they shower their largest benefits on the most affluent Americans,”<sup>31</sup> and that “they obscure government’s role from the view of the general public, including those who number among their beneficiaries.”<sup>32</sup> Many of the governmental benefits associated with marriage take this form: often, people do not even think of them as government benefits. Indeed, marriage promoters generally tout marriage as the number one antidote to government—a way that husbands and fathers can establish their independence and mothers can stop depending on the government.

Political scientists who study the submerged state argue that one of the keys to making more democratic and egalitarian policy in this country is helping Americans to recognize where the government is at work and what its policies do. That seems very true of marriage. Politicians and activists on the right keep up a constant drumbeat telling us that marriage is good, indeed, essential, for children and families. But what if we recognized that marriage is, among other things, a massive social welfare program through which the government

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<sup>27</sup> Emily Brooks, *The Movement: Heritage ‘Manhattan Project’ for Nuclear Family is A-Bomb on Right*, HILL (Sep. 9, 2025, at 08:00 ET), <https://thehill.com/newsletters/the-movement/5492846-manhattan-project-marriage-births> [https://perma.cc/6D4D-43X8] (noting “Start Supporting Married Families” is a heading under which several proposals fall).

<sup>28</sup> See Brief of Hist. of Marriage & the Am. Hist. Ass’n as Amici Curiae in Support of Petitioners at 11, Obergefell v. Hodges, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (explaining “economic dimension of the marriage-based family took on new scope when federal government benefits expanded during the twentieth century,” and that this “state and federal government[]” practice of “channel[ing] many economic benefits through marital relationships” has continued into twenty-first century).

<sup>29</sup> For outstanding scholarship in this field, see, e.g., JACOB HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES (2002); CHRISTOPHER HOWARD, THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY (2007); CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES (1997); SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY (2011); Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595 (1993).

<sup>30</sup> METTLER, *supra* note 29, at 4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 5.

channels money and other benefits to people? If the 1,138 federal benefits that make up this program actually benefit children and their parents—helping to make them wealthier and providing useful forms of security that enable them to better weather challenging circumstances—shouldn’t we extend more of these benefits to unmarried people and their children, who generally need them even more?

The challenge here is that many of the policies that make up the submerged state are submerged for a reason: they benefit and protect people who are already privileged. Marriage enables the disproportionately white, wealthy, and educated couples who join the institution to lay claim to over one thousand government benefits with no stigma; indeed, they are celebrated for joining the program. Marital privilege, as Mayeri conceives of it, refers to the set of rights and benefits accorded married people and their children in American law. But the history she recounts in her book illuminates another, less tangible, aspect of this privilege. Part of marital privilege is the ability to claim social welfare benefits without anyone framing it as dependence on the government—the privilege of knowing that, if you’re married, you can tap into a potentially very lucrative set of benefits without facing any of the social opprobrium often heaped on other people who receive money from the government to support their families.