FORMAL VICTORIES AND ROADS NOT TAKEN: EXCAVATING DEPARTURES AND THROUGHLINES IN CHALLENGES TO THE PLACE OF MARRIAGE

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INTRODUCTION

In 2015, Professor Serena Mayeri published an essay explaining why *Obergefell v. Hodges*,[1] the landmark Supreme Court decision holding that same-sex couples had the right to marry, was a "spectacular victory" for marriage equality advocates, yet also "felt bittersweet to many feminists and LBGT activists."[2] As a legal historian of twentieth-century feminism, Mayeri found *Obergefell*'s "valance" to be "especially complex" when measured against "two legacies of second-wave feminist legal advocacy: the largely successful campaign to make civil marriage formally gender-neutral, and the lesser known, less successful struggle against laws and practices that penalized women who lived their lives outside of marriage."[3]

With respect to the first legacy, Justice Kennedy's majority opinion in *Obergefell*, Mayeri observed, "wholeheartedly" embraced the transformation of marriage law from mandating hierarchical and gender-differentiated rights and duties of husbands and wives to establishing a gender-neutral partnership with reciprocal rights and duties.[4] Informed by the work of feminist historians of marriage,[5] Justice Kennedy recognized that the institution of marriage had "evolved over time": Its history was one of "both continuity and change"—evident in the demise both of coverture and of bans on interracial marriage, as

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[1] 576 U.S. 644 (2015).

[2] Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIRCUIT 126, 126 (2015) (discussing *Obergefell*).

[3] *Id.* at 127.

[4] *Id.*

[5] *See* Nancy J. Cott, *Which History in* Obergefell v. Hodges*?*, PERSPS. ON HIST. (July 1, 2015), https://www.historians.org/perspectives-article/which-history-in-obergefell-v-hodges-june-2015 [https://perma.cc/S7FL-KCGR]. Among other sources, Justice Kennedy cites an amicus brief filed by historians of marriage (including Cott) and Cott's book, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000). *See Obergefell*, 576 U.S. at 659-60.

in *Loving v. Virginia*.[6] This allowed him to identify four reasons that marriage remains "fundamental" that applied equally to same-sex couples.[7]

To be sure, Mayeri commented, Justice Kennedy could have been "far more precise" in making an Equal Protection argument for marriage equality by "drawing the doctrinal connections between constitutional sex discrimination law and the constitutional imperative of same-sex marriage"—as a federal appellate judge had in an earlier concurring opinion.[8] Justice Kennedy's failure to explicitly include a sexual orientation discrimination analysis also "disappointed many observers"; it raised concerns about whether, given the opinion's rhetoric about the "exalted status of marriage," *Obergefell* would be confined to marriage, leaving "other injustices untouched."[9] Even so, Mayeri concluded, *Obergefell*'s "gender egalitarian vision of marriage" is a "direct legacy of feminist legal advocacy."[10]

By comparison, Mayeri continued, second-wave feminism's second legacy is in "profound tension with *Obergefell*."[11] That legacy includes feminist attacks on "policies and practices that excluded women with nonmarital children from employment and housing, denied them government benefits, and forced mothers to reveal the identity of their children's father," as well as laws discriminating against "illegitimate" children that "burdened the mothers who were primarily responsible for their care and support."[12] Justice Kennedy's opinion, as Mayeri observed, "elevates and ennobles marriage in terms that implicitly disparage nonmarriage" and "laments the fate of children with unmarried parents as inherently difficult and demeaning."[13] Feminist campaigns against discrimination based on nonmarital status—sometimes directly challenging "marital supremacy"—enjoyed "only limited success, and fell largely under the constitutional radar."[14] Mayeri urged that the arguments made by those challengers resonate with "greater urgency today as an ever-widening marriage gap separates the wealthy, educated, married haves from the increasingly impoverished unmarried have-nots."[15]

A decade after *Obergefell*, Professor Mayeri's fascinating and meticulously detailed new book, *Marital Privilege: Marriage, Inequality, and the Transformation of American Law*, tells the stories of "marriage's challengers,"

[6] *Obergefell*, 576 U.S. at 659, 672-74 (discussing Loving v. Virginia, 388 U.S. 1 (1967)).

[7] *Id.* at 665-72.

[8] Mayeri, *supra* note 2, at 130 (citing Latta v. Otter, 771 F.3d 456, 479-97 (9th Cir. 2014) (Berzon, J., concurring)).

[9] *Id.* at 131.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 132.

[13] *Id.* at 135.

[14] *Id.* at 132.

[15] *Id.*

from the 1960s to the beginning of the twenty-first century.[16] Along with the stories of some "well-known" lawyers, advocates, and scholars, Mayeri also "rescu[es]" the stories of now "obscure" Americans who "pushed marital boundaries" to protect their parental rights, their careers, or their "freedom to make decisions about their bodies and families."[17] Such rescue allows readers to "see change as a bottom-up as well as a top-down process."[18] Mayeri explains that "[p]eople of color—from influential lawyers and national figures to community activists and litigants—often pioneered claims for equality and justice regardless of family status."[19] Notably, these challenges also "advanced what Black feminists later named reproductive justice: the right to bodily autonomy, to have children or not, and to raise families in thriving homes and communities with government support rather than surveillance."[20]

Mayeri uses the term "marital supremacy" to describe how the extensive body of "marital status law" prevalent in the "mid-[20th] century legal regime" treated marriage "as a largely unquestioned bulwark of American public policy, a moral and religious imperative imprinted in stark, formal terms on the face of the law."[21] Marital status had an impact on "everything from the lawfulness of sexual intimacy and childbearing to eligibility to the custody of children," to one's employment.[22] By the early twenty-first century, Mayeri argues, "marital supremacy" had given way to what she calls "marital privilege." On the one hand, "[p]rinciples of equality, privacy, and due process cleansed the law of the most overt discrimination against women, people of color, and children born outside of marriage," softening the "sharp edges of marital status law."[23] On the other, marriage was still the source of "public and private benefits unavailable to the unmarried;" and, as "marital status correlated more than ever with race, class, and education," the "advantages of marital privilege" were enjoyed mostly by "those who needed them least."[24]

Mayeri's book is an impressive achievement. It is bound to become an essential reference for legal scholars across many fields, students of social movements, and activists seeking inspiration. Like Mayeri's award-winning first book, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution*,[25] *Marital Privilege* makes the past vividly present not only through engaging

[16] SERENA MAYERI, MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW 4 (2025).

[17] *Id.* at 7.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 7.

[21] *Id.* at 4, 6.

[22] *Id.* at 5.

[23] *Id.* at 6.

[24] *Id.*

[25] SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

portraits of the people asserting claims to liberty and equality, but also through painstaking and careful reconstruction of the cultural, legal, and political landscape against which people asserted such claims. In addition, just as *Reasoning from Race* valuably foregrounded the crucial role played by Black civil rights activist and feminist Pauli Murray, *Marital Privilege* highlights how some of the most "intrepid" challengers to marital supremacy were Black women.[26] I will highlight a few aspects of this significant book that are particularly pertinent to me as a family law scholar and teacher, a casebook coauthor, and a gender and law scholar.

I. GOING BEYOND JUDICIAL OPINIONS

First, *Marital Privilege* powerfully illustrates that reading a judicial opinion, even a canonical one, does not give us the full story. By retrieving the stories of marital supremacy's challengers, Mayeri offers a rich trove of arguments voiced by the people affected by marital status laws as well as arguments and strategies debated (and sometimes rejected) by their lawyers and amici. Courts often did not adopt these arguments even when they ruled favorably. In particular, *Marital Privilege* enriches readers' understanding of how lawyers, scholars, and cause organizations believed—or hoped—that the Supreme Court's mid-twentieth century right of privacy decisions, particularly *Griswold v. Connecticut*[27] and *Eisenstadt v. Baird*,[28] promised robust protection of the sexual and reproductive autonomy of unmarried and married persons. Often, however, courts rejected these robust readings. There is an intriguing connection between Mayeri's mapping of these constitutional roads not taken and the present-day genre of "rewriting" significant Supreme Court (and other) opinions from a feminist or Critical Race perspective, using the tools that were available at that time in history.[29]

Mayeri's analysis of *King v. Smith*[30] is an instructive example of how much is lost in reading only the Supreme Court opinion. In *King v. Smith*, the Supreme Court struck down Alabama's "substitute father" (or "man-in-the-house") rule.[31] The rule allowed the state to cut off vital Aid to Families with Dependent

[26] MAYERI, *supra* note 16, at 321.

[27] 381 U.S. 479 (1965).

[28] 405 U.S. 438 (1972). For an insightful exploration of *Eisenstadt*'s unfulfilled promise, see Susan Frelich Appleton, *The Forgotten Family Law of* Eisenstadt v. Baird, 28 YALE J. L. & FEMINISM 1 (2016).

[29] *See* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. OPINIONS ON RACE AND THE LAW (Bennett Capers, Devon W. Carbado, Robin Lenhardt & Angela Onwuachi-Willig eds., 2022). For a list of the multiple volumes in the Feminist Judgments Project (published by Cambridge University Press), see *United States Feminist Judgments Project*, CRITICAL JUDGMENTS, https://criticaljudgments.com/united-states [https://perma.cc/6EZS-MD7J] (last visited Dec. 26, 2025).

[30] 392 U.S. 309 (1968).

[31] *Id.* at 333-34.

Children ("AFDC") benefits to children of a recipient mother who "cohabitated" with a man, whether the man actually supported the children financially or not.[32] Alabama terminated the AFDC benefits received by Mrs. Sylvester Smith, a Black thirty-four-year-old mother of four children, because of an alleged sexual relationship with Mr. Willie Williams, a married father of nine children.[33] The Court decided the case in Mrs. Smith's favor on statutory grounds: in light of amendments to the Social Security Act and the "Flemming Ruling," "Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of children of such children is the paramount goal of AFDC."[34] But the Court declined to reach Mrs. Smith's Equal Protection challenge to Alabama's rule.[35] However, in a concurring opinion, Justice Douglas argued that the reasoning in the recently-decided *Levy v. Louisiana*, that the Equal Protection Clause barred discriminating against "illegitimate children" because "they were conceived in 'sin,'" should apply in *King*: "the immorality of the mother has no rational connection with the need of her children under any welfare program."[36]

When I teach *King v. Smith* in my Family Law course, I situate it in the context of 1960s advocacy efforts by Black single mothers like Johnnie Tillmon, who received AFDC and organized (with other mothers) the National Welfare Rights Organization, to challenge intrusive welfare regulations.[37] In *Marital Privilege*, Mayeri provides that context and also locates *King* in the context of contemporaneous challenges to birth status discrimination (the "illegitimacy" cases, like *Levy*).[38] In doing so, Mayeri provides the foundation for a much deeper appreciation of the litigants' normative vision of their rights and the vivid strategy debates between lawyers about their best arguments.

Mayeri quotes Mrs. Smith's recollection that she told her caseworker, Jacquelyn Stancil, who warned Mrs. Smith she could lose her benefits if she continued to see Mr. Williams, that whether or not she had an intimate relationship with Mr. Williams was "none of her business": "As long as I'm not

[32] *Id.* at 313-14.

[33] *Id.* at 315-16.

[34] *Id.* at 322-25 (explaining Secretary of Health, Education, and Welfare Flemming's policy announcement that "a State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere" and Congress's subsequent adoption of the policy in statutory amendments).

[35] *Id.* at 333.

[36] *Id.* at 336 (Douglas, J., concurring) (citing Levy v. Louisiana, 391 U.S. 68 (1968)).

[37] On Tillmon, see MAYERI, *supra* note 16, at 50-51.

[38] *Id.* at 39-71 (describing these challenges in a chapter titled "Hapless and Innocent Children: Birth Status and Welfare").

having no more kids for you to support, why should you bother me?"[39] Ruben King, the head of the Alabama welfare department, saw things differently: "[T]he mother has a choice in this situation to give up her pleasures or to act like a woman ought to act and continue to receive aid."[40] Augmenting classroom coverage of *King* with these competing views by Smith and King helps illuminate governmental use of welfare regulations as a means of social control.

Smith's "declaration of sexual independence and insistence that her personal life was nobody's business," Mayeri observes, "did not translate neatly or easily into legal or constitutional claims." Her lawyer, Martin Garbus, asserted that Alabama's conditioning benefits on disclosing—and refraining from—sexual contact with men violated Mrs. Smith's right to privacy, due process, equal protection, and freedom of association.[41] Garbus also argued that recent legal commentary—such as the ALI's 1962 Model Penal Code calling for decriminalizing "all sexual practices not involving force, adult corruption of minors, or public offense" and scholarly interpretations of *Griswold* and *Loving v. Virginia*—"called into serious question" the "right (or the duty) of the state to prohibit 'immoral' conduct which damages no other ascertainable public interest" and instead identified an emerging right of privacy.[42]

As Mayeri recounts, neither the federal district court nor the Supreme Court engaged Mrs. Smith's right to privacy, due process, or freedom of association arguments.[43] The lower court emphasized instead that the rule was "irrational" and "unreasonable" because "the punishment is against *needy children*."[44] As quoted above, the Supreme Court adopted a "similarly child-focused, race blind approach," while avoiding the constitutional questions.[45]

Mayeri excavates sharp tensions between lawyers in the welfare rights and "illegitimacy" cases. Advocates debated over whether to make child-centered arguments or arguments that more forthrightly challenged marital supremacy. Some lawyers, such as family law scholar Harry Krause, stressed harm to "innocent children" and a child's right to a "familial relationship with" and support from his father. Other lawyers, including constitutional law scholar and disability activist Jacobus tenBroek, urged attacking the "dual system of family law" by arguing for poverty as a suspect classification and for government aid as a matter of constitutional right.[46] Family court judge Justine Wise Polier, who had "noted the disparate impact of birth status laws on families of color," urged

[39] *Id.* at 52.

[40] *Id.* at 57. King also stated: "If a man wants to lay then let him pay, and if he has the pleasures of a husband, then he ought to have the responsibilities of a husband." *Id.*

[41] *Id.* at 53.

[42] *Id.* at 52-54.

[43] *Id.* at 58.

[44] *Id.* at 58. The lower court acknowledged the discriminatory purpose and effect of Alabama's law but did not base its Equal Protection ruling on race. *Id.*

[45] *Id.*

[46] *Id.* at 22-30.

attention to the lack of adequate governmental support for single mothers and on the pernicious role of stereotypies about young Black women in structuring benefit programs.[47] Advocates debated whether to center the often glaringly evident racially discriminatory purpose and effect of many birth status laws.[48] No matter what arguments advocates offered, however, by the early 1970s, a Supreme Court "transformed by Nixon appointees" was closing the door to "expansive constitutional claims."[49]

II. CHALLENGING MORAL JUDGMENTS AND DOUBLE STANDARDS

A second contribution of *Marital Privilege* is how it traces an illuminating throughline from the welfare rights and "illegitimacy" cases to a wide range of marital status discrimination cases in other contexts that also challenged reliance on "moral judgments about women's nonmarital sexual activity."[50] Similar judgments about "immorality" motivated discriminatory treatment of gay men and lesbians. Professor Mayeri recreates compelling portraits of the women who challenged the sexual double standard that led to dismissals of unmarried mothers, but not unmarried fathers, from public employment (e.g., the military, public schools, and public libraries).[51] "Gay and lesbian pioneers" also challenged employment discrimination rooted in judgements about the "immorality" of "homosexuality."[52] For example, readers may be familiar with *Baker v. Nelson*, an early unsuccessful challenge by Jack Baker and Mike McConnell to Minnesota's marriage law. But they may not know the story of how McConnell's marriage advocacy cost him a job offer from the University of Minnesota's library.[53]

In these various contexts, advocates believed that *Griswold* and *Eisenstadt* (in particular) "opened tantalizing possibilities for sexual freedom and for those who would challenge marital status law."[54] However, the outcomes in these cases, Mayeri concludes, "underscore the unfulfilled promise of *Eisenstadt*" to challenge discrimination based on marital status.[55] The gains the plaintiffs won were more modest: a shift from a per se rule about immorality to a "nexus" test (or functional test) that inquired whether the employee's sexuality or parental status impaired their ability to do their job—allowing still for considerable discretionary judgments.[56]

[47] *Id.* at 27-30.
[48] *Id.*
[49] *Id.* at 62.
[50] *Id.* at 147.
[51] *Id.* at 144-52.
[52] *Id.* at 152-60.
[53] *Id.* at 152-53.
[54] *Id.* at 150.
[55] *Id.* at 175.
[56] *Id.* at 175-81.

CONCLUSION

There are many other rewards for readers of *Marital Privilege* that I can only mention briefly. Mayeri's retrieval of arguments made half a century ago for more functional, open-ended, and pluralistic definitions of family (e.g., in the context of housing or adult-adult relationship recognition) provides important precursors to contemporary arguments about moving beyond single-family zoning to expand housing options.[57] A scholarly virtue of *Marital Privilege* is Mayeri's even-handed presentation of contentious debates with present-day resonance: among feminists over whether marriage could be made "safe for equality" or was irredeemably patriarchal;[58] among gay and lesbian leaders over advocating for civil marriage equality versus marriage abolition;[59] and among family law reformers over whether to support functional definitions of parenthood.[60] Finally, the book offers numerous fascinating historical tidbits. For example, Mayeri recounts how it was that Justice Brennan did not hire his first female law clerk until 1974, the year *after* he authored the key sex equality opinion, *Frontiero v. Richardson*.[61] That law clerk, Marsha Berzon, clerked "the same year that Brennan's recently divorced daughter, Nancy, and granddaughter Connie came to live with him, so during the 1974 term the justice and his clerk often left chambers at the same time to pick up children from day care."[62] Berzon was assigned to one of then-attorney Ruth Bader Ginsburg's Equal Protection challenges, *Weinberger v. Wiesenfeld*,[63] in which a widowed father (whose wife earned more than he did) was denied survivor benefits from the Social Security Administration that would have been available to a widowed mother; Berzon drafted Justice Brennan's opinion, which embraced "both Ginsburg's sex equality and child-centered arguments."[64]

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[57] *See, e.g.*, *id.* at 113-43, 245-82 (chapter 4 "Redefining the Household" and chapter 8 "The Functional Family").

[58] *Id.* at 75-79.

[59] *Id.* at 309-13.

[60] *Id.* at 266-81.

[61] *Id.* at 82. Mayeri reports that the clerk's hiring happened only after a former (male) clerk urged Justice Brennan to reconsider his "'not only sexist . . . [but] literally unconstitutional' aversion, already discordant with his judicial opinions" to hiring female clerks. *Id.* In *Frontiero v. Richardson*, Justice Brennan's plurality opinion analogized race and sex discrimination and said strict scrutiny should be applied to sex-based classifications. 411 U.S. 677, 685-88 (1973).

[62] MAYERI, *supra* note 16, at 82.

[63] 420 U.S. 636 (1975).

[64] MAYERI, *supra* note 16, at 83. Chief Justice Rehnquist's experience with the childcare challenges faced by his daughter, a single mother and lawyer, leading him sometimes to leave work early to help, may have contributed to his notable recognition of the role of reinforcing stereotypes about male breadwinners and female caregivers in *Nevada v. Hibbs*, 538 U.S. 721 (2003). *See* Reva Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1882-83 (2006).

Mayeri concludes her book with a brief look at the current political and constitutional landscape, which includes not only debate over whether *Obergefell v. Hodges* will simply "entrench marital privilege" or "open new possibilities."[65] That landscape is also formed (or deformed) by *Dobbs v. Jackson Women's Health Organization*,[66] which was decided by a 6-3 movement conservative Supreme Court remade by President Donald J. Trump and sharply departed from *Obergefell*'s approach to liberty. As Mayeri observes, "less than a decade after *Obergefell*, marriage equality—and so much else—once again [hangs] in the balance."[67] Mayeri argues that, in confronting this landscape, it is important to remember that the rights that *Dobbs* has taken away or threatened often fell short of the "more capacious visions of reproductive and sexual freedom, racial and economic justice, and gender equity" for which advocates fought, in challenging "marital supremacy."[68] Understanding these past challenges helps to situate how *Dobbs* and resistance to *Dobbs* reflect both "continuity as well as change."[69] Mayeri's insights on these departures and throughlines are yet another reason to read *Marital Privilege*.

[65] MAYERI, *supra* note 16, at 329.

[66] 142 S. Ct. 2228 (2022).

[67] MAYERI, *supra* note 16, at 337.

[68] *Id.* at 335.

[69] *Id.* at 335-36.