

The Low Road

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Serena Mayeri, [Marital Supremacy and the Constitution of the Nonmarital Family](#), 103 *Calif. L. Rev.* 1277 (2015).

A concern about the marriage equality movement is that it has reinforced the supremacy of marriage and detracted from the LGBT community's broader agenda of family pluralism.¹ In her stunning new work, [Serena Mayeri](#) describes a similar dynamic in the history of another civil rights movement—the movement to eliminate illegitimacy classifications. There, too, important civil rights were secured at the cost of achieving broader, more comprehensive legal reform on behalf of non-conforming families. The parallelism of these two movements is not random or fortuitous. Indeed, Mayeri's work shows that the movements contributed to the same legacy of marital supremacy and that the loser in these two movements was the same: women, especially poor women and women of color, whose circumstances and desires put them outside the mainstream of traditional marriage.

Case by case, Mayeri takes us through the major litigation of the 1960s and 1970s that challenged illegitimacy classifications in Social Security benefits, inheritance rights, wrongful death claims, public assistance benefits, mandatory paternity disclosure rules, citizenship law, child support law, and employment bans against unmarried women. She shows that the illegitimacy challenges that succeeded (and many did not) did so because courts concluded that it was unfair to visit the sins of unmarried mothers upon their children. It was not that children were to be treated fairly *along with* their mothers; rather, they were to be *rescued from* the circumstances their mothers had created.

The difference matters. “[F]ocusing on the harm to (presumptively innocent) children while downgrading or penalizing their parents’ nonmarital (and presumptively not so innocent) relationships,” Mayeri writes, had “destructive symbolic and material consequences for nonmarital families.” (P. 1352.) These consequences included the strengthening the ideology of the marital family, the continued stigmatization of nonmarital sex, and the heightened marginalization of unmarried women, especially poor women. Bottom line: the important civil rights battle to end the status of illegitimacy for children was largely won, but the “larger battle over the relationship between family structure and racial, sexual, and economic justice.” (P. 1351) was lost. Sound familiar?

The failure to secure a larger victory for family non-conformism, Mayeri shows us, was not for lack of trying. In the context of these cases, advocates challenged the infringements to women's sexual privacy, the explicit distinctions many of these rules made between men and women, and the race and class implications of illegitimacy rules. Mayeri's meticulous research reveals a relentless (albeit restrained and largely uncoordinated) effort by advocates to defend the character of unmarried mothers, free women from the financial and employment penalties imposed by the state for their sexual choices, and remove them from the heavy shadow of race and class stereotypes.

Alas, courts weren't interested in the ways in which the challenged rules injured adults. Case by case, courts dodged sex discrimination claims, turned aside sexual privacy arguments, and ignored the race implications of these rules. The shunning of these arguments was so complete, Mayeri argues, that judicial opinions contain virtually no trace of them.

This article exemplifies the huge contribution history can make to family law scholarship. Like the scholarship of Reva Siegel, Ariela Dubler, Cary Franklin, Deborah Dinner and others, Mayeri's work helps us to better understand the importance of the roads taken and not taken. If our exuberance over the success of the marriage equality movement was insufficiently attentive to the consequences of that success for racial, gender, and economic inequality and for sexual and reproductive freedom, Mayeri shows us that we've been down this road before.

Maybe it's time to try another.

1. See, e.g., Nancy Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*, Beacon Press, 2008.

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