MARRIAGE EQUALITY AND MARITAL SUPREMACY

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Katherine Franke's Wedlocked: The Perils of Marriage Equality is the culmination of almost two decades of trenchant scholarship challenging the primacy of marriage in LGBT advocacy and in American law and society. Since the late 1990s, Franke has mined the history of African Americans' postbellum encounters with marriage for cautionary tales about the hazards of legal recognition. In both contexts, Franke argues, winning marriage rights risks exposed individuals and families to invasive regulation, stifling sexual freedom and experimentation, suppressing alternative arrangements for the provision of care and support, and demeaning those who cannot or do not wish to marry.[1]

The parallel between Reconstruction-era freedpeople and twenty-first century gay and lesbian Americans, as Franke is careful to acknowledge, is imperfect; it is discontinuity as much as similarity that makes the analogy fruitful. Most strikingly, the juxtaposition of these two cases spotlights how marriage equality advocates have succeeded, with astonishing alacrity, in normalizing what was once unthinkable. Franke argues that the marriage equality movement achieved this feat in part by inadvertently mobilizing the very ideological tropes and material realities that have rendered marriage at best an elusive ideal and at worst a rationale for the oppression and marginalization of African Americans.

Why have these encounters with marriage diverged so profoundly, defying Franke's earlier concern that gay marriage rights might aggravate rather than ameliorate homophobia? During Reconstruction, recognizing freedpeople as equal citizens with full ownership of their bodies and labor, with legal rights to marry and form families without interference from white overlords, posed a profound threat to the very foundation of white Southern society, labor relations, and political economy. Put simply, powerful white Southerners had everything to lose from recognizing the rights of freedpeople. The horrific backlash against marriage rights was part of a larger violent repression that squelched the promise of emancipation and largely reinstated a system that exploited African Americans' labor under conditions of excruciating unfreedom.

Today, most white Americans probably do not see basic legal rights for African Americans as a profound threat to their own status and well-being. (And indeed formal legal equality has proven to be a less-than-powerful weapon against entrenched racial privilege and injustice). Yet, as Franke describes, African Americans are perceived as, and blamed for, deviating from the

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[1] KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015).

normative ideal of family life. Specifically, bearing and raising children outside of marriage threatens a system that privatizes dependency in the nuclear family. Promoters of marriage as a solution to poverty seek to avoid the larger public outlays required to provide financial and/or caregiving support to single parents.

In contrast, equal rights for gay and lesbian couples appear to pose little material threat, real or perceived, to the political economy of marriage in the United States. While some straight Americans see in same-sex marriage an existential threat, marriage equality for gay and lesbian couples—and even enforceable laws against discrimination based on sexual orientation and gender identity more broadly—would not fundamentally alter the regional or national balance of social, political, and economic power. And (as Franke notes), at least some public officials perceive gay and lesbian (adoptive) parents as offering a "solution" to the "problem" of unplanned pregnancy, a problem which gay and lesbian parents themselves are assumed not to experience.[2] In other words, one explanation for the relative impotence of the anti-marriage equality backlash might be that same-sex marriage (and nondiscrimination based on sexual orientation and gender identity) does not appear to threaten entrenched power structures or pocketbooks.

Franke's transhistorical comparison also invites us to consider how the social meaning and material reality of marriage has changed in the century and a half between Reconstruction and the triumph of marriage equality. Since formerly enslaved persons gained access to the institution in the nineteenth century, marriage has undergone several intertwined and overlapping transformations. Relevant changes concern, for instance: the internal architecture of marriage (private inter se rights and obligations of spouses to each other); the relationship between marriage and the state (the public benefits and duties conferred by the government on marital families); the boundaries between marriage and nonmarriage (how the laws of marriage and marital status affect the nonmarried); the social norms and practices surrounding marriage and nonmarriage (including demographic shifts in who marries, divorces, cohabits, gives birth, performs parenting functions); and of course the larger political, economic, and social context.

The nineteenth-century marital bargain retained much of the formal structure of coverture, with husbands and wives expected to perform distinct reciprocal roles. Wives owed husbands personal services including maintaining a home, caring for children and other dependents, and sexual access. In exchange, husbands bore primary responsibility for the family's financial support. By the middle of the twentieth century, the marital bargain acquired a greater public component. For many women, marriage to a male breadwinner became the primary gateway to benefits such as Social Security and health insurance.[3]

[2] *Id.* at 186.

[3] *See* NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP (1998).

"Deserving" widows, abandoned mothers, and their children could receive public assistance through mothers' pensions and later Aid to (Families with) Dependent Children. But social insurance remained out of reach for the many African American women and men who worked in domestic and agricultural occupations.[4] De jure and de facto segregation in education, housing, and employment limited access to desirable jobs and neighborhoods. As black women and children gained access to welfare benefits, they became increasingly stingy and stigmatized.[5] Many African Americans, in short, never enjoyed the benefits of the old gender-based marital bargain.

A second transformation of marriage has occurred in the years since the 1965 Moynihan Report crystalized the political linkage of family structure and poverty. Feminists—led by African American advocates such as Pauli Murray and Eleanor Holmes Norton—promoted an egalitarian vision of marriage in which men and women shared breadwinning and caregiving responsibilities. This egalitarian vision underwrote Ruth Bader Ginsburg's 1970s litigation campaign, which turned husbands and wives into interchangeable spouses as a matter of formal law. By the end of the 1970s, marriage had become essentially gender-neutral as a matter of constitutional law: the government could no longer award benefits based on stereotypical assumptions of wives' dependence upon breadwinning husbands. Under the new marital bargain, educated professional women gained the opportunity—in theory, at least—to forge equal partnerships with men. Increasingly, however, marriage—egalitarian or otherwise—remained out of reach for many low-income women and women of color. Rates of divorce and nonmarital childbearing soared. Just as feminists renegotiated the marital bargain, marriage itself became a status of the privileged.[6]

Notwithstanding these profound changes, marriage's legal supremacy endured. Constitutional challenges succeeded in removing many of the formal legal disabilities endured by nonmarital children, but the government remained free to privilege and promote marriage at the expense of nonmarital families.[7] As the marriage equality movement exposed and emphasized, by the turn of the twenty-first century myriad federal and state laws conferred rights and obligations on the basis of marital status. And for all of the ways that twenty-first century marriage might be unrecognizable to a nineteenth-century American, certain constants remain. Marriage continues to be a primary means

[4] *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935 (1994); JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM, 1945-1965 (2005).

[5] *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY, chp. 5 (1996).

[6] SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIRCUIT 126 (2015).

[7] Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

of managing dependency in the absence of a robust welfare state. The more marriage correlates with socioeconomic status, the more the material and dignitary benefits of marriage accrue to those who need them least, exacerbating a vicious cycle of inequality.

This interim history can help shed light on the questions motivating Franke's study of marriage equality's perils, and the conclusions we might draw from her book. Chapter 6 asks, provocatively, is marriage "for straight people?"[8] Franke suggests that marriage may be a poor fit for individuals and couples who wish to depart from traditional heteronormative gender roles.[9] Arguably, though, marriage today is working best for couples who conform to the ideal of shared breadwinning and caregiving pioneered by African American feminists; many spouses who specialize in caregiving still find themselves disadvantaged at divorce. If this is true, then to the extent that married same-sex couples are more likely to have egalitarian relationships, divorce laws that assume equal contributions to the accumulation of marital property and limit long-term spousal support may be a reasonably good fit (or at least no worse than for different-sex couples). Same-sex couples (like different-sex couples) who wish to keep their property separate, and limit post-dissolution obligations, can opt out through premarital agreements.

The disciplining effect of marriage seems potentially more troubling, but there is another side to this story, too. As Mary Anne Case has written, marriage today may paradoxically confer greater "license" for couples to structure their relationships, including their sexual lives, as they choose without interference from the state.[10] And as feminist and family law scholars have long observed, it is nonmarital, dissolving, and impoverished families who experience intrusions into family life that marital privacy would never countenance.

Marriage, in other words, may be a good fit for gay and lesbian couples who look and act like the subset of privileged straight couples for whom marriage is working best. But regardless of one's predictions about how marriage will affect and be affected by the same-sex couples who choose to marry, the threat to the non-married (gay and straight) that Franke identifies seems undeniable. That threat, I would suggest, is posed not so much by marriage equality as by marriage supremacy—the legal and social privileging of marriage and marital families. So long as public and private benefits such as social insurance and health care are tied to marriage (or to conjugal partnership) and inaccessible to the nonmarried and unpartnered, marriage will continue to be an engine of inequality. So long as parental rights and obligations depend upon marital status, nonmarital parents and children will suffer disadvantage. So long as marriage is considered the gold standard of relationships, alternatives to marriage (and to conjugal partnership) languish, stifling and marginalizing not only marriage dissenters but those for whom marriage is desired but inaccessible.

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[8] FRANKE, *supra* note 1, at 208.

[9] *Id.* at 207-32.

[10] Mary Anne Case, Marriage Licenses, 89 MINN. L. REV. 1758 (2005).

The history of challenges to the legal primacy of marriage is a tale both cautionary and inspiring for those who share Franke's vision of a world in which marriage ceases to be central to social and economic citizenship. At the same time that feminists succeeded in making the laws of marriage and divorce formally gender-neutral, another, lesser-known, and less successful strand of feminism attacked laws that penalized unmarried women and their families. African Americans often led the way in these challenges to laws that excluded women with nonmarital children from employment and housing, denied them government benefits, forced mothers to identify their children's father, and discriminated against "illegitimate" children in matters of support, inheritance, government benefits, and the like. The campaign against illegitimacy penalties was most successful when it could frame innocent children as the primary victims of policies meant to deter adults' illicit sexual relationships, and when eliminating discrimination furthered the privatization of dependency. It was far less successful in persuading courts to question the supremacy of marriage, to endorse unfettered sexual and reproductive liberty, or to see discrimination based on marital status as unjustly perpetuating racial, sexual, and economic inequality.[11]

Wedlocked closes with a "Progressive Call to Action for Married Queers" in which Franke exhorts newly rights-bearing spouses to support alternatives to marriage; to resist the denigration of nonmarital relationships, sexuality, and reproduction; and to fight for other progressive causes such as racial and economic justice and reproductive rights.[12] Whether same-sex marriage marks the latest chapter in the history of marital supremacy or the first step toward achieving a broader vision of equality depends on all of us—married, queer, or neither—to heed her call.

[11] For more, see Mayeri, *supra* note 7.

[12] FRANKE, *supra* note 1, at 233-35.