
WHO ARE THE PEOPLE IN YOUR GAYBORHOOD? A RESPONSE TO KATHERINE FRANKE'S *WEDLOCKED*

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Katherine Franke has long been among the clearest voices on the double-edged nature of rights. Whoa to those who fail to take heed of her foresight on the hazards of anti-discrimination and anti-harassment protections. But in her remarkable new book *Wedlocked*,¹ Franke instructs us that the “perils of rights”² are not the principal lesson she wishes to illustrate. Instead, the archival gems that Franke has dug up for her readers are assembled to bring to light the “enduringly gendered nature of the institution” of marriage as well as its desexualization and racialization.³

As Franke’s readers are surely aware, contemporary advocates of “marriage equality” have long pressed an analogy between same-sex marriage and interracial marriage, or—conversely—between one man, one woman rules and the anti-miscegenation laws that were deemed unconstitutional in 1967 with the Supreme Court’s ruling in *Loving v. Virginia*.⁴ William N. Eskridge, Jr., for example, a leading academic proponent of same-sex marriage, elaborated this analogy in his 1996 book, *The Case for Same-Sex Marriage*.⁵ In *Loving*, Chief Justice Warren rested his decision striking down Virginia’s anti-miscegenation statute foremost on the Fourteenth Amendment’s equal protection clause and secondarily on the fundamental right to marry under the due process clause. Eskridge, undoubtedly vindicating the intuition of many observers, argued that same-sex couples ought to be accorded the right to marry under analogous applications of both clauses. In the case of the former, he posed a challenge to heterosexual-only marriage laws as impermissibly classifying people based on sex, but urged that the stronger challenge would characterize the laws as employing classifications based on sexual orientation. Properly understood, Eskridge argued, restrictions on the sex of one’s proposed marital partner would logically meet the same fate as restrictions based on race.⁶

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

² *Id.* at 6.

³ *Id.*

⁴ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵ WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

⁶ *See id.* at 153-82.

Litigation briefs and judicial decisions followed suit. In Goodridge, for example, the first real victory for the same-sex marriage campaign, Chief Justice of the Massachusetts Supreme Judicial Court Margaret Marshall explained:

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 [in *Perez v. Sharp*] that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment . . . or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment [in *Loving v. Virginia*]. As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice. In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance . . . because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here.⁷

The procession from different-race to same-sex marriage is a bit too easy, however, relying as it does on a pretense to value-neutral deduction from the formal equality principle in a context that is endlessly pliable. Franke takes us well beyond it. She mines instead a fresh comparison between the acquisition by African-Americans of the right to marry intra-race in the post-bellum period and the more recent acquisition of the right to marry by gay and lesbian couples. She identifies some consistencies across contexts, such as a pattern of resentful spouses leveraging the punitive power of the state in ways that invite regulatory incursion, for example in actions for support.⁸

The two contexts, however, also disclose some telling contrasts. Gays and lesbians, Franke observes, have by and large been welcomed into the marital fold.⁹ The mainstreaming of same-sex coupling on grounds of equality, deservedness, and love, has meant a new level of inclusion and citizenship for gays and lesbians. No longer imagined as figures of menace and moral decay, "lesbians and gay men have accomplished a kind of rebranding of what it means to be homosexual."¹⁰ Why, Franke invites us to wonder, has the same not been true for African-Americans, who have been free to marry one another for 150 years?¹¹ The differential in "social reputation"¹² between gay and black

⁷ *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 327-28 (2003) (citing *Perez v. Sharp*, 32 Cal.2d 711, 728 (1948); *Loving*, 388 U.S. at 1); cf. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (finding an analogy between the due process and equal protection analyses in *Loving* and the Court's analysis of the rights at stake in same-sex marriage).

⁸ FRANKE, *supra* note 1, at 166-81.

⁹ *Id.* at 197.

¹⁰ *Id.* at 201.

¹¹ *Id.* at 197.

¹² *Id.* at 198.

communities, she proposes, may mean that certain benefits have accrued to the gay rights movement by the widespread impression (deserved or not) that it is white.

[T]he gay community has been able to leverage its social capital in whiteness to their advantage in the marriage equality movement, yet African Americans have received little benefit in any endowment they might enjoy from the stereotype that all or most black people are heterosexual.¹³

Marriage has failed to work any rebranding for African-Americans. “No appeal to decency, tradition, or respectability [seems able to] overcome the logic of difference that structures racial identity in this country.”¹⁴ Worse, marriage has operated as a cudgel to brutalize black people: chastised for out-of-wedlock births, single motherhood, “matriarchal” family structure, and absent fathers.¹⁵ The contrast accrues a possible benefit to the gays and lesbians.

[T]he successes of the marriage equality movement may have been won precisely because of the negative reputation African Americans suffer when it comes to marriage. The racial endowment as white. . . surely helped conservative courts, legislators, and others come to see an affinity of interest with this cause.¹⁶

Franke does not posit that this has been intentional on the part of advocates for gay rights or marriage equality, but it is difficult not to observe the respectability politics that has characterized every aspect of the same-sex marriage campaign, from litigation to PR.

Moreover, Franke perceives a connection between the current valorization of gay family formation, even by judges,¹⁷ and impositions on black families by obstructed access to contraception and abortion services and by the excesses of the child welfare system.¹⁸ She points to rates of gay and lesbian adoption—lauded as a partial solution to the problem of unwanted children—and juxtaposes that against black (intended and unintended) reproduction and the removal of black children from their original homes, arguing that gay families supply a rationale for the impact of racist social policy on black communities. So African-Americans and gays are not just for comparing. Franke effectively proposes an

¹³ *Id.*

¹⁴ *Id.* at 204.

¹⁵ *Id.* at 198. *See also* DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965); CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980* (1984) (both placing much of the blame for black poverty on black family structure).

¹⁶ FRANKE, *supra* note 1, at 204.

¹⁷ Franke cites to Judge Richard Posner of the Federal Court of Appeals for the Seventh Circuit, *see id.* at 185, but since her book was published, Justice Kennedy made a similar point in *Obergefell*.

¹⁸ FRANKE, *supra* note 1, at 185-87.

economy in which same-sex marriage generates costs for African-Americans. The success of gay domesticity relies on the incomplete success of the black domesticity.

The eradication of sodomy prohibitions and the advent of same-sex marriage have enabled many gay people to live as respectable couples and families entitled to security. These achievements of the gay rights movement have occurred largely in a discourse that emphasizes love, privacy, commitment, domesticity, children, and family responsibility. Bourgeois same-sex couples in urban and suburban neighborhoods can join forces with their heterosexual neighbors to promote values of private property, domesticity and security. Not all LGBTQ people, however, are in a position to benefit from progress in those terms. Worse, in the case of gentrification conflicts, low-income, homeless, and marginally housed people, especially LGBTQ youth of color, emerge as threats to those values.

In many American cities, gay men and lesbians settle in enclaves that they expect not only to be tolerant, but also to maintain vibrant arts, culinary, and retail districts. Perhaps because gay men are less likely to have children, and lesbians do so a bit later on average than straight women, both may be less concerned with schools and more inclined to invest income in improving the value of their real estate.¹⁹

In New York City, for example, gentrification has put gay property owners and high-income tenants into conflict with LGBTQ people who live more of their lives in public spaces. In the West Village, affluent condominium dwellers located in the recently developed area near the Christopher Street Pier, fought to improve their “quality of life” by supporting a crackdown on LGBTQ youth, mostly of color, many of whom were homeless or unstably housed, who have historically gathered on the pier. The West Village has a long history of gay culture, and is home to the Stonewall Inn, the site of the famous riot that is sometimes regarded as the birth of the modern gay rights movement. During the mayoral administration of Rudy Giuliani, policing of the area intensified. Youth were arrested for petty crimes such as blocking a sidewalk. A vocal group of property owners and high-rent lessees calling itself RID (Residents In Distress) welcomed the increased attention to their security and property values. The youth, however, reacted by forming a grassroots organization, FIERCE (Fabulous Independent Educated Radicals for Community Empowerment) to protest their treatment by the police and residents.²⁰ RID and FIERCE clashed at neighborhood meetings. RID called for a curfew, greater police presence, and aggressive permit enforcement for medical vans and other vehicles there to provide services to the youth. Through its organizing and advocacy, FIERCE achieved several impressive victories, such as defeating a proposed curfew on the pier as well as nighttime closure of public restrooms.

¹⁹ GARY J. GATES & JASON OST, *THE GAY & LESBIAN ATLAS* 39-41 (2004).

²⁰ Gio Ross, *Youth Fight Displacement—and Win!*, FIERCE (Mar. 1, 2008), <http://www.fiercencyc.org/media/mentions/youth-fight-displacement-and-win>.

Similar clashes have taken place in Chicago's Boystown, San Francisco's Outer Tenderloin and elsewhere. The tolerance sought out by gay gentrifiers may in fact have its limits, manifest as intra-LGBT conflict along race and class lines. The discursive terms that have advanced the interests of the most advantaged gays not only excludes a broad swath of LGBTQ people, but in some instances treats them as threats to private property and secure domesticity.

The ecological relation into which Franke places gay rights and racial and class stagnation is an important insight—not because it lays all the blame for racial and economic injustice at the feet of gay rights or the marriage equality campaign, but because it urges cognizance of the “externalities”²¹ of the discourse that has so effectively served the gay rights movement. That eagerness to take responsibility is apiece with Franke's long record of advocating that we, the beneficiaries of gay rights, be willing to set aside defensiveness about the negative consequences of our victories for vulnerable constituencies.²²

Wedlocked gives us cause to reflect on the ecological relationships among marginalized constituencies and their justice pursuits. Marriage—infused as it is with moralism and belonging—produces its antipodes. I thank Franke for this reminder of the responsibility that success entails.

²¹ FRANKE, *supra* note 1, at 206.

²² See, e.g., Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 Colum. HUM. RTS. L. REV. 1 (2012) (on Western nation's exploiting their progress on gay rights to deflect from human rights abuses in other contexts).