
DREADLOCKED

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OBERGEFELL’S CONTRIBUTION TO CONSTITUTIONAL LAW	54
SAME-SEX COUPLES’ CONTRIBUTIONS TO FAMILY LAW	56
A CLOSING WORD ON LESSONS OF HISTORY	57

Scholars inevitably race against developments in their fields. *Wedlocked* is a prime example. It reports research that was, by the author’s account, undertaken to discourage advocacy for the cause of same-sex marriage, but completed and published in the wake of *Obergefell v. Hodges*’s constitutional vindication of that cause.

Professor Franke had taken as her starting point the fact that emancipation from United States slavery brought with it the right to marry. She then probed neglected records of post-Civil War treatment of emancipated people for evidence of sour grapes—evidence that, for African-Americans, the right to marry was more of a curse than a benefit. A sour grapes analysis can, of course, be undertaken with respect to any institution in which free citizens partake: Consider the electoral system, the housing market, or the job market. In each, subordinated people take lumps. With respect to each, we must choose when and whether to stand outside dreading abuse or complicity, or step inside and strive to generate change. Different choices are wise at different times and in different settings.

Professor Franke is a thoughtful scholar of gender, sexuality and family law, and she has written movingly of disadvantages that African-Americans suffered when emancipation brought legal recognition of their marriages and other family rights and responsibilities.¹ She documents the callous treatment of women and children officially liberated by the military enlistment of their husbands and fathers. She observes, rightly, that supremacist white officials looked upon marriage as a “civilizing” influence for a primitive people. She also observes, rightly, that with marriage recognition came vulnerability to both private and official actions for bigamy, adultery, child or spousal support and the like, and that these vulnerabilities were more serious for their potential to entrap people in convict labor systems.

It does not follow, however, from Professor Franke’s catalogue of abuses that legal recognition of the African-American family was either a curse or a hollow

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

victory. On this point, I confess to speaking personally and therefore somewhat emotionally: I am the descendant of a woman of color who waged and won a seemingly futile legal battle, well before the Civil War, for recognition of a natal tie and the rescue of her child from a legally questionable servitude. But I speak also as a student of slavery in the United States who must balance the disabilities that may flow from family recognition against the civic and social exclusion, coerced sexual liberties, usurpations of parental authority, and forcible family separations that were common characteristics of slavery.

Many are eager to celebrate the Obergefell decision as a civil rights—and, indeed, a human rights—victory. Others, like Professor Franke, are reluctant to celebrate Obergefell because celebrating the right to marry lends legitimacy to an institution that is patriarchal, puritanical, a tool for policing intimate conduct, and a tool for the degradation of non-conforming lifestyles. I observe the debate between eager and reluctant celebrants with the strong feeling that both sides are right: We should celebrate loudly and with confidence, but we should take care to do so in ways that further the cause of human freedom and dignity, rather than strengthen patriarchy, puritanism, panoptic policing and bigotry. Professor Franke seems to take somewhat the same position in this post-Obergefell world: She has—wisely, I think—expanded *Wedlocked*'s project of documenting cautionary tales against marriage to include a litany of pitfalls to be avoided as the institution becomes more inclusive.

This is wise for two reasons. The first is that Obergefell's recognition of a substantive right to marriage recognition is an important step in the process of understanding how and why our post-slavery Constitution mandates respect for human dignity. The second is that Obergefell's inclusion of lesbian and gay people in states' family law regimes opens possibilities for making those regimes less patriarchal and more constructively child-centered. I justify these assertions in turn below.

OBERGEFELL'S CONTRIBUTION TO CONSTITUTIONAL LAW

Loving v. Virginia,² in which the Supreme Court upheld the right of white and non-white people³ to intermarry, is pivotal to the constitutional moves by which the Supreme Court upheld the right of homosexual marriage. Unfortunately, however, its relevance has been only partially recognized: *Loving* is commonly—and rightly—understood as having decided, on equal protection grounds, that states may not interfere with a person's choice to marry across lines distinguishing the white race and all others.⁴ But *Loving* is just as important

² 388 U.S. 1 (1967).

³ It was important to the Court's reasoning that the anti-miscegenation laws at issue were not symmetrical; they were titled "An Act to Protect Racial Integrity," and designed to protect the "white race" from contamination. *Id.* at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

⁴ *Loving*, 388 U.S. at 9.

for having established that marriage recognition is itself a fundamental right. In the words of the Court:

These [anti-miscegenation] statutes deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the pursuit of happiness by free men.⁵

In looking both to the equal protection and the substantive due process grounds for invalidating anti-miscegenation laws, the Court called forth principles that speak to both of two conspicuous ways that marriage rights of African-Americans have been constrained in the United States: they speak not only to the racial restrictions that were at issue in *Loving*, but also to the slave laws under which recognition of the marital and other familial relations of African-American people were denied entirely. Marriage recognition is not just something that must be granted to different kinds of people equally; it is a substantive right that must be granted unless there is a compelling interest in denying it. The difference is subtle but significant. In the same-sex marriage context, it is the difference between saying that singling out same-sex couples for exclusion from the institution of marriage would have to be strongly justified and saying that the institution of marriage is so important that any significant constraints upon it must be specially justified. In the African-American context, it is the difference between recognizing, as *Loving* did, a right of choice in marriage partners regardless of race and understanding, as *Loving* also did, that participation in the institution of marriage is a civic entitlement.

I speak of civic entitlement and free citizenship as those ideas are understood from the antislavery perspective that is the genius of our reconstructed constitution. The constitutional amendment that was the basis for the *Obberfell* decision is a Reconstruction amendment, and the Reconstruction amendments—the Thirteenth, Fourteenth, and Fifteenth—were structured most importantly to sketch out what it would mean to be a free person in a polity that had overthrown slavery. Reconstruction’s founders understood that the denial of family recognition had been a hallmark of slavery and that family recognition would be an essential component of free citizenship.⁶

Anti-miscegenation laws were, as the *Loving* court recognized, a supremacist insult conceived to maintain racial hierarchy. Nonetheless, the laws that made enslaved people officially rootless were more potent and more plainly incompatible with free citizenship than were the laws forbidding interracial marriage. Anti-miscegenation laws signaled degradation. But the social death achieved by natal and familial alienation was something more. It marked a distinction between people and property. It didn’t just separate enslaved people and free people; it legitimized disregard of any of an enslaved person’s intimate

⁵ *Id.* at 12.

⁶ Accounts of this kind are collected in PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997).

choices and relationships, and this disregard was an even greater affront to human dignity than the mandatory segregation that was its sequel.

The fundamental right to own and define ourselves and to exercise moral autonomy, all within collectively and reasonably imposed limits, is what the substantive components of the due process and citizenship clauses protect. *Obergefell*'s validation of these rights is reason enough to celebrate. Celebration should, however, be followed by dedication to assuring that family law systems limit human freedom in ways that are reasonable for a diverse and mutually respectful collection of people.

SAME-SEX COUPLES' CONTRIBUTIONS TO FAMILY LAW

A distinguished philosopher was recently asked whether he thought gay and lesbian people should marry now that the right has been secured. The questioner was concerned that to marry was to strengthen and endorse an institution steeped in patriarchal and puritanical tradition. The philosopher, himself a married man, acknowledged the complexities of the question and the seriousness of the questioner's concern. He then responded that he thought it reasonable to seek change both from without and from within an institution like marriage.⁷ The values of changing domestic relations law from the inside should not be gainsaid.

Nancy Cott's turn-of-the-century account of the relationship between public and private influences on conceptualizations of marriage suggested that a "disestablishment" of marriage wrought radical changes in the period beginning in the 1970s.⁸ Cott used the term "disestablishment" to describe a privatization of family norms analogous to their secularization in Europe as non-religious law unseated papal control. She pointed to birth control access, abortion choice, "no-fault" divorce, decriminalization of consensual sexual conduct, recognition of pre and post-nuptial agreements and recognition of cohabitation agreements as legal developments that gave people greater control and choice in their intimate lives. Cott observed, however, that resistance to same-sex marriage stood as an anomalous and intransigent obstacle in a path that seemed in other respects to lead to a regime in which couples would be freer to choose the terms of their intimate partnerships.

The question whether and how marriage would change when same-sex marriages were authorized was at the center of arguments in the *Obergefell* cases and their predecessors, and the arguments against same-sex marriage were filled with foreboding. However, as Cott pointed out at the dawn of the 21st Century, marriage change was not a mere possibility in the pre-*Obergefell* years, but a dynamic and ongoing process. Laws and practices governing domestic relations were—and had been for decades—loosening, tightening and otherwise changing

⁷ Remarks of Professor Anthony Appiah during a panel discussion of David Richards, *Why Love Leads to Justice* (2015), at NYU School of Law, December 3, 2015.

⁸ NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2002).

in ways that respond to the interests and arguments of married and unmarried couples as they negotiated or litigated the terms of their relationships.

The obstacle that seemed immovable to Cott in 2002 has now been removed. Lawmaking about family rights and responsibilities now encompasses an unprecedented variety of officially sanctioned family forms. Traditional gender roles are problematized as partners make liberated choices about how the fruits of their labor should be divided and what responsibilities they each owe to family support, home-making and child-rearing. At the same time, lawmakers are forced to take account of the interests of children whose ties to caregivers do not track the Dick and Jane family form, but may extend to a number of genetically or legally related and genetically or legally unrelated adults.⁹

We tolerate diversity not only for the comfort of people who can be labeled “different,” but also—and I think more importantly—because toleration makes it possible for traditions to expand and to be enriched. There is beauty in orthodox celebrations of Diwali, Hanukah, Christmas, solstice, and Kwanza, but festivals of light and love can be broadened and enriched when diya, menorah, yule log, and kinara lights combine.¹⁰ The opportunity for intelligently ordered liberty in the realm of domestic relations is there to seize.

A CLOSING WORD ON LESSONS OF HISTORY

It is interesting to compare Lea VanderVelde’s recently published accounts of suits brought by enslaved people who used the legal system to reclaim their freedom. The VanderVelde book, *Redemption Songs*, is no parade of triumphs. The litigants, usually pursuing freedom as families rather than as individuals, are repeatedly thwarted by the webs of doctrine that protected rights to human property before Reconstruction. Time and again, litigants were declared free only to be kidnapped and transported to states whose laws were friendlier to slaveholders’ rights. Time and again, family members were separated. Still, the VanderVelde focus is on truths to be found in efforts to articulate an entitlement to freedom, whereas the Franke focus is on law as a sacrifice of freedom. Both perspectives should be valued.

⁹ See MERLE H. WEINER, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW* (2015) (proposing that when the biological or legal parents of a child are not (or are no longer) married, their status as co-parents be formalized as a legally recognized relationship).

¹⁰ Molly Engle, *There Are 11 Winter Holidays at Least . . . , Evaluation is an Everyday Activity* (Dec. 18, 2013), <http://blogs.oregonstate.edu/programevaluation/2013/12/18/11-winter-holidays-least/>.