
DECENTERING MARRIAGE RIGHTS

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Katherine Franke's *Wedlocked: The Perils of Marriage Equality* draws from Franke's painstaking research on newly emancipated blacks' experiences with freedom to provide cautionary and critical reflections on the contemporary movement for marriage equality for same-sex couples. One important strategy that helped to move Americans toward the embrace of same-sex marriage was an optimistic and ultimately successful effort to analogize illegitimate bans on interracial marriage to bans on same-sex marriage. This strategy rooted opposition to egalitarian marriage in both cases squarely in prejudice against and degradation of blacks, gays, and lesbians and relied on constitutional equality as the remedy, but Franke's analysis goes deeper than just evaluating the analogy for fit and political leverage. Rather, she uses it to ask crucial questions. What is the significance of placing our private lives under "public control through law?"¹ What are the political consequences for subordinated individuals who gain rights in a climate where they still face prejudice and hatred? What work does marriage as an institution do to discipline its participants and their families? And how can we expect the struggle for marriage equality to reorganize and divide the gay rights movement? Franke reminds her readers that ultimately, despite lesbians' and gay men's enthusiastic embrace of marriage both as a good in itself and as a new marker of equality, the institution is controlled and administered by a state that is, in historian Margot Canaday's analysis, straight in its orientation and likely to remain so.²

As Franke explains, during the era of mass emancipation, many blacks initially saw marriage as both a ticket to freedom and a benefit of it. The states that had previously denied any formal recognition to black familial ties within the framework of slavery recognized the symbolic and practical importance of marriage for blacks. They acknowledged and encouraged marriage and used the emancipation of married women as an incentive to encourage black male military enlistment. In practice, however, the rules that allowed and encouraged marriage did nothing to ensure the safety and security of these newly acknowledged families, the most vulnerable members of whom quickly found themselves at the mercy of private and state abuse and violence.³ Franke uses the stories of emancipated Kentucky wives and children of black enlistees who

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¹ KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* 3 (2015).

² See MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH CENTURY AMERICA* (2011).

³ FRANKE, *supra* note 1, at 24-50.

faced brutal retaliation from former masters and callous indifference on the part of the state to which they fled for assistance to underline the paradoxical nature of depending upon the institution of marriage as a means of advancing civil rights. As Franke notes, “It is a curious thing to pursue a civil rights strategy that nests a fuller form of public citizenship within marriage, a distinctly private domain.”⁴ Furthermore, this example and others she provides underline the fundamentally patriarchal nature of marriage, which reifies status relations tied to dependence in ways that cannot be readily transformed simply by allowing same-sex couples access to the institution.

Across several dimensions of marriage policy in the immediate post-bellum years, Franke illustrates the same dynamics. While the extension of marriage rights and the state’s new willingness to acknowledge black families as legal units appeared superficially to be hallmarks of citizenship and civic belonging, in practice, the implementation of marriage supported state imperatives and interests over the interests that many blacks and their advocates believed marriage to serve. Furthermore, Franke argues, the symbolic respect and concern of the state that marriage rights signaled all too often provoked backlash both against those who sought to benefit from marriage and those who attempted to hold off on assuming its obligations.

While she does not argue any direct causal or path-dependent developmental relationship between this history and the current effect of marriage equality for lesbians and gay men, Franke draws thoughtful analogies to illustrate both the negative effects that equality is already producing and to warn about other potential problems that the past history predicts. From that history, she concludes—and I concur—that “the laws of marriage have the potential to lock us into roles, responsibilities, and limitations from which it is very hard to break free,” and that advances in marriage equality should not be trusted to produce a grand march forward for equality across the board for the LGBT community, any more than such advances did for blacks during and after Reconstruction.⁵ While Franke does not predict the kind of full-scale structural political disempowerment of LGBT citizens that occurred for blacks in the wake of Reconstruction’s failure, she properly warns that the rosier imagined scenarios of civil, political, and social equality are not likely to come to fruition either as a result of Obergefell or as the culmination of a more general cultural acceptance for queer individuals and communities.

As someone who has also studied marriage critically,⁶ I couldn’t agree more, for all of the reasons in Franke’s book that I have emphasized. Marriage itself is

⁴ *Id.* at 51.

⁵ *Id.* at 230.

⁶ My 2008 book, *Racial Union*, showed how Alabama’s criminal regulation of interracial intimacy provided an institutional and constitutional site for the development and legitimation of white supremacy in the years between the end of the Civil War and the dawn of the civil rights movement. JULIE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954* (2008).

a fundamentally hierarchical, private, and conservative institution that nonetheless does distributive and signaling work for the state, dividing families and familial relationships into protected and unprotected, legitimate and illegitimate, recognized and unrecognized. The achievement of equality through marriage rights depends upon performance—lesbians and gay men successfully shifted cultural narratives and constitutional principles largely by assuming the obligations of marriage and performing marriage-like relationships and then demanding state recognition. In many courts' eyes, only in being same-sex rather than opposite-sex couples did they deviate from normative families. They presented themselves and were embraced by courts as having the same standing, interests, community ties, responsible membership, and civic engagement as any married couple, and leveraged their equality on the basis of this sameness.

Franke's 2015 warning that the expansion of marriage rights may trigger backlash appears prescient in light of the current wave of new regulations ranging from the use of religious freedom to allow individuals and businesses to deny services to same-sex couples to laws seeking to prevent transgender individuals from using appropriate bathrooms. I am not convinced, however, that it's precisely backlash that's going on here. I see it rather as a reordering of deviance and a reconfiguration of hierarchic institutions to accommodate this ordering. The ability of lesbians, for instance, to get married or to serve in combat roles in the military does not signal an expansion of either institution, nor will lesbians' presence in these institutions transform them merely through the inclusion of their bodies. Indeed, once in these institutions, as Franke recognizes, they may find themselves more transformed than the institutions.

I expect us to see state (and some private) recognition of those couples who perform well the civic and cultural elements of a stable, committed familial relationship backed up by the economic and cultural capital that render this relationship recognizable as normatively desirable. This recognition will do little or nothing for relationships and families that fall outside the mold and may, as Franke suggests, undermine the minimal protections they have now. Moreover, increased recognition of same-sex intimate relationships seems to be coinciding with the emergence of increasingly robust protection for Christian religious belief and practice that undercuts gender equality and more aggressive arguments on behalf of taxpayers' rights that undermine state support for society's most vulnerable members.

I am left wondering what kinds of rights might be worth pursuing directly, rather than hoping that marriage may leverage them. I don't mean to argue that marriage is worthless or useless; same-sex couples' right to marry will make a meaningful positive difference for many. But state recognition of the legitimacy of relationships won't secure homes for these families. It won't guarantee their access to adequate health care. It will not bar workplace discrimination, nor will it advance respect and recognition for non-marital families. I concur with Franke's progressive call to action for those who've benefited from marriage, but I would also encourage decentering marriage itself and focus on building

new institutions that reject the hierarchic and exclusive divisions that marriage cannot help but to embed.