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Wedlocked: The Perils of Marriage Equality – The Author Meets Her Readers

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WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY THE AUTHOR MEETS HER READERS

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You write a book and you wonder: "will anyone read it?" This *Boston University Law Review Annex* Symposium on *Wedlocked* answers my question. Not only did "someone" read the book, but those "someones" are some of the scholars I admire most, and they took the time and thought to engage *Wedlocked*'s arguments in this symposium. Thank you to each of the scholars who participated in this symposium, thank you to Professor Linda McClain for inviting their participation, and thank you to James Tobin, the Online Editor for the BU Law Review, for providing a home for this conversation about the virtues and perils of marriage equality.

One of the things I appreciate most about the symposium's contributions is the diversity of views they offer. Far from a round of applause, the participants take the book's arguments seriously and give them serious critique. Of course, this book invites that kind of critical engagement, for it is far from a kind of post-Obergefell victory lap. I left that project to others. Instead, *Wedlocked* comes at the question of marriage rights for same-sex couples by asking a set of uncomfortable questions. Are there any lessons today's marriage equality movement could learn from the experiences of another marginalized community that celebrated the right to marry for the first time as part of a larger civil rights project? Are there any costs, or externalities, of nesting a notion of freedom or equality in the institution of marriage? What does it mean for lesbian and gay people to elaborate a more free and equal form of citizenship through the institution of civil marriage, a form of state licensure? And how might we understand something about the differences between racism and homophobia by examining the way in which marriage has been an enormously effective tool to rebrand homosexuality?

Almost all of the contributors to this symposium favorably appraise the insights *Wedlocked* offers about the role marriage played in the emancipation of formerly enslaved people. And some were persuaded by the virtues of an exercise that held up the contemporary marriage equality campaign in some proximity to the historical case—probing the juxtaposition for lessons, continuities and discontinuities. As I wrote the book I knew this would not work for every reader, and that this kind of complex comparative analysis would be unsettling, if not unconvincing, for many. This awareness solidified my resolve to take it on, as I was convinced that the reflection of today's marriage rights

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movement cast back on an earlier era might reveal both something new about the concept of marriage equality today and the meaning of freedom through marriage in the 19th century.

Specifically, Professors McClain and Culhane are unconvinced by the book's claim that gaining marriage equality for same-sex couples may have been achieved at some cost to families of color. McClain insists that Justice Kennedy's soaring language in Obergefell can count as an advance for the case of racial equality in our constitutional jurisprudence. To be sure, racial justice figures prominently in Kennedy's ruling for the Court, operating as a kind of witness post against which the new claims of same-sex couples are to be measured or orientated. On a rhetorical level, I cannot disagree. Yet if racial equality were the real framing device of marriage equality in Obergefell, why not decide the case on Equal Protection grounds, rather than dignity? In this sense, as a case that fundamentally turns on the dignity that civil marriage confers on those it blesses with public licensure, Obergefell resonates more with the Court's sexual liberty/reproductive rights cases than it does with those from the racial equality tradition. In my view, Kennedy's opinion leaves little footholds for the advocates of racial equality. If I were litigating the next race case I wouldn't reach to Obergefell for new language to advance my cause.

Professor Culhane is similarly unconvinced by the arguments waged in the book about the racial endowment likely enjoyed by today's marriage equality movement. That said, I read his commentary to have mistaken my effort to explain the racial underpinnings of the phenomenal success of the marriage equality movement with the motivations or intentions of the beneficiaries of that movement. By no means does the book argue that collaboration in a racial project entails a conscious intention to do so. Rather, my aim is to assess the unintended consequences of finding a friendly forum in the likes of federal court judges who do not share a larger progressive political agenda with many of the advocates of marriage equality. To my mind the advocates of marriage rights bore a moral and political duty to attend to the racial and gendered pay off of some of the arguments made in favor of gaining constitutional recognition for same-sex couples, and *Wedlocked* seeks to explain the contours of that duty. Professor Culhane invokes a conversation held in a taxi with the late Paula Ettelbrick as a kind of credential for his more sanguine views on the virtues of marriage. I traveled a long road with Paula in which we both developed and evolved in our critiques of a movement strategy that prioritized marriage rights over recognition of non-marital family forms. Indeed, Paula's piece in Outlook magazine from 1989 that Culhane describes as "the most persuasive tract against the positive effects of same-sex marriages I'd ever read," was written in our living room as a result of conversations and fights we'd had with movement partners over the matrimonial turn we both anticipated the Big Gay organizations were about to make.[1] While Paula did not begrudge the joy that same-sex couples experienced when they could marry for the first time, she

[1] John Culhane, *Rhetoric and Reality in Wedlocked*, 96 B.U. L. REV. ANNEX 39 (2016).

remained to her death attendant to a larger picture of a movement that did not place marriage at its center.

Professor Peggy Cooper Davis, an enormously respected and accomplished scholar of U.S. racial history, the family, and gender, characterizes the overall project of *Wedlocked* as "sour grapes."[2] This assessment I find, well, rather disappointing as I understand this term to capture an attitude in which someone adopts a negative attitude to something because they cannot have it themselves. If that is what Professor Davis supposes I have been up to in this book, then I fear I've been horribly misread. *Wedlocked*'s analysis derives not from resentment that others are getting things I can't have, but from a desire to critically assess what it is we got. Professor Davis suggests that "Obergerfell'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."[3] This may well be true, and we'll have to wait and see in what ways this might be so. As several contributors to this symposium note, the reform of civil marriage to accommodate same-sex couples is less a revolution than the next step in the decades-long liberalization of marriage more generally. Reform of couverture laws and the introduction of no-fault divorce, as Professor Serena Mayeri writes, more radically transformed the institution of marriage than did folding in same-sex couples.

Professor Davis's commentary on *Wedlocked* leans heavily on the fundamental importance of civil marriage and the role that Obergefell plays in carrying on the legacy of Loving v. Virginia. Loving recognized "that participation in the institution of marriage is a civic entitlement," she writes.[4] Yes, Loving held that the right to marry was a fundamental right for the purposes of constitutional substantive due process analysis, as did oddly enough, Skinner v. Oklahoma, the Court's 1942 case that found mandatory sterilization laws unconstitutional. The fundamental nature of marriage was unnecessary to the Court's analysis in Skinner, and I would argue that the same was true in Loving. What made Loving a stand out case in the Court's equal protection jurisprudence was that the Court linked anti-miscegenation laws to the larger project of maintaining white supremacy. Would that Justice Kennedy had linked the laws at issue in Obergefell to the maintenance of hetero-supremacy.

Professor Davis celebrates the kind of liberty mobilized by marriage in both Loving and Obergefell. Yet on the facts, the liberty that was protected in Loving was a white man's right to marry a woman of color, as the statute at issue was one that prohibited "a white person from marrying any save a white person."[5] As Professor McClain writes, the African American civil rights movement was ambivalent, at best, about this case, as was Mildred Loving herself. In light of this complexity, *Wedlocked* argues that mobilizing a civil rights movement in

[2] Peggy Cooper Davis, *Dreadlocked*, 96 B.U. L. REV. ANNEX 53 (2016).

[3] *Id.*

[4] *Id.*

[5] VA. CODE ANN. § 20-54 (1960).

and through marriage risks sacrificing the interests of the community for interests that underlie the institution of marriage itself. The book doesn't repudiate the importance of marriage in a robust notion of citizenship, but rather seeks to examine the nature and costs of that complexity.

Professors Solangel Maldonado, Tamara Metz, Julie Nokvok and Serena Mayeri's commentaries accept the basic premise of *Wedlocked* but push the argument further. Each of them intervene on the level of "yes, and . . . ." Professor Maldonado joins me in thinking hard about how we might differentiate the utility of marriage rights in rebranding homosexuality, while marriage remains a cudgel to inflict punishment on African Americans. She insists that "racial segregation might be as important as race itself. Gays and lesbians are integrated into dominant society but African-Americans are quite segregated from the majority."[6] This observation is rich in complex ways, suggesting that we think about how subordinated identity gets woven into a community in different ways—geographically, residentially, and materially for people of color, yet perhaps more ideologically and symbolically for sexual minorities. Of course, there is so much more to say about the notions of integration and identity that Professor Maldonado's comment suggests. (For example: African American people overwhelmingly hail from African American families, whereas lesbian and gay people do not; racial identity is so much more socially, politically, and economically salient than is sexual orientation; etc.)

Professor Tamara Metz draws from her own work, Untying the Knot: Marriage, the State, and the Case for their Divorce (2010), to supplement the argument in *Wedlocked* by framing the success of the marriage equality campaign as a victory for neo-liberalism more generally. "Same sex marriage was rebranded in ways that tapped into broader trends where marriage is cast at once as a free and private choice, and as the site of responsible intimate care, hence a choice no rational actor would refuse."[7] No argument from me on this point; Professor Metz is correct to say "there's more to the story" and that "more" is about political economy.[8] On this Professor Libby Adler agrees: "Franke effectively proposes an economyin which same-sex marriage generates costs for African-Americans."[9]

Professor Metz calls me to task for not going all the way and advocating that the state should get out of the marriage business altogether. Professor Mayeri suggests as much by questioning the supremacy of marriage more generally. *Wedlocked*'s ambition was not to make this kind of policy recommendation, but instead to offer an honest assessment of the perils that may accompany winning marriage equality. But in other contexts, including a forthcoming "opinion" I

[6] Solangel Maldonado, *Just Like Everyone Else*, 96 B.U. L. REV. ANNEX 49 (2016).

[7] Tamara Metz, *Perils of Marriage and Neoliberal Politics of Care*, 96 B.U. L. REV. ANNEX 25 (2016).

[8] *Id.*

[9] Libby Adler, *Who Are the People in Your Gayborhood?: A Response to Katherine Franke's Wedlocked*, 96 B.U. L. REV. ANNEX 43 (2016).

contribute to Jack Balkin's specially convened alternative Supreme Court "What Obergefell v. Hodges Should Have Said," I will argue that the disestablishment of the institution of marriage is essential to the disestablishment of the supremacy of heteropatriarchy.

Finally, Julie Novkov challenges us to consider the institutional contexts in which LGBT rights are being waged: marriage, the military, and other conservative institutions. What kind of equality is it that takes form within the contours of traditions and structures that are likely to overwhelm the new rights holders? Professor Tracy Higgins, among others contributing to this symposium, is more optimistic about the potential of same-sex couples to influence and reform the forms of historical privilege that civil marriage reproduces. Again, we'll see. This is a debate I've had with Professor Nan Hunter for years. I am skeptical, but would be delighted to be wrong. No sour grapes here.

It is my great delight that *Wedlocked* has generated such a rich conversation among such accomplished scholars about the relation of today's marriage movement to historic movements for racial justice, about the evolving role of marriage in citizenship and gender-based inequality, and about the differences between homophobia and racism in the United States. Of course we won't all agree, but I am thrilled that *Wedlocked* has provoked such hard thinking about hard things.