

Just Married

A Discussion of Stephen Macedo's *Just Married: Same-Sex Couples, Monogamy and the Future of Marriage*

Just Married: Same Sex Couples, Monogamy, and the Future of Marriage. By Stephen Macedo. Princeton: Princeton University Press, 2015. 300p. \$29.95.

On June 26, 2015, the U.S. Supreme Court ruled, in *Obergefell v. Hodges*, that the Fourteenth Amendment of the U.S. Constitution forbids legal discrimination against same-sex marriage. The decision sent shock waves throughout the country, with both supporters and opponents regarding it as signal of dramatic shifts in public opinion and a revolutionary development on the road to sex-gender equality. Just two days earlier, on June 24, 2015, Stephen Macedo's *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* was published. Macedo has always worked at the intersection of legal theory, normative theory, and public policy, and *Just Married* offers a nuanced liberal democratic defense of marriage equality with striking resonance in light of *Obergefell*. We have thus invited a range of scholars on LGBT rights, and LGBT politics more generally, to comment on his book.

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doi:10.1017/S1537592716001171

Notwithstanding that it has three designated parts, Stephen Macedo's book pursues two interconnected ideas. The first idea might be captured, somewhat facetiously, by the old quip "It works in practice, but will it work in theory?" Responding directly to the proliferation of state-sanctioned same-sex marriage and utilizing primarily the reasoning of judges in these marriage-equality cases as his foil, Macedo offers a well-researched, wide-ranging argument for the special role of marriage in democratic society and the ability of same-sex marriage to fit within this accepted role.

In using the new political reality of marriage equality as an opportunity to fundamentally reimagine social theory, Macedo joins other political theorists of late in fundamentally reconstructing understandings of the place of marriage, identity, desire, and sex (e.g., see Yvonne Zydan, *States of Passion: Law, Identity, and the Social Construction of Desire*, 2011).

Macedo's major contribution around this first idea is to directly address an ongoing theoretical question within both the academy and the larger marriage-equality movement: Does marriage, as an institution and as an accepted social practice, occupy a special place in democratic

politics, or is it simply yet another transient bureaucratic form utilized for expedient political purposes? If it is a special form, its fundamental parameters should be largely impervious to change over time, even as it incorporates new groups within its purview. This is an argument advanced by some scholars in American Political Development (e.g., see Priscilla Yamin, *American Marriage: A Political Institution*, 2012), who propose that incorporation through marriage recognition bestows upon groups enhanced democratic status, and it has therefore played a singular role in extending democratic inclusion as well as demarcating democratic exclusion. In contrast, if it is a transient bureaucratic form, it is likely subject to revision, replacement by competing amorous and non-amorous-based alternatives, and its own eventual demise after having outlived its political and social usefulness. This is an idea that seemed not just theoretically appealing to those challenging the strictures of marriage, including feminist scholars and queer theorists, but an idea that appeared to be supported by the noticeable demographic trend of declining marriage rates in the United States.

Macedo firmly embraces marriage as a special form. He does so through a comprehensive engagement with the philosophical and popular underpinnings of marriage, including well-honed critiques from all sides—conservatives, feminists, and queer theorists. But his approach is to return to first elements. To Macedo, marriage has a set shape and an established form that fulfills essential democratic

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functions not met by other alternatives. Accordingly, it deserves and warrants political support as an institution. However, unlike many conservatives who follow such a reasoning with the presumption that marriage is therefore unchanging in its constituents, the author argues that it is precisely the fact of this special form that makes marriage capable of integrating same-sex marriage: Same sex marriage is just another marriage because it adheres strictly to the parameters that already define marriage, even as it extends its reach into previously excluded groups.

If marriage is such an integrative form, however is it not therefore open to the incorporation of all nature of relationships? Macedo's response is the second big idea in *Just Married*, and it flows from the framework constructed in the first section. He directly addresses the proposition, often raised by conservatives, that there is a theoretically slippery slope from state recognition of same-sex marriage to state recognition of polygamy and, by implication, eventual state recognition of incestuous, age-restricted, and other currently non-state-sanctioned relationships. Using polygamy as his example, Macedo directly challenges that conservative proposition based on the role that monogamy occupies as one of defining parameters of marriage as a form; to him, the slope is not very slippery at all.

The second section is interesting precisely because it speaks to potential future directions in marriage, which presumably could spring from the current fertile ground established by the ongoing political discourse on marriage equality. More specifically, it addresses a question that was purposely eschewed by the marriage-equality movements, in part, one suspects, because of a hope to avoid both invoking extramovement opposition and reigniting intramovement conflict over the earlier issue of whether same-sex marriage was fundamentally altering marriage as an institution, as in "queering marriage."

Yet for all the evidence that Macedo marshals and the strong intellectual coherence of the arguments in each section, the larger approach of the book could be problematic. To the author, if you accept marriage as a defined set of parameters occupying a special role in democratic society, as deftly and effectively constructed in the first section, the challenges raised in the second section to the potential of polygamy transforming marriage seem inherently logical, given that polygamy is taken as being outside of those parameters and inconsistent with the special role. The very idea that law is both articulating and protecting a special role for marriage, while still able to incorporate new groups within that institution, seems consistent with existing understanding of the role of law by sociolegal scholars.

The very breadth of Macedo's argument, which reflects both philosophical and popular responses, and his use of court decisions to assist in situating the current norms create their own problem, however. Much of legal reasoning operates by reference to legal precedent, consideration of analogous situations, and the often implicit acknowledg-

ment of currently accepted social norms. Although Macedo uses this aspect to his advantage in constructing his arguments, the use of these sources by law means that the very approach of law tends to overemphasize tradition and accepted social practices in constructing its subsequent arguments. Truly, law has a conservative bias. Moreover, legal reasoning often interweaves reasoned argument with assertions about current social practices in ways that do not clearly demarcate or acknowledge the boundaries. Adopted norms become evidence of socially accepted norms that are, in turn, transformed by both Macedo and legal reasoning into the socially allowable practices. For all the complexity of his argument and the breadth of his evidence, he may have "found" that law simply codifies the accepted practice—even if recently changed by social movement action, as for example same-sex marriage from 1971 on—and simultaneously wields its power to legitimate these social practices to the effective exclusion of possible alternatives.

By focusing on the future, Macedo compounds the issue by occasionally conflating arguments of the theoretical fit of polygamy within marriage and the current lack of social acceptance of this marginalized social practice with arguments related directly to its expected popular resonance in the future. And it is troubling that the comparison of same-sex marriage with its possible future counterparts lacks an underlying symmetry; at the point that Macedo is referencing, same-sex marriage reflects a well-established set of well-resourced social movements, but its possible counterparts, including polygamy, are clearly lacking in similar organizational counterparts. A better comparison of fit might be to compare marriage-equality activities by isolated individuals between 1969 and 1975 and the occasionally thoughtful response of courts to these actions with present individual activities on polygamy and the occasionally thoughtful modern court responses.

Yet, at its heart, Macedo is, in fact, proposing something larger about law, politics, and democratic society. In invoking law and assigning marriage a special role, he is acknowledging the fact that some institutional forms may themselves be so central to the definition of democratic society that the form itself must be maintained largely unchanged for democratic society to not just function presently but be sustained over the longer term—an idea that imbues much of his discussion of polygamy and polyamory. And that very idea raises fascinating elements about the study of law and politics: Which institutional forms, beyond marriage, are also supposedly central? How does law privilege these institutional forms in maintaining their existence over the longer term? Does law somehow know to do so, or is this a nonreflexive social process that just happens to be applied to these institutional forms over and over again in ways that reflect more a random evolutionary-like process, including its ability to adapt to new political environments, rather than any inherent intelligent design of the underlying democratic system? These are all good questions under the surface of this interesting book.

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doi:10.1017/S1537592716001183

Who will pay the price for gay acceptance? This is not the question that manifestly motivates Stephen Macedo's *Just Married: Same-Sex Couples, Monogamy & the Future of Marriage*, but I wish it had been. Instead, Macedo asks, *why does justice require the legal recognition of same-sex marriage; why should the state be in the marrying business; and why should marriage be limited to monogamy* (pp. 12–13). This last question might turn out to be the table manners version of the gay acceptance question, the point on which I will conclude. Macedo's three questions correspond to three parts of the book; his answers are well-researched and well-argued, if ultimately unsatisfying.¹

Part I is familiar territory for anyone versed in marriage equality debates, but also an important rehearsal of our nation's often breathtakingly homophobic history. Macedo illustrates how even the more sophisticated opposition to same-sex marriage espoused by New Natural Law (NNL) proponents dissolves under the "constant tug of the demand for reasons" (p. 36). He counters too conservative claims that same-sex marriage unsettles gender norms (which were patriarchal and illiberal to begin with, pp. 62–63) and harms children (an argument from bad data, pp. 67–68).

Part II defends marriage as a "distinctive status in law," challenging liberal and left critiques of civil marriage as a violation of "state ethical neutrality" (p. 80, 84). Combing data that document the myriad ways marriage benefits spouses, children, and democracy and praising the reciprocity and commitment entailed in companionate marriage, Macedo insists the state is just and right to license marriage.

Here is where I become skeptical. For once Macedo concedes that justice requires a fairer distribution of rights, obligations and benefits to singles and unmarried couples (p. 85, 140), I am not sure what is left of the uniqueness of marriage other than its symbolic power (p. 85)—expressed and encompassed in its "extremely public" nature (p. 91)—and its purported basis, love. But while Macedo argues that civil codification publicizes marital commitment far beyond the amplifying force of weddings, religious institutions, and Facebook, this surely is not right. Marriage's publicity campaign does not need state backing, as so many institutions collude to broadcast that matrimony is marvelous.² So if we do not need the state to publicize marriage, and the legal incidents routed through marriage should be democratized, then we are left with the state drawing a distinction between "marriage," premised on love (which it need not be), and everything else ("civil union," "reciprocal beneficiaries," etc.), premised on

whatever (care, friendship, convenience). And *that* statutory distinction, between love and everything else, seems to violate "state ethical neutrality."³

Part III pushes back hard against suppositions from both left and right that same-sex marriage will (d)evolve into the recognition of polygamy. Sympathetically, Macedo acknowledges that rejections of polygamy often harbor the very animus that underlie objections to same-sex marriage. Macedo searches for "general principled considerations" distinguishing same-sex marriage from plural marriage (p. 160), and indeed fares better than the antipoly polemics published in the wake of *Obergefell v. Hodges*, 576 U.S.—(2015), the Supreme Court decision holding state same-sex marriage bans unconstitutional.⁴ Surveying the history of Mormonism and Mormon persecution, relevant case law from Canada and the United States, and the television series, *Sister Wives*, Macedo contends that same-sex marriage tends toward equality and fair opportunity, whereas polygamy tends toward relational conflict and patriarchy (pp. 162–66). He argues that data on the relational and social benefits of polyamory are too sparse to ground claims for state recognition (pp. 200–01).⁵

Still: are we prepared to tell an otherwise egalitarian, harmonious lesbian thuple—or even a stable, low-conflict polygynous group—that the history and available data on plural marriage (a history and data set far removed from our contemporary context) vanquishes outright any claim for statutory recognition, while we dole out marriage licenses to nearly any dyadic couple, no matter how dysfunctional, high-conflict or inequalitarian, because monogamy, abstracted as social form, is good for liberal democracy and social justice?⁶ This ethical consequentialism seems especially callous when the stakes of marital union are as high—for spouses and for society—as Macedo sets them. Macedo's earlier excavations in *Just Married* document that interracial, low-income, and Black couples experience comparatively higher rates of divorce (p. 74, 113, 115). Should we not by the same logic prohibit rather than promote these marriages since they tend toward conflict?

Neither Macedo nor any good liberal would ever sign on to such state overreach, as our premium on relational and intimacy choices absent demonstrable, not probable, harm, trumps consequentialist concerns. This calculus perhaps never has been truer than now, after *Obergefell's* exuberant exultation of the right to marry.

And so Macedo's line-drawing returns me to the price of gay acceptance. Macedo's condescension toward polyamory (p. 72, 198), his patronizing characterization of gay promiscuity (p. 73, 116), and his alarmism around sexual (rather than sexist) publics (p. 47, 74) seem to symptomize a Kantian allergy to sex (notwithstanding Macedo's objections to New Natural Law sexual ethics, pp. 42–44), as if sex itself—and not, say, eroticized dominance, social inequalities, or the maldistribution and privatization of benefits through the

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couple form—undermines our democratic and intimate commitments.

For the victory of gay acceptance that is marriage equality, as Macedo tells it, a *who* pays the price, but so does a *what*. The *who* are the poly folks, those challenging or at least not buckling to statutory and cultural valorizations of twoness. The *what* is sex. In this regard, *Just Married*, despite the measuredness of its criticisms, sometimes feels like a monographic version of Gayle Rubin's (1993) famous concentric circles of sexual normativity, wherein the inner "charmed circle" contains the sorts of sexual subjects about whom we watch romantic comedies (p. 13). The outer circle contains our sexual riffraff. Like pedophiles, homosexuals used to hang out in the outer circle. Over the past three decades many of us gays have relocated to charmed and charming, and Macedo redraws the circumference of moral *cum* legal permissibility just widely enough to include, well, me and him. But our entry to the inner circle does not require our desexualization (or more precisely, our desluttification), nor distancing ourselves from poly folks and other "bad queers."⁷ What if marriage equality instead invited ethical and political sensitivity to the variety of intimacy arrangements that stabilize and sustain all of us? Marriage equality might portend our opening up—slip-and-sliding our way down a slope, if not *that* slope—to possibilities of sexual and social flourishing, rather than to battenning down the gay hatches. As it stands, the happy marriage Macedo officiates between liberalism and monogamy should make us worry about liberalism's ulterior motives, its infidelities to us and to itself.

Just Married, because of its provocations, not despite them, deserves praise for challenging us to deliberate more diligently the promises and pitfalls of civil marriage.

Notes

- 1 Having penned a blog post, an edited volume chapter, and book review arguing that marriage equality does and should lead to the statutory recognition of multiple-partner intimacy arrangements, I suppose I was never going to be an easy sell. Fischel 2014, 2016a, 2016b.
- 2 More sustained engagement, rather than surface dismissal, of queer theoretic critiques of marriage (as subverting rather than supporting liberal democratic promise) might have tempered Macedo's sanguinity to the conjugal couple. For example, see Duggan 2003 and Warner 1999. Released after the publication of *Just Married*, Katherine Franke's (2015) *Wedlocked: The Perils of Marriage Equality* challenges the unequivocalness of marriage as a democratic good.
- 3 At times, Macedo proceeds as if the only two options are marriage as a legal status or individualized contracts (p. 129). There are (or could be) a range of

options between the poles of status and contract. See, for example, Aloni 2013.

- 4 For example, see Saletan 2015 and Young 2015.
- 5 A reasonable point, but Macedo might have over-viewed research by Elisabeth Sheff (2014), whose book is cited in the bibliography but not substantively discussed.
- 6 Den Otter's (2015) *In Defense of Plural Marriage* questions the relevance of polygamy data from other times and places (p. 87), and emphasizes that restrictions on plural marriage rationalized by gender equality are overinclusive and underinclusive (p. 65–122).
- 7 Warner 1999, 114.

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doi:10.1017/S1537592716001201

The Supreme Court's 2015 decision in *Obergefell v. Hodges* has left many of us thinking about what Stephen Macedo says is the main question of this book: "what's next for marriage?" (12). Organized around three questions, each of which take up three chapters: "*Why same-sex marriage? Why marriage? Why monogamy?*" (13), the book takes its cues from conservative opposition to same-sex marriage. So the real question of the book seems to be "what's next for conservative arguments for marriage?" There is much that is useful here, and much that is left on the table at the end of the book—which is to say that on such a broad topic, no book, as Macedo notes, can address all of the important questions.

It has been challenging to write about marriage equality over the past decade—every time you write something, it is overtaken by changes in the law. So this book was likely started when conservative arguments seemed more salient, before they had been tried and found wanting in American courts. This is partly a strength of the book: the reconstruction of conservative arguments and their demolition is useful. Macedo notes that one way to see the demise of conservative arguments in opposition to same-sex marriage is as an exercise in public reason-giving, a practice at the very heart of a democratic society, and "Enshrining a sectarian ideal of marriage in law would fail to respect the range of reasonable opinions in our society" (36). Macedo provides a very useful dissection of conservative natural law arguments. This is certainly a service to the rest of us, so that we do not need to read this particularly unpleasant group of fellows (and they are fellows). As Macedo notes of some of these arguments, it is "striking. . . how distant it is from anything resembling sympathetic engagement with the lives of actual people" (51).

Implicit throughout the book is the crucially important question, what is the relationship between marriage and democracy? This is a key question for political theorists to address, as feminist political theorists have been arguing for a couple of centuries now, and there is still much to discuss here. The book is at its best when Macedo is speaking directly to these questions, and in his own voice. As he notes, "Making moral judgments about the questions that lie before us requires a modicum of openness to the quality of the lives that actual people live" (52).

We are what we read—and reading conservative natural law theory surely shaped this book in ways that are

unhelpful for addressing the most important questions facing us—Americans, political theorists, democrats—regarding marriage. The most interesting and important questions about marriage and democracy are actually not being asked by conservatives. While Macedo has read some feminists, the book would be much stronger if he had read more feminist theory, and more importantly, if his arguments actually took seriously feminist arguments about marriage, racism, care, class, intersectionality, structural inequality, mass incarceration, intimate partner violence, and about what the important questions are in political theory regarding marriage. Macedo usually lumps feminist and queer theorists together as critics of marriage—without thinking any more carefully about some of the differences between those arguments, the longer feminist genre of marriage critique (if we take seriously that he means queer theory, which can only fairly be seen as originating in the late 1980s), and the deeply intersectional nature of the questions about marriage and democracy that lie before us. Racial inequality and racism do not really make an appearance in the book, except in relation to the class divide, and then only briefly. Yet much of the conservative marriage movement has taken its cues from the ideas in the 1965 Moynihan Report (*The Negro Family: The Case for National Action*), and racism, white supremacy, and racial inequality are deeply related to what we talk about, and what we do not talk about, when we talk about marriage in the United States.

Perhaps it is because I have not really studied the question, but I was puzzled upon reviewing the table of contents, and remain puzzled after reading the book, about why it was necessary to spend three chapters discussing polygamy. It seems that this question came from the conservative argument that marriage equality leads to polygamy: "one oft-repeated question is whether there is a public case for monogamy in the wake of gay marriage" (141). And if the question is "why monogamy" it is not really clear why polygamy (and not, perhaps, serial monogamy or adultery) is seen as the main alternative to monogamy. In short, polygamy does not seem, even on Professor Macedo's account, to be the most important question about marriage facing the U.S. at this time.

Rather, class differences in marriage patterns seem to be more important. Macedo says, "This class-based marriage divide, not same-sex marriage, is the greatest problem facing us" (100). Unfortunately Macedo does not spend much time puzzling over the question of why or how these differences have come about, and, like many conservatives, chooses conservative moral gestures over empirical evidence (112–115). Without reference to any actual empirical evidence, he concludes that "An important part of the marriage divide seems to be explained by culture, values, and social norms" (115). This is a common mistake, endemic to the conservative marriage movement over the

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past several decades. Marriage is not the independent variable that leads to education and economic prosperity. The causal arrow, it is fairly clear from the social science evidence, points in the other direction. Economic well-being and educational attainment lead to marriage. So, if you want people with less economic security to marry, give them more economic security, through structural social supports such as universal health care, real access to quality K through 12 and higher education, universal child care and preschool, a basic guaranteed income. When conservatives start to make this argument, we might actually have a chance at improving our democracy in the United States. Of course, I am demanding a great deal here, but I am doing so because like Macedo, I think the stakes are very high: I do think, like most feminist political theorists, that democracy itself is at stake, once we start to think in great detail about marriage and democracy.

Writing as a political theorist about matters of public policy, matters about which there are both strong normative theoretical arguments and a great deal of detailed social science evidence, is a difficult task. It is difficult to be conversant enough in all of the relevant literature to make useful arguments. And there is also a critical matter of judgment: on what topics is normative argument most relevant, and on what topics is empirical evidence most important? The book would benefit on several matters from paying more careful attention to empirical social science evidence, rather than resorting to the normative arguments that Professor Macedo happens to agree with. This is certainly true in the discussions of gender. For example, in the chapter that addresses the benefits of marriage, Macedo cites all of the scholars of the marriage movement who have been making the same argument for almost three decades, most of whom are not empiricists, and who have a very specific agenda in

support of traditional gender differentiated marriage (see pages 108–112). This is most obvious when Macedo is citing the benefits of marriage: the actual empirical evidence shows a gender difference in the benefits of marriage, a gender difference that none of the scholars he cites see any reason to note because they believe in gender-differentiated marriage. But the positive effects on health, for example, are gender-differentiated: there is a “consistent finding that men derive more benefit from marriage” (Rebekah Wanic and James Kulick, “Toward an Understanding of Gender Differences in the Impact of Marital Conflict on Health,” *Sex Roles*, 65: 5–6, 2011, 297).

Macedo has every intent to be inclusive of feminist ideas about marriage, but his argument focuses on feminists who argue for the dismantling of marriage as a civil contract. There are actually many feminist positions on marriage, and a more helpful guide to some of the questions that he wishes to address regarding caring relationships outside of civil marriage would be, for example, Joan Tronto’s book, *Caring Democracy* (2013), which is a deep meditation about how we should think about the place of care in democracy and about what democratic citizenship might be when we take the quality of the lives of *all* people seriously.

Professor Macedo is smart and thoughtful, and I really want to know what he thinks should be done about what he says is the most important public policy question about marriage: the class divide. So it is my sincere hope that he might now take up the question “what is next for marriage and democracy?” and offer us his thoughts on that subject. The conversation, the public reasoning process, about marriage, can do much to improve political theorists’ ideas about democracy. Hopefully, this conversation might also inform democracy in practice.