

**MODERN MARRIAGE AND
JUDGMENTAL LIBERALISM:
A REPLY TO GEORGE, GIRGIS,
AND ANDERSON**

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The political question of whether same-sex marriage ought to be permitted is inextricably linked with a more fundamental philosophical question—why is the government in the marrying business at all? Simply put, why does the state sanction and encourage marriage? At stake in the same-sex marriage debate is not only the legitimacy of same-sex relationships, but also the legitimacy of the modern institution of marriage itself.

I will show that the extent of the right to marriage is interwoven with the question of marriage's social purpose. If marriage is purposeless, then the state ought not to be involved in marriage at all, and marriage should be left to private institutions and treated like typical private contracts. If, on the other hand, marriage serves a

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social function, then a further question arises—does the rationale for heterosexual marriages apply to same-sex couples?

Conservative natural law theorists, specifically Robert George, Gerard Bradley, and John Finnis, traditionally answer the first question affirmatively, maintaining that marriage has a purpose: the intrinsic good of marriage. However, they hold that this purpose is unique to heterosexual couples. With regard to marriage licenses, homosexual couples need not apply.

In the mid-1990s, Stephen Macedo answered these conservative critics of same-sex marriage, arguing that their criticisms stem from a “cramped” conception of sexual morality and marriage. As a result, Macedo concludes that although they present a coherent argument against same-sex marriage, it is ultimately unconvincing. In a recent article, Robert George, Sherif Girgis, and Ryan Anderson responded to Macedo and criticized his conception of marriage.

Their argument is twofold. First, they defend their traditionalist definition of marriage. Second, they argue that the standard liberal justification of same-sex marriage rests on an incoherent, “revisionist” conception of marriage. George, Girgis, and Anderson posit that the same-sex marriage debate “hinges on one question: *What is marriage?*” However, rather than attempting to identify marriage’s social purpose in modern Western democracies, George, Girgis, and Anderson discuss the essence of natural marriage instead. Their paper examines two competing conceptions of marriage. The first conception, “conjugal view” of marriage, which underpins their argument against same-sex is the exclusive, permanent, reproductive union of a man and a woman.

In contrast, the second conception of marriage, one commonly utilized by gay marriage advocates, conceives marriage as a union of two people’s hearts and minds, enhanced by sexual intimacy. George, Girgis, and Anderson defend the

former. In essence, they argue that marriage is fundamentally linked to procreation and childrearing—a sophisticated version of a standard conservative argument against same-sex marriage. They argue that the second conception of marriage is not “internally coherent” since it is inconsistent with the standard liberal justification of same-sex marriage.

This paper agrees with George, Girgis, and Anderson in several areas. First, they correctly discern that the same-sex marriage debate turns on how marriage is defined. Second, the modern institution of marriage has inherent normative elements. Third, standard liberal justifications of same-sex marriage are inconsistent with tenets of certain strains of legal liberal theory because these normative elements are engrained into the modern marriage.

In Part I, I explain these inconsistencies by analyzing the political and legal theoretical framework where standard liberal justifications of same-sex marriage are rooted. First, I explore John

Rawls' liberalism circa *Political Liberalism*. Rawls discusses how debates about fundamental rights (such as the right to marry) ought to unfold. Second, I assess the standard liberal justification of same-sex marriage within Rawlsian liberalism.

In Part II, I demonstrate why Rawlsian liberalism offers an insufficient theoretical foundation for supporting George, Girgis, and Anderson's "revisionist" conception of marriage; I define this concept as "modern marriage." However, unlike George, Girgis, and Anderson, I argue that these inadequacies are superficial and the standard liberal justification of same-sex marriage suffers from only artificial limitations. Therefore, rather than abandoning the modern conception of marriage or the liberal legal framework entirely, we should adapt Rawlsian liberalism slightly. By reinforcing the foundations of liberal theory, I intend to construct a sturdier argument for gay marriage.

Part III focuses on George, Girgis, and Anderson's traditionalist conception of marriage and their argument against same-sex marriage. This

article suggests that although their opposition is ultimately unconvincing, their claims are coherent. Their position is rooted in a controversial conception of the good. To refute their arguments, however implausible, requires engaging with comprehensive doctrines, something a neutral liberal cannot do.

Although this article holds that the negative portion of George, Girgis, and Anderson's argument raises significant objections to the traditional arguments for same-sex marriage, this article posits that the positive portion of their paper is flawed. George, Girgis, and Anderson challenge same-sex marriage advocates to criticize their argument on its merits, "for example, by showing that it rests on a false premise or a fallacious inference." In Part IV, this article argues that these traditionalists' reliance on a pre-political notion of marriage is fundamentally misguided. Moreover, the article contends that their argument against same-sex marriage rests on counterintuitive premises within

the modern Western world, which run counter to everyday experience.

George, Girgis, and Anderson also challenge same-sex marriage advocates to construct an argument for same-sex marriage to explain the normative features of modern marriage (its commitments to monogamy and fidelity) and answer their objections to standard liberal justifications of marriage. In Part V, this article provides an argument to same-sex marriage that overcomes the traditionalists' criticisms. While Rawlsian liberalism cannot support a modern conception of marriage, Stephen Macedo's "judgmental liberalism" can support this modern view. Judgmental liberalism holds that justice-respecting conceptions of the good can be ranked, insofar as certain ones can be "gently encouraged" by the state. In turn, the same-sex marriage debate demonstrates how a judicial liberal would tackle a thorny social issue without infringing on people's rights or inhibiting their conceptions of the good.