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BOOK REVIEW

DWORKIN, MARRIAGE, MEANINGS – AND NEW JERSEY

IS DEMOCRACY POSSIBLE HERE? By Ronald Dworkin. Princeton, New Jersey: Princeton University Press August, 2006.

Reviewed by Monte Neil Stewart[*]

I. INTRODUCTION

As one of the Nation's preeminent legal philosophers[1] and public intellectuals,[2] Ronald Dworkin has, not surprisingly, engaged the Nation's preeminent legal-political-social issue – the meaning of marriage.[3] That engagement appears in its most

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 Portions of this book review were presented as a paper at the "What's the Harm?" Conference at Brigham Young University, Provo, Utah (Sep. 15, 2006). For their valuable assistance in the creation of this book review, I thank William C. Duncan and Jacob Briggs. This article is available on-line at www.manwomanmarriage.org.

[1] *See* Rob Hanson, *Objective Decision Making in Lonergan and Dworkin*, 44 B.C. L. REV. 825, 839 (2003).

[2] *See* Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L. J. 687, 712 (2003).

[3] The key word in the adjectives modifying this notion of "preeminent issue" is *legal*. Although other great contemporary issues confront the Nation (the War on Terror comes to mind, as does human activity relating to climate change), and although those issues generate important legal acts (court

focused form in *Is Democracy Possible Here?*[4] published in August 2006 (with key excerpts appearing in the September 21, 2006 issue of the New York Review of Books[5]) but is prefigured in his *Justice in Robes*[6] of April 2006.

Dworkin's marriage project is characteristically ambitious. It is to make the case, at the deepest level at which discourse on the matter does or can occur, that a core legal and consequently societal meaning of marriage ought to be the union of any two persons, with the law making irrelevant the gender of the two participating adults (hence, *genderless marriage* replacing *man/woman marriage*). Dworkin's marriage project is also characteristically influential. In late October 2006, three of the seven justices on the New Jersey Supreme Court accepted Dworkin's argument and made it a centerpiece of their argument, in dissent, that constitutional norms mandated genderless marriage.[7]

Also characteristic is Dworkin's projected level of self-confidence relative to his execution of his marriage project. He challenges all who may disagree to "show[] why I am wrong" on "my more concrete political convictions,"[8] including his stand on genderless marriage. And then, true to the epic model,[9] he repeats the challenge: "The cultural argument against gay marriage . . . . is a deep mistake . . . . Who will argue – not just declare – that I am wrong?"[10]

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decisions, legislation, etc.), those other issues – unlike the marriage issue – will not be centrally and ultimately resolved in legal fora (courts and legislatures).

[4] RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? (2006).

[5] Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sep. 21, 2006, at 28-30.

[6] RONALD DWORKIN, JUSTICE IN ROBES 9-10, 151-54, 215 (2006).

[7] Lewis v. Harris, 908 A.2d 196, 231 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (citing Dworkin, *supra* note 5, at 30).

[8] DWORKIN, *supra* note 4, at 8.

[9] *See generally* 1 *Samuel* 17 (recounting the story of David and Goliath).

[10] DWORKIN, *supra* note 4, at 89.

To make such a challenge is an effective rhetorical move – except when it isn't. It is effective at the outset because the very making of the challenge conveys a sense of strength and certitude, and it grows in effectiveness thereafter when no one takes up the challenge, or takes it up and fails badly. In that case, the champion's challenge magnifies his victory. It isn't good rhetorical strategy when what may be called the Goliath phenomenon[11] repeats itself. In that case, the champion's challenge magnifies his defeat.

With due regard for his stature and high ability (and therefore quite soberly), this review accepts Dworkin's challenge.

II. AT THE LEVEL OF PRINCIPLES

Dworkin laments the widespread perception that the Nation is deeply divided between red-state culture and blue-state culture,[12] between "two mutually contemptuous worlds of personality and self-image,"[13] and between "two zeitgeists competing for national dominance . . . ."[14] While acknowledging that "the two-cultures thesis . . . now has a political life of its own,"[15] he is loathe to concede that "there is no common ground to be found and [therefore] no genuine argument to be had"[16] because, if that is so, our democracy "becomes only a tyranny of numbers."[17] He therefore puts himself first to the task of "find[ing] shared principles of sufficient substance to make a national political debate possible and profitable."[18] His follow-

[11] *See* 1 *Samuel* 17, *supra* note 9.

[12] DWORKIN, *supra* note 4, at 2-4.

[13] *Id.* at 3.

[14] *Id.* at 4.

[15] *Id.*

[16] *Id.* at 6.

[17] *Id.*

[18] *Id.*

up endeavor is to "try to show the force and bearing of those shared principles on the great issues that divide us,"[19] including the meaning of marriage.

Dworkin posits two admittedly abstract principles that "almost all of us"[20] share.

> The first principle–which I shall call the principle of intrinsic value–holds that each human life has a special kind of objective value. It has value as potentiality; once a human life has begun, it matters how it goes. . . . This is a matter of objective, not merely subjective value; . . . . The success or failure of any human life is important in itself . . . .
>
> The second principle–the principle of personal responsibility–holds that each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him. He must not accept that anyone else has the right to dictate those personal values to him or impose them on him without his endorsement. . . . [Any] deference [to tradition or other forms of authority] must be his own decision; it must reflect his own deeper judgment about how to acquit his sovereign responsibility for his own life.[21]

Because his formulation of the second principle evokes extreme notions of individuality and autonomy, Dworkin quickly moves to assure:

> [The two principles] do not suppose, just as abstract principles, that the success of a single person's life can be achieved or even conceived

[19] *Id.* at 7.

[20] *Id.* at 9.

[21] *Id.* at 9-10.

> independently of the success of some community or tradition to which he belongs or that he exercises his responsibility to identify value for himself only if he rejects the values of his community or tradition. The two principles would not be eligible as common ground that all Americans share if they were individualistic in that different and more substantive sense.[22]

He provides another assurance when he expressly limits the second principle to adults with capacity, that is, "adults we think are basically rational, even if we think their judgment is very poor . . . ."[23] His final assurance-by-limitation is especially consequential for the marriage issue, although not in a way that the language chosen may initially suggest:

> Our ethical convictions define what we should count as a good life for ourselves; our moral principles define our obligations and responsibilities to other people. The principle of personal responsibility allows the state to force us to live in accordance with collective decisions of moral principle, but it forbids the state to dictate ethical convictions in that way.[24]

Dworkin's claim for the two principles is instrumental – that most Americans share these principles (or would if they took time to consider them) and that therefore they can serve as "common ground"[25] underlying productive democratic discourse on more concrete matters, including the marriage issue. That is a claim of what *is*, as a matter of fact, not a claim of what *ought* to be, although Dworkin undoubtedly believes that these abstract principles ought to be universally shared. As to whether they are in fact shared by nearly all Americans, I

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[22] *Id.*at 10.

[23] *Id.* at 20.

[24] *Id.* at 21.

[25] *See id.* at 10.

have no evidence one way or the other. But *I* choose to share the two principles, "just as abstract principles,"[26] both from conviction and as a plausible platform for the assessment of the book's argument for genderless marriage.

I decline, however, to embrace Dworkin's conceit that the two principles constitute the two "dimensions of human dignity"[27] and "together define the basis and conditions of human dignity . . . ."[28] I so decline– and take the time to explain why – because of the practical consequences in the real world of letting Dworkin capture and be the arbiter of the meaning of human dignity. At the same time, I acknowledge that Dworkin is of course free to choose any number of short-hand labels for the two principles, including *Harley-Davidson* and *human dignity*. But he is not doing that.

What Dworkin is doing is asserting that human dignity is to be understood in terms of the two principles. That is both dangerous and not right. It is not right because neither in the book nor elsewhere does Dworkin pay the price in scholarly work ultimately supportive of that conclusion – and no one else has yet paid that price either. Certainly Dworkin has not given us "a rigorous historical inquiry . . . into the best philosophical and legal thought of Western civilization on the meaning of human dignity . . . ."[29] His bald assertion that the two principles "together define the basis and conditions of human dignity"[30] is just that, bald.

Beyond bald, Dworkin's assertion is dangerous, and not just a little. The meaning of *human dignity* is highly consequential for a number of modern liberal democratic states. In such a state, dignity can be either a constitutional right, a

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 119 (2004), *available at* http://manwomanmarriage.org/jrm/pdf/jrm.pdf [hereinafter Stewart, *Redefinition*].

[30] DWORKIN, *supra* note 4, at 10.

constitutional value, both or neither. The South African constitution expressly makes it both a constitutional right and a constitutional value.[31] The United Nation's 1948 Universal Declaration of Human Rights speaks in article 1 of all being equal in dignity and in article 22 of everyone being "entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity. . . ."[32] The Canadian Charter of Rights and Freedoms does not use the word *dignity*, but the Supreme Court of Canada, in an act of judicial inventiveness, has chosen to use dignity, as a value, to drive interpretation and application of the express equality right.[33] To date, American courts, state and federal, have deployed only occasionally the concept of human dignity as something akin to an operative constitutional value, while never deploying it as a free-standing and substantive constitutional right.[34] But a trend may be emerging where some American judges are both ready and willing to write human dignity, as a value or a right, into constitutional jurisprudence.[35]

I leave aside the obvious question whether such writing-in is a constitutionally legitimate exercise of the power of judicial review. The valid knock on human dignity as a constitutional value or right is its indeterminacy. After all, what real guidance to (and therefore effective limitation on) the exercise of judicial power can the phrase provide when historically it has been

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[31] S. AFR. CONST. Ch. 2, §§ 7, 10, 36(1), 39(1).

[32] Universal Declaration of Human Rights, G.A. Res. U.N. GAOR, 3d Sess. 1st plen. mtg 217A, at 71, 72, 75 (Dec. 10, 1948), *available at* http://www.unhchr.ch/udhr/index.htm.

[33] Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at ¶ 51, 1999 Can. Sup. Ct. LEXIS 10.

[34] *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1211-20 (2004).

[35] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); *see also In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 731 (Cal. Ct. App. 2006) (Kline, J., concurring and dissenting) (speaking of "the individual autonomy and dignity that is embodied in the freedom to marry the person of one's choice . . . .").

seriously used all the way from a core feature of Nazi ideology,[36] to a justifying component of pre-modern class structure,[37] to an object of Christian theological criticism?[38] The proof of this problem is in the pudding – the Canadian Supreme Court's repeated failures, despite its multiplication of semantic formulas intended to give determinacy to the indeterminate, to use the dignity value in a way that gives anyone any confidence as to how it will be used instrumentally in the next and even slightly different case.[39] (It is always certain, however, how the dignity value will be used rhetorically – to portray the Court's ultimate decision as advancing or at least fully respecting human dignity; something, of course, that we all very much favor.)

One may think it extreme to challenge a single American legal philosopher's bald assertion of the meaning of the phrase

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[36] *See* James Q. Whitman, *On Nazi "Honour" and the New European "Dignity," in* DARKER LEGACIES OF LAW IN EUROPE 243 (Christian Joerges & Navraj Singh Galeigh eds., 2003) (arguing that the development of "dignity" in European law should be seen as a largely continuous history, one that includes developments during the Nazi period).

[37] *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1313-32 (2000).

[38] *See* JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 4-5 (Doris C. Anson trans., 1971) (1943). *See also* Iain Benson, *The Use of Religious Concepts in a Post-religious Age: Canada's Continuing Edwardianism*, CENTRE FOR CULTURAL RENEWAL BLOG (Sep. 25, 2006), *available at* http://www.culturalrenewal.ca/qry/page.taf?id=37&_function=detail&sbtblct_uid1=159&month=9&year=2006&_nc=cadc830c1aeb7a0e08a20b2c25a1053d (arguing that "human dignity" is a religious term, "rich in meaning and part of an overall framework that supports [it] in one period," which, when used by the law without reference to that meaning and framework, is essentially meaningless and hence may be used "in highly elastic and, in light of traditional meanings, suspect ways.").

[39] *Compare* Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 (no violation of dignity) *and* Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429 (no violation of dignity), *with* Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504 (violation of dignity) *and* Gosselin v. Quebec (Attorney General [2002] 4 S.C.R. 429 (L'Heureux-Dubé, J., dissenting) (violation of dignity); *see* Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429 (Bastarache, J., dissenting) (addressing concern that "overarching concern with human dignity . . . . [w]ithout some link to the language of the *Charter*, [brings into question] the legitimacy of the entire process of *Charter* adjudication . . . .").

human dignity on the ground that, left unchallenged, the assertion may go on to materially shape constitutional jurisprudence in a number of important democracies. But consider this: In a 1977 publication, an American legal philosopher originated the phrase "*right to equal concern and respect*" and advocated constitutional recognition of that right.[40] Moreover, the philosopher not only asserted the right to be fundamental, especially when conceived of as "the right to treatment as an equal,"[41] but proposed "that individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights."[42] The philosopher's argument was rather effectively criticized, and in his comprehensive treatment of equality a couple of decades later, that argument is not present in any intact or recognizable form.[43] But in the meanwhile, that is, in 1989, the Canadian Supreme Court gave in the *Andrews* case[44] its first comprehensive explication of the equality rights specified in the 1982 Charter of Rights and Freedoms. In doing so, the Court, without discussion, adopted the phrase "*right to equal concern and respect*"[45] and has used it ever since in highly consequential, and arguably highly dubious, ways.[46] The American legal philosopher featured in this true slice of legal history is Ronald Dworkin.

So, just as meanings are the life of social institutions (as we will see in a moment), they are also the life of constitutional norms. They therefore ought not be left to unchallenged (which usually means unworthy) appropriation.

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[40] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 181 (1977).

[41] *Id.* at 273.

[42] *Id.* at 273-74.

[43] Stewart, *Redefinition supra* note 29, at 102-07.

[44] Andrews v. Law Society, [1989] 1 S.C.R. 143.

[45] *Id.* at 152.

[46] *See* Stewart, *Redefinition*, *supra* note 29, at 107-115.

III. AT THE LEVEL OF APPLICATIONS: THE SOCIAL INSTITUTION OF MARRIAGE

No one can address the marriage issue without standing on some notion of what marriage *is*. That notion may be expressly stated or left implicit; it may be well thought through or not; it may be defensible or silly. But all the arguments in the marriage debate have (and I believe necessarily so) roots tapping into some understanding of what marriage now *is*, an understanding of a matter essentially factual and empirical.

All informed participants in the marriage debate acknowledge that marriage is a vital social institution.[47] That understanding has brought attention to social institutional studies, which in turn has led to a number of uncontroversial understandings of social institutions in general and the marriage institution in particular, which in turn has led to the social institutional argument for man/woman marriage.[48] Because of what it succeeds in demonstrating, that argument is a sufficient response to all constitutional attacks levelled at the laws defining and sustaining man/woman marriage and even overcomes all policy arguments for the redefinition of marriage.[49] And as to why it can be, in light of what I just said, that the marriage issue still rages in the courts, the answer is this: The judges supportive of genderless marriage have evaded, ignored, and otherwise elided the social institutional argument, even when their judicial colleagues have articulated it in the very same decision.[50] The scholarly legal literature now chronicles in

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[47] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

[48] *See* Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 6-28 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*].

[49] *Id.* at 27-28.

[50] *Id.* at 28-60. *See also* Monte Neil Stewart, *Eliding in New York*, 1 DUKE J. CONST. L. & PUB. POL'Y 221, 231-59 (2006), available at http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf [hereinafter Stewart, *New York*].

considerable detail this deficient judicial performance,[51] and no one is coming forward to say that the true picture is otherwise.

Much to Dworkin's credit, he both sees the social institutional argument for man/woman marriage (what he calls "the cultural argument against gay marriage") as the strongest such argument and actually tries to engage and counter the argument.[52] This is much to his credit exactly because, to date, not only the judges who would mandate the redefinition of marriage but all other genderless marriage proponents have assiduously elided the argument. But to fairly judge Dworkin's engagement requires a prior and fair understanding of the social institutional argument itself, and that is where I go now.

A. THE SOCIAL INSTITUTIONAL ARGUMENT FOR MAN/WOMAN MARRIAGE

The social institutional argument demonstrates that marriage, like all social institutions, is constituted by a web of shared public meanings; that these meanings teach, form, and transform individuals, providing identities, purposes, and projects; and that in this way, these meanings provide vital social goods.[53] Across time and cultures, a core meaning

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[51] Stewart, *Judicial Elision*, *supra* note 48, at 28-60; Stewart, *New York*, *supra* note 50, at 231-59; Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. (forthcoming 2007), *will be available at* www.manwomanmarriage.org.

[52] DWORKIN, *supra* note 4, at 86-89.

[53] Stewart, *Judicial Elision*, *supra* note 48, at 8-10; *see also* William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 175 (Amitai Etzioni ed., University of Virginia Press 1995). These insights are not recent:

> As Tocqueville saw it, it was the institutional order, the patterns of normative, sanctioned interaction themselves, which worked through daily life to shape the imagination and character of the citizens. That is, institutionalized mores linked market, state, and civil society into the mutually reinforcing whole Tocqueville identified as American democracy. Besides individual consciousness and social interaction, human life also entails shared, socially sanctioned patterns of purpose. These are the institutional forms of family,

constitutive of the marriage institution has virtually always been *the union of a man and a woman*.[54] This core man/woman meaning is powerful and even indispensable for the marriage institution's production of at least six of its valuable social goods.[55] The man/woman marriage institution is:

1. Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).
2. The most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not just the basic requirements like food and shelter but also education, play, work, discipline, love, and respect).
3. The indispensable foundation for that child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's—and therefore society's—well being.
4. Society's primary and most effective means of bridging the male-female divide.
5. Society's only means of conferring the identity of, and transforming a male into, husband/father, and a female into wife/mother, statuses and identities particularly beneficial to society.
6. Social and official endorsement of that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms. That rationality has been demonstrated in the scholarly literature and remains, to date, unrefuted.[56]

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school, religious congregation, business firm, and club, which structure the patterns of everyday life.

Id. at 173-74.

[54] W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS, SECOND EDITION: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 15 (2005).

[55] Stewart, *Judicial Elision*, *supra* note 48, at 16-20.

[56] *Id.*

Those are not all the social goods produced by the marriage institution, but for our purposes they are the relevant ones. They are relevant exactly because they are the social goods produced materially and even uniquely by the man/woman *meaning* and that must therefore disappear when that *meaning* is de-institutionalized.[57]

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[57] In my judgment, a purely instrumental approach to social institutions is not warranted, but the very nature of constitutional analysis and litigation brings to bear a kind of pneumatic pressure to frame the practices of social institutions, including marriage, in that way. The best antidote may well be careful attention to what William M. Sullivan illuminates:

> American thinking has long been famous for its technical and instrumental bent. . . . American individualism . . . has long cohabited happily with a certain instrumental cast of mind. . . .
>
> From this perspective institutions have appeared as instruments for the efficient pursuit of individual and collective satisfaction. From the family to the law, institutions have been reduced to an instrumental status, as little more than arrangements for the mutual convenience of the parties involved. The values or preferences of actors have been analytically separated from the contexts in which their values have been formed. In American intellectual culture as in popular opinion, the dominant theme has been to free individuals from social constraint, to enhance agency. . . . While foregrounding agency, this approach has often minimized the significance of institutions as the necessary contexts for the development of individuals, as enabling and not only as constraining forms of life.
>
> . . .
>
> Besides individual consciousness and social interaction, human life also entails shared, socially sanctioned patterns of purpose. These are the institutional forms of family, school, religious congregation, business firm, and club, which structure the patterns of everyday life. Individual agency and moral responsibility depend upon the cultivation of certain kinds of social relationships that can be sustained over time *only if institutionalized in customary and legal forms.*
>
> [What are] the practical conditions necessary for the civic culture of democracy[?] . . . The most plausible account of how to sustain the character and customs necessary for a civic regime must give a central place to a non-instrumental conception of institutions.

The social institutional argument further demonstrates that, with its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage, with concomitant loss of the institution's social goods.[58] Further, genderless marriage is a radically different institution than man/woman marriage, as evidenced by the large divergence in the nature of their respective social goods (in the case of genderless marriage, only promised, not yet delivered).[59] Fundamentally different meanings, when magnified by institutional power and influence, do not produce the same social identities, aspirations, projects, or ways of behaving, and hence the same social goods.[60] In other words, the man/woman marriage institution will socially construct a people and hence a society different from the people and society socially constructed by the genderless marriage institution.[61] It could not be otherwise because the genderless marriage institution is radically different in what it aims for and in what it teaches.[62] To say that the result will be otherwise is to say that the core meanings constitutive of powerful social institutions do not matter in the formation and transformation of individuals, and no rational and informed observer says that.[63] Indeed, the observers of marriage who are both rigorous and well-informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage, and this is so regardless of the

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Sullivan, *supra* note 53, at 170-71, 173-74 (emphasis added).

[58] Stewart, *Judicial Elision*, *supra* note 48, at 11-13.

[59] *Id.* at 20-24.

[60] *Id.* at 20-21.

[61] MARY DOUGLAS, HOW INSTITUTIONS THINK 108 (1986) ("First the people are tempted out of their niches by new possibilities of exercising or evading control. Then they make new kinds of institutions, and the institutions make new labels, and the label makes new kinds of people."); Stewart, *New York*, *supra* note 50, at 240.

[62] *Id.*

[63] *Id.*

observer's own sexual, political, or theoretical orientation or preference.[64]

As to genderless marriage being radically different in what it aims for and in what it teaches, to grasp that reality requires a clear understanding of the "close personal relationship" model of marriage. This model – sometimes advanced as descriptive (what marriage *is*), sometimes as aspirational (what marriage *ought* to be) – posits a relationship stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction that the relationship brings to the two adults involved.[65] But it is just wrong as a matter of fact to assert that the close personal relationship model is *now*—after a process of evolution—*all* that marriage *is*. Although it is *not* wrong in some American communities or in portions of that world created by Hollywood, it is wrong, on the ground, across the

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[64] *See* LADELLE MCWHORTER, BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION 125 (1999); JOSEPH RAZ, THE MORALITY OF FREEDOM 393 (1986); Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 SOCIAL THEORY AND PRACTICE 111, 114 (1998); Daniel Cere, *War of the Ring*, in DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 11-18 (Daniel Cere & Douglas Farrow eds., 2005) [hereinafter DIVORCING MARRIAGE]; Douglas Farrow, *Canada's Romantic Mistake*, *in* DIVORCING MARRIAGE, *supra*, at 1–5; Maggie Gallagher, (*How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L. J. 33, 53 (2004) [hereinafter Gallagher, *Social Institution*] ("Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage."); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 15, 17-18 (1996); E.J. Graff, *Retying the Knot*, 262 THE NATION 12 (June 24, 1996) ("The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. . . . Marriage is an institution that towers on our social horizon, defining how we think about one another. ...[S]ame-sex marriage . . . announces that marriage has changed shape."); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 12-19 (1991); Katherine Young & Paul Nathanson, *The Future of an Experiment*, *in* DIVORCING MARRIAGE, *supra*, at 48–56.

[65] *See* DANIEL CERE, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 14–15 (Council on Family Law 2005), *available at* http://www.marriagedebate.com/pdf/future_of_family_law.pdf (discussing the close personal relationship model of marriage).

Nation.[66] Although the contemporary social institution of marriage undoubtedly includes the ideal of "a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support,"[67] enduring aspects of the institution go far beyond that limited and limiting description of transformative meanings, and those enduring aspects are grounded in the man/woman meaning. Here is Daniel Cere's summary of them:

> Conjugal marriage [i.e., man/woman marriage] has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.
>
> As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage.
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> . . . .
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> . . . [Man/woman marriage] provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life,

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[66] *See, e.g.*, Ron Lesthaeghe & Lisa Neidert, *The Second Demographic Transition in the United States: Exception or Textbook Example?*, 32 POPULATION & DEVELOPMENT REV. 669, 679 (2006), *available at* http://sdt.psc.isr.umich.edu/pubs/online/US_SDT_text.pdf.

[67] Hernandez v. Robles, 805 N.Y.S.2d 354, 381 (N.Y. App. Div. 2005) (Saxe, J.P., dissenting).

> and provide a stable social setting for their children.
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> . . . .
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> Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and woman often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.[68]

Some thoughtful proponents of man/woman marriage acknowledge that if the close personal relationship model is all that marriage now *is*, then genderless marriage must prevail as a matter of constitutional norms and simple social justice.[69] But in this Nation, that model – as description – is so incomplete as to be fundamentally false and misleading. Because the contemporary man/woman marriage institution is so much more than what the close personal relationship model purports to describe, many tens of millions in this Nation continue to

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[68] CERE, *supra* note 65, at 12–13; *see, e.g.*, Stewart, *Redefinition*, *supra* note 29, at 41–58; Stewart, *Judicial Elision*, *supra* note 48,,at 16–20; Gallagher, *Social Institution*, *supra* note 64, at 43–51; and Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post*-Lawrence *World*, 23 QUINNIPIAC L. REV. 447, 451–71 (2004) [hereinafter Gallagher, *Post*-Lawrence *World*] (discussing further descriptions of the meanings and purposes inhering in contemporary man/woman marriage and meanings beyond those few comprising the close personal relationship model).

[69] *E.g.*, Douglas Farrow, *Rights and Recognition*, in DIVORCING MARRIAGE, *supra* note 64, at 97-120.

enjoy the significant incremental increase in child and adult happiness, health, and productivity associated with that institution, something that social science has measured and stated in conclusions that are by now rather uncontroversial.[70]

The next social institutional reality must not be ignored or otherwise elided. It is that a society can have, at any one time, only one social institution denominated *marriage*.[71] That is because a society, as a simple matter of reality, cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons." A society, as a simple matter of reality, cannot, at one and the same time, tell people, and especially children, that *marriage* means "the union of a man and a woman" *and* "the union of any two persons." The one meaning necessarily displaces the other. Hence, every society must choose either to retain the old man/woman marriage institution or, by force of law, to suppress it and put in its place the radically different genderless marriage institution. But again, to suppress, by force of "constitutional" law no less, the shared public meanings constituting the old institution is to lose the valuable social goods flowing from those institutionalized meanings. Thus, the social institutional argument refutes the "no-downside" argument advanced by genderless marriage proponents and seen in the famous tactic of asking: "How will letting Jim and John marry hurt Monte's and Anne's marriage?"[72]

For completeness, I need to say that a society really has three options: man/woman marriage, genderless marriage, or no normative marriage institution at all.[73] Among elites worldwide,

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[70] WILCOX, *supra* note 54; THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2006), *available at* http://www.princetonprinciples.org/contents.html.

[71] Stewart, *Judicial Elision*, *supra* note 48, at 24 ("Given the role of language and meaning in constituting and sustaining institutions, two 'coexisting' social institutions known society-wide as *marriage* amount to a factual impossibility.").

[72] *Id.* at 39-44.

[73] Although legislatively created arrangements such as civil unions or domestic partnerships are sometimes called "marriage lite" or "counterfeit marriage," and although such arrangements may adversely affect the vitality

the third option has a large number of strong and effective advocates, and the Americans in their midst "came out of the closet" in July with the *Beyond Same-Sex Marriage* manifesto.[74] The contemporary American political reality, however, is that presently we have only the first two options. But it seems clear that many of the most influential advocates of the second option – genderless marriage – correctly and gladly see that option as leading quite certainly to the third option – no normative marriage institution at all. Remember, when public meanings and norms are insufficiently *shared*, the social institution constituted by those meanings and norms disappears – as do the social goods uniquely and previously provided by that institution. When the disappearing social institution is marriage, what is left is a motley crew of lifestyles, and a lifestyle is to an institution what a plain sheet of paper is to a $1,000 bill. (By the way, money is one of our most important social institutions.[75])

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of a marriage institution (whether man/woman or genderless) and the strength of its norms, *see* Jonathan Rauch, *Dire Straights: Why Outlawing Marriage for Gays Will Undermine Marriage for All*, WASHINGTON MONTHLY 20 (April 1, 2004) ("Conservatives may argue that allowing gay marriage endangers matrimony for straights; in fact, creating alternatives to marriage, such as civil unions, is far more likely to undermine the institution of marriage."); Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 440 (2002) ("Another general social effect of legalizing same-sex civil unions is the enhancement and increase in the devaluation of marriage."), it must be remembered that such arrangements were created and intended and exist as something that is *not* marriage; indeed, in the realm of shared public meanings, that *not* may well loom as large as the arrangements' numerous marriage-like features.

[74] BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS (2006), *available at* http://www.beyondmarriage.org/BeyondMarriage.pdf

[75] *See* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 32 (1995):

> [W]e can say, for example, in order that the concept "money" apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as,

The social institutional realities that I have been summarizing further reveal phrases like *gay marriage* or *same-sex marriage* to be misleading.[76] These phrases get people thinking that a society will keep its old kind of marriage and just get a new and separate kind. But that is not so because of the social institutional realities just reviewed; a society can have one or the other but never at the same time both possible kinds of civil marriage.[77] And after a judicial decree of genderless marriage, made in the name of constitutional norms of equality, liberty, dignity, or autonomy, an American state will certainly *not* be the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space.[78] Rather, that state will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially constrained, officially disdained, and sharply curtailed.[79]

Further, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings.[80] Social institutional studies teach that the dominant society and its law, language, and meanings will, like an ocean and its waves, inevitably wear down and cause to disappear any island enclave of an opposing norm. (The early, but not isolated, example of the Massachusetts Catholic Charities adoption agency comes to

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> etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, marriages, buying and selling, political offices, and so on.

[76] Stewart, *Judicial Elision*, *supra* note 48, at 25.

[77] *Id.*

[78] *Id.* at 48-49.

[79] *Id.*

[80] *Id.* at 46-49.

mind.[81]) Moreover, to the degree that members of the enclave were to adopt the speech of the dominant society, they would lose the power to name, and in large part the power to discern, what once mattered to their forbears.[82] To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible.[83]

One other salient social institutional reality is this: man/woman marriage is a pre-political institution, while genderless marriage must of necessity be a post-political, law-constructed, and hence fragile institution.[84] Some judges bent on replacing the former with the latter have asserted that the man/woman marriage institution is solely a legal (that is, post-political) construct. One, a New York appellate judge, asserted as the first words of his dissenting opinion: "Civil marriage is an institution created by the state . . . ." [85] But Joseph Raz captures

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[81] *See* Maggie Gallagher, *Banned in Boston: The coming conflict between same-sex marriage and religious liberty*, THE WKLY. STANDARD, May 15, 2006, at 20.

[82] *See* Sullivan, *supra* note 53, at 176:

> Living in institutions is thus always in part centered in language. It is a conversation, sometimes an argument about who and what we and our shared form of life are. This process is a moral and, implicitly, a political one, since institutional life is always making some forms of activity possible and others impossible, some kinds of life legitimate and others illegitimate. ... Institutions provide the socially enacted metaphors of family ... church, and state through which individuals inescapably interpret situations and actions. This suggests the profound influence that institutional patterns as such exert on the thinking and aspiration as well as the behavior of individuals.

[83] Stewart, *Judicial Elision*, supra note 48, at 47.

[84] Seana Sugrue, *Soft Depotism and Same-Sex Marriage*, *in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 172, 180-81, 186-91 (Robert P. George & Jean Bethke Elshtain eds., 2006). Sugrue notes: "Being entirely a creation of the state, [the genderless marriage institution] is an institution that needs to be coddled, and which demands cocooning to protect it. Its very fragility demands a culture in which it is protected." *Id.* at 190.

[85] Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (Saxe, J., dissenting). Soon after boldly asserting the "state-created" conclusion, however, and apparently not aware of the inconsistency, he actually supports

the reality well and accurately when he observes that the law's role relative to man/woman marriage and other pre-political institutions is "to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations."[86] All this teaches that when a same-sex couple successfully asserts a "right to marry" they are necessarily imposing on the state *not* a correlative duty to allow them into the existing man/woman marriage institution – which the law is impotent to do,[87] although it is sufficiently potent to de-institutionalize the man/woman marriage[88] – *but* a correlative duty to construct and maintain in all its fragility the radically different genderless marriage institution, in which all couples who claim to be married (both same-sex and man/woman) must participate if their claim is to have legitimacy.[89]

B. DWORKIN'S ENGAGEMENT WITH THE SOCIAL INSTITUTIONAL ARGUMENT

Dworkin's first step is to position the social institutional argument as essentially a "religious" argument, that is, as an expression of religious values, as a manifestation of the impulse to limit individual ethical choices to a religiously acceptable range, indeed, as a product of the "political militancy, aggressiveness, and apparent success of fundamentalist religion"[90] in America. Now, in light of the previous section's summary of the social institutional argument, what I just said

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rather powerfully the contrary conclusion, by invoking John Locke. All this is described in detail in Stewart, *New York*, *supra* note 50, at 243-46.

[86] JOSEPH RAZ, THE MORALITY OF FREEDOM 161 (1986); *see* F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALBERTA. L. REV. 619, 635 (2003).

[87] Stewart, *Redefinition*, *supra* note 29, at 84-85.

[88] Stewart, *Judicial Elision*, *supra* note 48, at 36-37.

[89] *Id*. at 52 n.137.

[90] DWORKIN, *supra* note 4, at 52.

about Dworkin's first step must be met with disbelief. After all, the argument patently emerges in a thorough-going way from modes of inquiry and analysis, and from sources, that are most decidedly not religious. Rather, using the common term, they are clearly secular, and the argument itself fully qualifies as Rawlsian "public reason"[91] and satisfies even Linda McClain's high standard: "The requirements of public reason would . . . require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture."[92]

Banish the disbelief; *Is Democracy Possible Here?* indeed casts the social institutional argument for man/woman marriage as "religious." The book characterizes the exclusion of same-sex couples from marriage as part of the larger "problem" of American religiosity's expression in the political arena. It is in the chapter devoted to this perceived problem, entitled "Religion and Dignity," that Dworkin embeds his analysis of the social institutional argument for man/woman marriage, right along with his analysis of the teaching of creationism or intelligent design in public schools and of "under God" in the Pledge of Allegiance.[93] And all the tools carefully crafted in earlier portions of this chapter on the "religion" problem are used to advance the book's argument for genderless marriage. Moreover, speaking of the three Massachusetts justices who dissented from the *Goodridge* decision's mandate of genderless marriage, the book labels their perception of what marriage is and is all about as a "perception [that] itself reflects a judgmental religious perspective . . . ."[94] This is telling exactly because one dissenter's opinion (joined by the other two dissenters) sets forth quite admirably the social institutional argument for man/woman marriage.[95] Further, the book says

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[91] *E.g.*, John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

[92] Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1251 (1998).

[93] *See* DWORKIN, *supra* note 4, at 78, 84, 86.

[94] *Id*. at 87.

[95] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995-96 (2003) (Cordy, J., dissenting).

that the social institutional argument "has the same form as the argument for a religious pledge of allegiance . . . ."[96] As another example, Dworkin says that the "tolerant religious model supposes a narrow conception of religious freedom that does not include . . . a right . . . to marry someone of the same sex."[97] As a final example, he asks, "Should gay marriage be recognized?"[98] and then identifies that as a "cutting-edge issue about church and state."[99] It simply cannot be gainsaid that Dworkin intends his readers to understand the social institutional argument for man/woman marriage as just another "religious" argument.

Plainly, however, it is not a "religious" argument. That is not to say that religion, like the law, does not interact with the marriage institution. What Raz said of the law's relationship with the marriage institution can be said quite accurately of religion's relationship with it: Religion gives marriage in general and particular marriages formal recognition, brings religious arrangements into line with marriage, facilitates marriage's use by members of the religious community who wish to do so, and encourages the transmission of belief in marriage's value to future generations.[100] Moreover, like the law (and usually with the law's sanction), religion "performs" or "solemnizes" marriages; it does weddings. So what we have is both the law and religion, each in its own (albeit related) ways, interacting with, supporting, and sustaining the *same* pervasive and influential social institution – man/woman marriage.

To digress for a moment: This is an important point because of the efforts of genderless marriage proponents to speak as if "civil marriage" and "religious marriage" were two different creatures, two different social institutions if you will, which is just silly.[101] What has been true "at least since the beginning of

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[96] DWORKIN, *supra* note 4, at 87.

[97] *Id.* at 67.

[98] *Id.* at 55.

[99] *Id.* at 56.

[100] JOSEPH RAZ, *supra* note 86, at 161.

[101] *See* F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference Re Same-Sex Marriage*, 42 ALBERTA. L. REV. 1099, 1102-03, 1110-19 (2005).

recorded history, in all the flourishing varieties of human cultures" is true in contemporary America: "marriage has been a universal human institution" that "across [our society] is a publicly acknowledged and supported sexual union that creates kinship obligations and resource pooling between men, women, and the children that their sexual union may produce."[102] And this understanding that law and religion interact with the *same* marriage institution is important for a second and a third reason. The second pertains to the fact just noted that both law (the justice of the peace) and religion (priest, rabbi, etc.) perform weddings. Although a wedding is not a marriage, confusion seems prevalent among genderless marriage proponents who speak of the right to "a highly public celebration" of a couple's mutual love and commitment.[103] Reflection reveals such a "right" to be more truly understood as an incident of institutional meanings and practices. If such a "right" were conceived as a free-standing civil right (and one conjured from the ether to boot) and made the basis for replacing the man/woman marriage institution with the genderless marriage institution, we would have the ultimate example of the tail wagging the dog – to its death.[104] The third reason is the now widely-accepted understanding that for the law to go where the large portion of American religions and religious cannot go – genderless marriage – is to bring the law into pervasive conflict with religion in ways sure to result in a

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[102] WILCOX, *supra* note 54, at 15.

[103] *E.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (2003).

[104] *See In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 717 (Cal. Ct. App. filed Oct. 5, 2006):

> Although there are expressive aspects to it, entering a marriage is obviously something much more than a communicative act. If the state has legitimate reasons for limiting marriage to opposite-sex couples, then the unavailability for same-sex couples of this one form of expressing commitment – when all other expressions remain available – does not rise to the level of a constitutional violation.

quite massive loss of religious liberties, as understood for some centuries in this Nation.[105]

Back to the main point, that is, to Dworkin's effort to cast the social institutional argument for man/woman marriage as "religious." Although the marriage institution interacts with other social institutions – the law, private property, religion – and thereby takes from each certain hues,[106] social institutional studies see marriage as meaningfully distinct from those other institutions.[107] Thus, after stating a standard definition of *institution* – "An organized system of social relationships (roles, positions, norms) that is pervasively implemented in the society and that serves certain basic needs of the society" – American social psychologist Richard Clayton identifies "at least five basic institutions:" education, economics (which in our society would encompass private property, money, and markets), government (encompassing the law), family (encompassing man/woman marriage), and religion.[108] In light of these uncontroversial understandings, to characterize the social institutional argument for man/woman marriage as "religious" makes no more sense than to characterize it as a product of the ideology of rich capitalist despisers of distributive justice.

In mischaracterizing the social institutional argument as fundamentally religious in origin and impulse, Dworkin is

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[105] *See generally*, Becket Fund for Religious Liberty, *Scholars' Conference on Same-Sex Marriage and Religious Liberty* (December 15, 2005), *available at* http://www.becketfund.org/index.php/article/494.html; *see also* Gallagher, *supra* note 81, at 20.

[106] It really is commonplace that marriage is both a meaningfully distinct social institution and one that interacts with other important institutions; *see, e.g.*, Celia Kitzinger & Sue Wilkinson, *The Re-Branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership*, 14 FEMINISM & PSYCHOL. 127, 132 (2004) ("Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction."); Sullivan, *supra* note 53, at 173 ("[T]he realm of civil society is itself deeply interconnected with market and state, both through the market processes that sustain the lives of families, organizations, and associations of all kinds and by the state in the form of law, regulation, and direct subsidy.").

[107] *E.g.*, SEARLE, *supra* note 75, at 32; RAZ, *supra* note 86, at 161-162, 393.

[108] RICHARD R. CLAYTON, THE FAMILY, MARRIAGE, AND SOCIAL CHANGE 22 (2d ed. 1979).

treading a well-worn path. Keen observer that she is, Canada's Margaret Somerville identified it rather early on:

> One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level.[109]

That strategy is even possible for Dworkin only because he states the social institutional argument in a profoundly shriveled way and then colors the desiccated remnant to his own purposes:

> The institution of marriage is unique; it is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning. We can no more create an alternative mode of commitment carrying a parallel intensity of meaning than we can create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered; it enables two people together to create value in their lives that they could not create if that institution had never existed.[110]
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> . . . .
>
> The case against gay marriage, put most sympathetically, comes to this: the institution of

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[109] Margaret Somerville, *What About the Children?*, *in* DIVORCING MARRIAGE, *supra* note 64, at 70, 71. She goes on to note that these tactics "do not serve the best interests of either individuals or society in this debate." *Id*. at 71.

[110] DWORKIN, *supra* note 4, at 86.

> marriage is, as I said, a unique and immensely valuable cultural resource. Its meaning and hence its value have accreted organically over the centuries, and the assumption that marriage is the union of a man and a woman is so embedded in its meaning that it would become a different institution, and hence a less valuable institution, were that assumption now challenged and lost. Just as we might struggle to maintain the meaning and value of any other great natural or artistic resource, so we should struggle to retain this uniquely valuable cultural resource.[111]

As we will see in the coming pages, this statement of the social institutional argument, one "put most sympathetically," lacks only everything that prevents Dworkin from overcoming it. But this dessicated statement does serve well enough to allow the "religious" mischaracterization to pass the blush test. That mischaracterization, however, is not worthy of Dworkin, and it is intellectually despicable.

Ironically, the tools that Dworkin develops to turn back public school teaching of creationism and intelligent design, "under God" in the Pledge, and the "religious" arguments for man/woman marriage rather powerfully vindicate the social institutional argument. The key tools are, first, the distinction between "our ethical convictions" and "our moral principles":

> Our ethical convictions define what we should count as a good life for ourselves; our moral principles define our obligations and responsibilities to other people. The principle of personal responsibility allows the state to force us to live in accordance with collective decisions of moral principle, but it forbids the state to dictate ethical convictions in that way.[112]

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[111] *Id.* at 87-88.

[112] *Id.* at 21.

Second is the distinction between "personally judgmental justifications" for state restraints on our liberty and "impersonally judgmental justifications":

> A *personally judgmental* justification appeals to or presupposes a theory about what kinds of lives are intrinsically good or bad for the people who lead those lives. . . . *[I]mpersonally judgmental* justifications . . . appeal to the intrinsic value of some impersonal object or state of affairs rather than to the intrinsic value of certain kinds of lives. . . .
>
> The principle of personal responsibility distinguishes between these two kinds of judgmental justifications because it insists only that people have responsibility for their own ethical values, that is, their own convictions about why their life has intrinsic importance and what kind of life would best realize that value for them. It does not give them immunity from laws that protect impersonal values like natural or artistic treasures. . . .
>
> This distinction between personally and impersonally judgmental justifications for limiting freedom is crucial to the defense of liberty. We must distinguish between laws that violate dignity by usurping an individual's responsibility for his own ethical values and those that exercise a community's essential collective responsibility to identify and protect nonethical values.[113]

The social institutional realities of marriage point unequivocally to this: under Dworkin's own formulation, a community does not violate his two principles by sustaining and even privileging the vital social institution of man/woman marriage. That is because the polity is thereby preserving, in the only way it can, the valuable social goods resulting materially and even uniquely from the man/woman meaning. To de-

[113] *Id.* at 70-71.

institutionalize that meaning is to lose those valuable social goods, for children and adults now and for generations to come. That is an impersonally judgmental justification, and it is not rendered otherwise by the promise (maybe good, maybe not) of different social goods yet to be delivered by the genderless marriage institution. When a community cannot have all the social goods provided (or promised to be provided) by two radically different and mutually exclusive institutions, when it can have one set or the other but not both, it is nonsense to say that, by choosing one set or the other, the community is somehow "usurping an individual's responsibility for his own ethical values."

The nonsensical nature of such a position merits this elaboration. If that position is not nonsense but true because exclusion from a social institution is such a usurpation and therefore unacceptable, the community is stymied; think of the many millions who, on religious and/or non-religious grounds, will want, for the full expression of their own ethical values, to participate in the man/woman marriage institution but cannot because the law has suppressed it. The only "fair and equal" solution would be for the community to have no normative marriage institution at all but leave all members of the community to their own lifestyles and solipsistic vision; the only price is the loss of either the actual or the promised social goods. (If that is what Dworkin is aiming for, he really ought to be clear on the point.) Moreover,[114] acceptance of Dworkin's own argument will actually shrink the scope of "an individual's responsibility for his own ethical values" in a deep way; it will profoundly limit what choices are even conceivable to him. Remember that "an institution guides and sustains individual identity ..., forming individuals by enabling or disabling certain ways of behaving and relating to others, so that each individual's possibilities depend on the opportunities opened up within the institution to which the person belongs."[115] Remember, further, that to the degree members of even an enclave devoted to man/woman marriage adopt the speech of the dominant

[114] I am indebted to Seana Sugrue for guidance and insights relative to what follows in this paragraph.

[115] HELEN REECE, DIVORCING RESPONSIBLY 185 (2003).

genderless-marriage society, they will lose the power to name, and in large part the power to discern, the older ethical choice – while the members of the dominant society itself will have no chance at all to discern it. Currently, an individual in our society can indeed discern and therefore choose, as an act of ethical conviction, between entry into man/woman marriage and entry into a close personal relationship. But given the power of institutionalized meanings to limit or expand our power to discern and hence make ethical choices,[116] once marriage is legally and then inevitably socially redefined, the close personal relationship model becomes the only option. So in a very real way, Dworkin's genderless marriage argument, premised on aversion to the "usurpation" of individual ethical choices, becomes an engine destructive of such choices.[117]

Returning to Dworkin's own analytical tools: a polity's choice of the man/woman marriage institution does not qualify as a personally judgmental justification because it does not judge "what kinds of lives are intrinsically good or bad for the people who lead those lives"[118] (This is important because an oft-repeated tactic of genderless marriage advocates is to ascribe "hatred" and "homophobia" to all efforts to preserve man/woman marriage,[119] a tactic that Dworkin himself gets

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[116] As William M. Sullivan explains:

> [I]ndividual freedom, the ability to realize a particular life plan or identity, turns out to be heavily conditioned by the kinds of practices and moral understandings available to persons in a particular life context. The available normative patterns of expectation and significance set the limits for both public activity and individual motivation. Such patterns, otherwise described, are institutions.

Sullivan, *supra* note 53, at 175.

[117] In this way, Dworkin's genderless marriage argument misses what William M. Sullivan sees clearly: "Individual agency and moral responsibility depend upon the cultivation of certain kinds of social relationships that can be sustained over time *only if* institutionalized in customary and legal forms." Sullivan, *supra* note 53, at 174 (emphasis added).

[118] DWORKIN, *supra* note 4, at 70.

[119] *E.g.*, Somerville, *supra* note 109, at 71 ("[P]eople who oppose same-sex marriage are labelled as homophobic, ultra-conservative, or self-righteous.

close to when he speaks of "show[ing] contempt for the value of other people's lives."[120]) In preserving man/woman marriage, the only judgment being made about the lives of homosexuals is both indisputably true (factually true) and inescapably so. It is that homosexuals, as same-sex couples, *cannot* participate in the man/woman woman marriage institution and *can* participate in an institution denominated *marriage* only if the old institution is suppressed and replaced with a radically different one.[121]

Dworkin makes another fundamental error. Society values social institutions of betterment because, among other reasons, they allow participating individuals to create value in their own lives that they could not create without that participation. Man/woman marriage is a social institution and does provide to the men and women who participate in it well that kind of "institutionally added value." It is generally assumed that genderless marriage – even though post-political, legally constructed, and necessarily fragile[122] – will likewise qualify as a social institution. Thus, the further assumption arises that it will provide to the people who participate in it well some kind of "institutionally added value." On that basis (apparently), Dworkin argues the unfairness of excluding same-sex couples from the (undifferentiated) marriage institution; the exclusion denies them "access to that wonderful resource."[123] His remedy for the unfairness and inequality is to replace the man/woman marriage institution with the genderless marriage institution; then all couples who desire to participate will have the necessary

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These are ad hominem attacks that do not seek to address the arguments but to denigrate and thereby dismiss the people so labelled.").

[120] DWORKIN, *supra* note 4, at 17.

[121] This, of course, is a matter of institutional realities, particularly the constitutive nature of public meanings. *See* Stewart, *Redefinition*, *supra* note 29, at 84-85. Thus, this is *not* a matter of mere "definitional preclusion." In *Justice in Robes*, Dworkin stoops to box about the ears the "definitional preclusion" argument, DWORKIN, *supra* note 6, at 153-54, which most serious proponents of man/woman marriage never made and which none do now. *See* Stewart, *Judicial Elision*, *supra* note 48, at 4.

[122] *See generally* Sugrue, *supra* note 84.

[123] DWORKIN, *supra* note 4, at 86.

institutional support for creating in their lives that otherwise unobtainable value. It all follows logically.

But what if there is a material defect in one of the links in the logical chain? What if there is something about the marriage of a same-sex couple that generally precludes the institutionally added value of the kind experienced by couples in man/woman marriage? Anticipating Dworkin's argument, F.C. DeCoste, in a brilliant bit of analysis, rather convincingly demonstrates that marriage does not provide to same-sex couples anything – at the level we are talking about – not available to them outside of marriage.[124] He began:

> Social practices are only intelligible in terms of their "point," and any given practice can only (continue to) exist if its practitioners or participants are seized of some "sense" of the overall point of the "form of life" which the practice brings into the world. Marriage is a social practice that in life and subsequently, in law, has a point that constitutes it as a distinct practice. The point of marriage is the bestowal of a certain status on those who choose and are otherwise capable of entering into it and the creation of relations between them. The status bestowed by marriage is that of "wife" and "husband," and the relation between husband and wife is the form of life that marriage alone creates and of which it alone is the practice.[125]

DeCoste then noted, accurately,[126] that the courts mandating genderless marriage have first declared marriage to be, as a matter of fact, nothing other than a close personal relationship.[127] Speaking specifically of the *Halpern* decision

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[124] DeCoste, *supra* note 86, at 625-27.

[125] *Id*. at 625 (footnotes omitted).

[126] *See* Stewart, *Redefinition*, *supra* note 29, at 97-98.

[127] DeCoste, *supra* note 86, at 626-27.

from Ontario[128] (although this applies with equal validity to the other decisions reaching the same conclusion), he observed:

> In the place of men and women, the Court offers as the subjects of marriage what it terms "conjugal couples," which are, in its view, either "same-sex" or "opposite-sex." In the place of marriage as the bestowal of status, the Court construes marriage as the expression and recognition of "love and commitment."[129]

(Recall one of the valuable social goods listed earlier: man/woman marriage uniquely makes possible and confers a valuable – both to individuals and to society – status (*wife, husband*); genderless marriage, of course, does not, indeed cannot, do that.[130])

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[128] Halpern v. Canada (Attorney General), [2003] O.J. No. 2268.

[129] DeCoste, *supra* note 86, at 627 (footnotes omitted).

[130] Just as the imposition of genderless marriage precludes conferral of and nurturing in the status of *husband* or *wife*, it likewise wreaks havoc with the statuses of *parent, mother*, and *father*:

> In Canada, the law that recently legalized same-sex marriage nationally also quietly erased the term "natural parent" across the board in federal law, replacing it with the term "legal parent." With that provision, the federal understanding of parenthood for every child in the nation was changed in order to bring about the hotly-debated legalization of same-sex marriage.
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> ....
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> In response to [*Goodridge* in Massachusetts], the State Department of Public Health changed the standard marriage certificate to read "Party A" and "Party B," instead of "husband" and "wife," and proposed amending birth certificates used for all children in Massachusetts to read "Parent A" and "Parent B" rather than "mother" and "father." As in Canada and Spain, once same-sex marriage is legalized some advocates immediately argue that legal understandings of parenthood for *all* children must changed, even to the point of erasing the words "mother" and "father" from the foundational legal document issued to all children by the state.
>
> ....

> [T]he effect is plain: marriage [once it becomes genderless marriage] no longer has anything at all to do with the bestowal of a status which makes possible relations which, in the absence of the status, are unavailable in our lifeworld. Instead, marriage now has to do with the recognition and endorsement of *pre-existing* dispositions and relations. So viewed, marriage adds nothing to human possibility and, is as a result, de-institutionalized.[131]

As a simple matter of standards of scholarship, if Dworkin knew of DeCoste's analysis, he should have grappled with it in the book, and if he did not know, he should have. In any event, that analysis leaves for now Dworkin's "institutionally added value" argument without legs. It will remain that way until he or someone else is able to locate "institutionally added value" someplace in the institution other than in its central role of preparing people for, conferring on them, and sustaining them in the unique status of *husband* or *wife*.

> The legalization of same-sex marriage, while sometimes seen as a small change affecting just a few people, raises the startling prospect of fundamentally breaking the legal institution of marriage from any ties to biological parenthood.

COMMISSION ON PARENTHOOD'S FUTURE (ELIZABETH MARQUARDT, PRINCIPAL INVESTIGATOR), THE REVOLUTION IN PARENTHOOD, THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 10-11, 14, 32 (2006), *available at* http://www.americanvalues.org/pdfs/parenthood.pdf (footnotes omitted; emphasis added).

[131] DeCoste, *supra* note 86, at 627 (emphasis added). Mary Douglas's approach may likewise call into question the assumption that genderless marriage qualifies as a social institution. She excludes

> from the idea of institution . . . any purely instrumental or provisional practical arrangement that is recognized as such. Here, it is assumed that most established institutions, if challenged, are able to rest their claims to legitimacy on their fit with the nature of the universe. . . . [I]n reply to the question, "Why do you do it like this?" . . . the final answer refers to . . . the way that . . . humans . . . naturally behave."

DOUGLAS, *supra* note 61, at 46-47.

I turn now to what I deem to be the most valuable fruit of critical engagement with the book's treatment of the marriage issue. Our freedom from Dworkin's mischaracterization of the social institutional argument for man/woman marriage as "religious" allows us to address in a clear-eyed way the key question posed by Dworkin: "Who should have control, and in what way, over the moral, ethical, and aesthetic culture in which we must all live?"[132] He asked that question in the religious versus secular context, but it is exactly the right question to ask regarding our marriage culture.[133] Indeed, the asking of that question relative to our marriage culture is the single greatest benefit arising from *Is Democracy Possible Here?* To help answer the question, wherever in the following quotes Dworkin uses the word *religion* or the like, I replace it with the word *marriage* or the like:

> The strongest and most popular case for [the man/woman marriage institution] in a nation most of whose members [participate, or at least believe, in that institution] is not paternalistic but cultural. That case rests on the assumption that a political majority has a right to create the [marriage] culture it wants to live in and raise its children in not for the sake of the minority who might protest but for their own sakes – because a society openly committed to [the] values [embedded in and advanced by the man/woman marriage institution] is better for them. . . .
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> This is the crucial issue we must now face about [our marriage culture]. Who should have control,

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[132] DWORKIN, *supra* note 4, at 74.

[133] *See In re* Marriage Cases, 49 Cal. Rptr.3d 675, 685 (Cal. Ct. App. 2006) (holding that California's man/woman marriage statutes do not violate the state constitution):

> The six [consolidated] cases before us ultimately distill to the question of who gets to define marriage in our democratic society. We believe this power rests in the people and their elected representatives, and courts may not appropriate to themselves the power to change the definition of such a basic social institution.

> and in what way, over the [marriage] culture in which we must all live? This complex [marriage] culture is shaped by many forces, but I now isolate two of these. It is shaped by discrete decisions of individual people about [whether, how, and in what ways to couple]. Our [marriage] culture is in large part a vector of many millions of such decisions that people make, as individuals, one by one, every day. But our [marriage] culture is also shaped by law, that is, by collective decisions taken by elected legislators as to [the meaning and role of civil marriage]. . . .
>
> Americans who feel entitled to a [man/woman marriage culture] assume that a majority of citizens has the right, acting through the normal political process, to shape the [marriage features] of our shared culture by law. They accept that the majority must also respect the right of dissenters to their own [coupling, or lifestyle, choices]. But they insist that if the majority thinks that [man/woman marriage] is good for a community, it can direct the power and prestige of the state to endorse [the man/woman marriage institution] . . . .[134]

One who accepts rather than elides the rather uncontroversial social institutional realities of marriage will respond to that reading with, "Of course. The Americans who feel that way are right." To which Dworkin has no response. He has no response because there is no Establishment Clause and no Establishment Clause jurisprudence and no widely shared Establishment Cause sensibility relative to the man/woman marriage institution, only to religion. Upon the failure of his mischaracterization (as "religious") of both the man/woman marriage institution and the societal interests in sustaining it, Dworkin is left without any argument for the judicial redefinition of marriage. And also upon that mischaracterization's failure, it is difficult to locate his argument

[134] DWORKIN, *supra* note 4, at 74-75.

that Americans out of respect for his two principles ("human dignity") ought to voluntarily, "acting through the normal political process,"[135] replace the man/woman marriage institution with the genderless marriage institution. After all, he does not demonstrate that the close personal relationship model is now *all* that marriage *is* across the Nation. Nor does he demonstrate that the de-institutionalization of the man/woman meaning will not mean the loss of the valuable social goods materially and even uniquely produced by that presently institutionalized meaning. Nor does he demonstrate that the promised social goods uniquely to be provided by the genderless marriage institution are likely to be realized, let alone that they will be of greater worth to society than the valuable social goods certain to be lost. In short, once deprived of the bugaboo of religious tyranny relative to the marriage issue, Dworkin has nothing to give a rational voter or a rational legislator facing that issue.

III. WHITHER DWORKIN?

In his treatment of the marriage issue in *Is Democracy Possible Here?*, Dworkin mischaracterizes as "religious" the social institutional argument for man/woman marriage; does not give a fair account of that argument, only one shriveled and colored in a way to facilitate his counter of it; presents a conclusion in favor of genderless marriage refuted by his own analytical tools, fairly applied; misses an earlier scholarly demonstration of the material defect in a key component of his "institutionally added value" argument; and, in the end and because of these earlier defects, fails to achieve his project of providing a credible basis for either the judicial redefinition of marriage or its legislative redefinition. That is not a good report card. Yet it gets worse on turning to one very short statement in the book that, for me, is also very telling.

The story of the judicial redefinition of marriage in Massachusetts is the story of the Four against the Three. The Four are the justices, led by Chief Justice Margaret Marshall, who in *Goodridge*[136] mandated the redefinition and then a few

[135] *Id.* at 75.

[136] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

months later in *In re Opinions of the Justices to the Senate*[137] rejected the possibility of a marriage-like civil union arrangement for same-sex couples. The Three are the justices who dissented in both cases. Dworkin speaks of "the careful case made by Chief Justice Margaret Marshall of the Massachusetts Supreme [Judicial] Court that the widely shared principles of her state's constitution required her to decide that gay marriage be permitted no matter how offensive that might seem to most people".[138] As noted earlier, he labels the Three's perception of what marriage is and is all about as a "perception [that] itself reflects a judgmental religious perspective . . .",[139] despite the fact that their "perspective" encompasses rather than elides the social institutional realities of marriage. What Dworkin does not reveal is that his own earlier and influential writings, applied in a rather straightforward fashion, stand as a cogent criticism of the judicial performance of the Four and as an endorsement of the performance of the Three.[140] Nor does he reveal that scholarly work (accepted by other courts in subsequent cases[141]) exposes that "careful case made by Chief Justice Margaret Marshall" to be intellectually sloppy through and through[142] and demonstrates that the Four "did an unacceptable job with their performance of the very tasks that lie at the heart of judicial responsibility in virtually every case."[143] Nor does he reveal that all six American appellate courts[144] deciding the marriage issue after *Goodridge* and before

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[137] 802 N.E.2d 565 (Mass. 2004).

[138] DWORKIN, *supra* note 4, at 5-6.

[139] *Id.* at 87.

[140] *See* Stewart, *Redefinition*, *supra* note 29, at 102-115, 119-130.

[141] Lewis v. Harris, 875 A.2d 259, 269 (N.J. Super. Ct. App. Div. 2005); *id.* at 276 (Parrillo, J., concurring); Morrison v. Sadler, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005).

[142] *E.g.*, Stewart, *Judicial Elision*, *supra* note 49; Stewart, *Redefinition*, *supra* note 29.

[143] Stewart, *Redefinition*, supra note 29, at 132.

[144] Andersen v. King County, 138 P.3d 963 (Wash. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Samuels v. New York Dep't of Pub. Health,

the book's publication had rejected Chief Justice Marshall's assertedly "careful case" and instead relied[145] on the analysis of the Three, particularly Justice Cordy's analysis, which includes a quite good statement of the social institutional argument for man/woman marriage.[146]

We may safely conclude that what Dworkin does not reveal he nevertheless knows. And that is a troubling conclusion, as are the conclusions appearing on the report card mentioned above. For a long time, he has performed as an influential legal philosopher and public intellectual, with that influence grounded in important part in his adherence to accepted standards of intellectual inquiry and discourse. I am saying that the (otherwise unsuccessful) case made for genderless marriage in *Is Democracy Possible Here?* falls below those standards.

IV. THE DISSENTING OPINION IN NEW JERSEY'S MARRIAGE CASE

In New Jersey's marriage case, *Lewis v. Harris*,[147] the New Jersey Supreme Court justices had before them, in a quite fully elaborated and sophisticated form, the social institutional argument for man/woman marriage. It was before them in briefs,[148] in law journals and monographs,[149] and (perhaps most

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811 N.Y.S.2d 136 (N.Y. App. Div. 2006); Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005); *Lewis*, 875 A.2d at 268-269; Morrison v. Sadler, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005).

[145] *E.g.*, *Hernandez*, 855 N.E.2d at 13; *Hernandez*, 805 N.Y.S.2d at 360; *Morrison*, 821 N.E.2d at 26.

[146] *Goodridge*, 798 N.E.2d at 995-96 (Mass. 2003) (Cordy, J., dissenting).

[147] 908 A.2d 196 (N.J. 2006).

[148] *E.g.*, Brief Amicus Curiae of the Family Leader Foundation, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (Case No. A-224-03T5).

[149] *E.g.*, INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 8-28 (2006); Gallagher, *Social Institution*, *supra* note 64, at 52-65; Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage*, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 225, 231-38 (2004); Stewart, *New York*, *supra* note 50, at 223-28,

tellingly) in the very decision that they were reviewing, the decision of New Jersey's intermediate appellate court.[150] That intermediate appellate court upheld the state's man/woman marriage laws against all constitutional attacks, with both the majority opinion and the concurring opinion addressing the social institutional nature of marriage and the concurring opinion doing so in fairly complete fashion. Thus, the concurring opinion notes that marriage is a social institution comprised by shared public meanings; that those meanings extend beyond the constricted "close personal relationship" model of marriage (which "strips the social institution 'of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved'"); that to eliminate the core constitutive man/woman meaning would be to render the institution "non-recognizable and unable to perform its vital function" and would be to "seriously compromise[], if not entirely destablize[] . . . the durability and viability of this fundamental social institution;" that the law "'has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions;'" and that "its opposite-sex feature makes it [the marriage institution] meaningful and achieves important public purposes," including the public and rational privileging of heterosexual intercourse in marriage and the advancement of marriage's "private welfare" purpose.[151]

At the New Jersey Supreme Court, the four-justice majority held that the state constitution did not mandate genderless marriage, but only if the state legislature expanded the state's domestic partnership law into a civil union law providing to same-sex couples essentially all the attributes of marriage that the law is capable of conferring, except the name *marriage*.[152] The dissenting opinion, expressing the views of the remaining

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231-59; Stewart, *Judicial Elision*, *supra* note 48, at 7-78; Stewart, *Redefinition*, *supra* note 29, at 71-85.

[150] Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005), *aff'd in part & modified in part*, 908 A.2d 196 (N.J. 2006).

[151] *Id.* at 275-78 (Parrillo, J., concurring) (citations omitted).

[152] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

three justices, wanted the state constitution read as mandating genderless marriage.[153] As noted at the outset, the dissenting opinion made Dworkin's argument for genderless marriage a centerpiece of its own analysis.[154]

Because *Is Democracy Possible Here?* boldly claims that it meets and conquers the social institutional argument for man/woman marriage, and because the dissenting opinion incorporates in significant part the book's counter-argument, that opinion may plausibly be viewed as bearing a mark of singular distinction: the first judicial opinion by judges intent on mandating genderless marriage that engages rather than evades the social institutional argument. But the luster of that mark seems much diminished, and the mark itself rather badly tarnished, by two now well-demonstrated facts. The first is that Dworkin's own argument for genderless marriage fails; it presents a conclusion in favor of genderless marriage refuted by his own analytical tools, fairly applied, and it misses an earlier scholarly demonstration of the material defect in a key component of his "institutionally added value" argument (which the dissenting opinion quotes in full). The second fact is that Dworkin's counter to the social institutional argument for man/woman marriage is premised entirely on the mischaracterization of that argument as "religious"; when that falsity is corrected, his counter also fails.

An important and interesting question is what to make of the quality of the dissenting opinion's judicial performance in adopting and making a centerpiece of Dworkin's (failed) genderless marriage argument. Two considerations counter a harsh judgment. One is Dworkin's own reputation; for over thirty years now, he has been one of the Nation's preeminent legal philosophers and one whose work has been widely attended to and often influential. Another mitigating consideration is the reputation of the book's publisher, the Princeton University Press, for high scholarly standards. But two other and closely related considerations seem to call for a strong negative assessment of the judicial performance reflected in the dissenting opinion. One is that the state supreme court

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[153] *Id.* at 224-31 (Poritz, C.J., concurring and dissenting).

[154] *Id.* at 231.

justices had before them in more than adequate detail and clarity the social institutional argument for man/woman marriage; indeed, the lower court decision before the justices for review itself made that argument well. The other aggravating consideration is that it is not all that hard to see the fatal defects in Dworkin's scholarly performance. To possess even an elementary understanding of the social institutional argument is to understand that argument as most decidedly not "religious." Moreover, Dworkin does not disguise his tactic of so labeling the argument; as demonstrated earlier, it is a tactic repetitively reinforced. And once the mischaracterization is seen for what it is and the bugaboo of religious tyranny discarded, it is not all that difficult to apply Dworkin's own analytical tools in a straight-forward way to conclude that his two principles, rather than compelling adoption of genderless marriage, sustain society's choice of the man/woman marriage institution or at least the validity of leaving that choice to democratic processes. In light of all this, it seems fair to me to view the dissenting opinion's judicial performance as at least disappointing.