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Gay Marriages and Civil Unions: Democracy, The Judiciary and Discursive Space in the Liberal Society

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Articles

Gay Marriages and Civil Unions: Democracy, The Judiciary and Discursive Space in the Liberal Society

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I. INTRODUCTION

The various states have given provisional answers to the socially volatile quest by gay couples for legal recognition of their relationships as marriage.[1] The provisional quality of the policy-making is related to the status of the language of marriage as a contested site.[2] The language evolves, but pressure exists to stall public acknowledgment of changes in descriptors for basic relationships. The prominence of language as itself a matter of dispute gives new and broadened meaning to classic arguments defending the judicial role on the grounds that courts function well to advance public discourse, particularly if they do not impose final answers that are immune to majoritarian revisions.[3] The fluidity of the language relating to underlying societal building blocks puts courts in the business of accelerating change when they memorialize and record new meanings, when they press for public

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1. Some statutes specifically prohibit same-sex marriages. *See* ALA. CODE § 30-1-19 (2000); ALASKA STAT. § 25.05.013 (2000); ARIZ. REV. STAT. § 25-101 (2000); ARK. CODE ANN. § 9-11-109 (2000); ARK. CODE ANN. § 9-11-208 (2000); CONN. GEN. STAT. § 46a-81r (2000); DEL. CODE ANN. tit. 13, § 101 (2000); FLA. STAT. ANN. § 741.212 (2000); O.C.G.A. § 19-3-3.1 (2000); O.C.G.A. § 19-3-30 (2000); IDAHO CODE § 32-209 (2000); 750 ILL. COMP. STAT. 5/212 (West 2000); 750 ILL. COMP. STAT. 5/213.1 (West 2000); IND. CODE § 31-11-1-1 (2000); KAN. STAT. ANN. § 23-101 (2000); KY. REV. STAT. ANN. § 402.040 (2000); KY. REV. STAT. ANN. § 402.045 (2000); LA. CIV. CODE ANN. art. 89 (West 2000); LA. CIV. CODE ANN. art. 96 (West 2000); LA. CIV. CODE ANN. art. 3520 (West 2000); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 2000); MICH. COMP. LAWS ANN. § 551.271 (West 2000); MINN. STAT. § 363.021 (2000); MINN. STAT. § 517.03 (2000); MONT. CODE ANN. § 40-1-401 (2000); N.H. REV. STAT. ANN. § 457:1 (2000); N.H. REV. STAT. ANN. § 457:2 (2000); N.C. GEN. STAT. § 51-1.2 (2000); OKLA. STAT. tit. 51, § 255 (2000); 23 PA. CONS. STAT. § 1704 (2000); P.R. LAWS ANN. tit. 31, § 221 (2000); S.C. CODE ANN. § 20-1-15 (2000); TEX. FAM. CODE ANN. § 2.001 (West 2000); UTAH CODE ANN. § 30-1-2 (2000); VA. CODE ANN. § 20-45.2 (2000); W. VA. CODE § 48-1-18a (2000).

Other statutes generally state that marriage is between a man and woman but do not specifically mention same-sex marriages. *See* CAL. FAM. CODE § 300 (West 2000); COLO. REV. STAT. § 14-2-104 (2000); MD. CODE ANN., FAM. LAW § 2-201 (2000); MO. REV. STAT. § 451.022 (2000); S.D. CODIFIED LAWS § 25-1-1 (2000).

Other statutes allow for same-sex "solemnizations" or unions. *See respectively* HAW. REV. STAT. § 572-1.6 (2000); VT. STAT. ANN. tit. 15, § 1202 (2000).

2. *See* ROBIN TOLMACH LAKOFF, THE LANGUAGE WAR 19 (2000) (describing language-based controversies as being about "[w]ho gets to make meaning for us all" and who can make "our definitions of ourselves").

3. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962) (emphasizing that democracy implicates the power of majorities to accomplish reversals of policies not favored by a current majority); *Id.* at 27 (arguing that judicial review must be consonant with the central tenet of democracies and that the majority has the ultimate power to reject any part of the decision-makers' policy).

recognition of new linguistic facts, and when they resist new usage in a manner that is plainly unstable and unconvincing.

Because of the inevitably provisional nature of the responses to couples' petitions for the right to marry without regard to biological sex, the states are fated to serve as laboratories for social experiment in the matter of same-sex marriage and to create occasions for court involvement in discourse about the definition of marriage. Several different factors render the attempted answers provisional and thus experimental, no matter who is the decision-maker or speaker.[4] First, some forms of legislative or constitutional statement are so emphatically negative[5]

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4. In calling the answers provisional, I am particularly emphasizing the experimental component of policy-making in a democratic society. The experimentalism emphasized by pragmatic philosophers is deeply embedded in democratic decision-making. In this Article, I also link the "provisionalness" of answers about gay marriage to the fluidity of the language mediated by its actual use in living speech. *See* Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385 (1999). Paul Brest, in the context of a symposium on constitutional interpretation that examined the range of views from originalism and textualism to nonoriginalism, described the "hermeneutic insight" as suggesting "that judicial review can at best produce contingent conceptions of justice that depend on who is doing the interpreting or moral philosophizing." *See* Paul Brest, Comment, *Who Decides?*, 58 S. CAL. L. REV. 661, 663 (1985). Here, I emphasize not simply that judicial interpretation is contingent, but that given the fluidity of language and the experimental quality of democracy, all responses to contests over the public language, by whatever speaker, decision-maker, or opinion leader, are provisional. Thus, the traditional concerns that judicial review is problematic if it imposes finality on controversial topics in a democratic system lose some force because of the evolutionary quality of the terms at issue in gay marriage and, as set forth below, because of the provisional nature of the answers yielded by the state systems.

5. The statutes reassert the definitional veto of same-sex marriage that lost persuasiveness in the courts. In the 1970s, courts readily rejected same-sex marriage by claiming that the definition of marriage was a union of a man and a woman. *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974), *rev. denied*, 84 Wash. 2d 1008 (1974) (citing other courts and arguing that "same-sex relationships are outside of the proper definition of marriage"); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973) (arguing that the appellants are not entitled to a marriage license because "what they propose is not a marriage"); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). The definitional answer became unpersuasive for a variety of reasons. A sense by courts that it was circular was the logical jumping off point. Its circularity became apparent, however, because culturally the meaning of marriage changed, giving the judicial imagination access to the logical fallacy of beginning an argument with a conclusion. The effort to reinstate the certitude that judges drew from the dictionary seems unlikely to endure. The loss of confidence by the judiciary in a definitional resolution is an emblem of the stop-gap nature of definitional assertions offered to return stasis to the evolving language of marriage.

In addition, some of the negations go so far as to enter the realm of the jocular. The current Nebraska proposal for a Defense of Marriage Act ("DOMA"), enacted in response

they seem unlikely to endure. In addition, efforts by courts to shore up the attempted gender clarity and boundary maintenance of the statutes contain hyperbole about the clarity of gender lines that undermines the statutes.[6] Second, "gay-friendly" courts issue rulings that, by their

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to Vermont's passage of the civil union law, provides as follows: "Only a marriage between a man and a woman shall be valid or recognized in Nebraska." *See* Frank Kameny, Posting on Queerlaw, *Nebraska DOMA drive reaches signature goal; language questioned* (July 10, 2000) <http://www.qrd.org/qrd/www/qlegal.html>. A posting by activist Frank Kameny noted:

> As it stands, this would seem to say that anything else whatever, of any sort, type or variety, in any context at all, in the whole vast variety of life and of human activity, which is not a marriage, is no longer recognized in Nebraska. In short, Nebraskans would no longer be able to achieve official recognition for ANYthing that they might do, or for any contract entered into, if it were not a heterosexual marriage. Those poor Nebraskans, if this goes into effect. They could do nothing with their lives AT ALL except to get married heterosexually.

Id.; *see also* Nancy Hicks, *Wording of Petition Questioned*, LINCOLN J. STAR, July 7, 2000 (quoting state senator as saying that the proposed amendment would cover relationships that are legal under both the state and the United States Constitutions, rendering invalid any contract between two people of the same sex, including a father and a son who want to form a partnership to run a farm or a law practice and two men who form a business partnership in Iowa).

6. *See* Phyllis Randolph Frye, Posting on Queerlaw, *Lesbians Seek Legal Marriage Using Recent Texas Decision: Expect Clerk's Office to Follow the Law* (Aug. 15, 2000) <http://www.qrd.org/qrd/www/qlegal.html>. Persons in Texas have successfully applied for a license for two persons, one of whom is a post-surgery male-to-female transsexual, the other of whom is female by birth, and both of whom have been deemed female by the Harris County Clerk on the basis of genital configuration. The applicants argue that binding Texas precedent, based on the Texas DOMA, requires that a person born with male genitalia be presumed to be chromosomally and unalterably male. The applicants cite *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (explaining of a male-to-female transsexual that "[t]here are some things we cannot will into being. They just are."), which denied standing to sue for wrongful death to a surviving spouse on the grounds that the marriage of a male to a person who had undergone sex change surgery from male to female was infirm as a matter of law. Extrapolating from *Littleton*, the applicants demanded that two persons identified as lesbians be issued a marriage license on the basis of one party's legally inalterable male biological history. The applicants announced on August 15, 2000, an intent to apply for a marriage license in the same jurisdiction, Bexar County, where the binding precedent states that the original assignment of sex as "F" or "M" on the birth certificate is inalterable. *See* Frye, Posting on Queerlaw, *Lesbians Seek Legal Marriage* <http://www.qrd.org/qrd/www/qlegal.html>. The license was issued on September 6, 2000. *See Same-Sex Couple Find Loophole to Wed*, N.Y. TIMES, Sept. 7, 2000.

The opinion in *Littleton* is an interesting example of a court form of speech about marriage that is so emphatically negative about the impossibility of including "non-conforming" couples under the rubric of marriage that it lacks probable stability. It has the expectable characteristic of linguistic fiat: "Marriage is tightly defined in the United States: 'a legal union between one man and one woman.'" *See Littleton*, 9 S.W.3d at 226. It also interestingly dovetails with tight-lipped common sense and community sentiment affirming the right of vigilant gender referees to rule which things "just are" and

forthright grant of marital rights in states with constitutions that can be readily amended, are patently destined to be preempted by legislative action or voter referenda.[7] The corrective actions are in turn improbably negative for assuring closure in a democratic society. Third, the action that preempts the court's decision is overtly provisional in that it assigns constitutional control of defining marriage to the state legislature and thus incorporates, even if insincerely, the possibility of changes.[8] Fourth, the legislature attempts the compromise of extending to same-sex couples the equivalent of marriage while maintaining a linguistic boundary that stipulates that legally identical statuses may carry different names, thus explicitly putting the state in the unstable enterprise of refereeing language.[9] Finally, more broadly, the question of marital rights involves a clash of strong forces: the demand of one group of citizens for fair civic treatment of living arrangements that share the basic characteristics of marriage[10] and the heated backlash,

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presumably to exclude some people from eligibility for any marriage, when their personal gender history challenges the view that, in gender, things that "just are" never change.

The ability of the courts to remain immune to post-modern theories of the social construction of gender and thus to the fluidity of the terms in marriage seems unlikely to be permanent. *See, e.g.*, Monique Wittig, *One is Not Born A Woman*, *reprinted in* THE LESBIAN AND GAY STUDIES READER 103 (Henry Abelove et al. eds., 1993) (arguing that "woman" is not a natural category and lesbians are not women). Indeed, as I argue above, it seems likely that courts altered their understanding of the power of a logical claim about the terms subject to analytic inquiry as a result of the fluidity of underlying terms involving marriage and gender in contemporary society.

7. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (holding that, because the right to marry is a fundamental right, it cannot be withheld from same-sex couples).

8. *See* HAWAII CONST. art. I, § 23 (providing power to legislature "to reserve marriage to opposite-sex couples"). The Hawaii constitution was amended by voter referendum to overturn the holding of the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993).

9. *See* Baker v. State, 744 A.2d 864, 889 (Vt. 1999) (holding that the state must extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law but need not do so through a marriage license); *see also* An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2000); 2000 Vt. Acts & Resolves, 91 §§ 1(8), (10), 1999, No. 91 (Adj. Sess.), § 2, effective Apr. 26, 2000 (reciting the purpose of the law to "provide eligible same-sex couples the opportunity to 'obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples'" and making a legislative finding that "[c]ivil marriage under Vermont's marriage statutes consists of a union between a man and a woman").

10. *See* Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence and Couples of the Same Gender*, 41 B.C. L. REV. 265 (2000); *see also Baker*, 744 A.2d at 864.

tinged with talk of violence,[11] against any civic recognition of gay unions.[12] The near certainty that proffered answers are temporary, given the collision of aspiration and aversion, confers an experimental quality on the topic and on policy-making. The unresolved and volatile character of the question places the courts, with their charge to decide cases that allege unequal treatment by applying principles capable of being generalized, in a difficult cultural circumstance. The courts must look for a path between the duty to apply general norms and a pragmatic concern about the effect on courts and social harmony of challenging the authoritarian impulses that patrol the language and reject, in connection with gay marital rights, the civic premises associated with social cooperation.

The specific political processes in which these policy experiments occur seem likely to take a place in a public narrative[13] of rights,[14] social change,[15] court roles, democracy, and the emerging focus of legal contest over language and symbols.[16] The courts will play a central role because those who wish to marry and are denied the license will demand that courts intervene.[17] The litigants have no power to force a result from courts, but they have the power to engage the court in speech about gay marriage. The power is significant, for it drafts the courts as participants in a moment of cultural transition. It is the thesis of this Article that courts are a critical site for the expansion of public

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11. *See* Carey Goldberg, *Vermont Residents Split Over Civil Unions Law*, N.Y. TIMES, Sept. 3, 2000, at A18 (describing threat to shoot vandals who steal anti-gay signs that have sprouted in response to the passage of the Vermont civil union law).

12. *Id.*

13. *See* Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U.L. REV. 841, 850-78 (describing the role of narrative in maintaining cultural coherence and giving examples of narratives about gay people and traditional marriage).

14. *See* Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 514 n.369 (2000) (terming the gay rights movement the "gay rights revolution"); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103, 118 (noting that the "sexual revolution . . . culminated in the 1970s gay civil rights movement"); Norman Dorsen, *An Agenda for Social Justice Through Law*, 40 CLEV. ST. L. REV. 487, 487 (1992) (grouping the gay rights movement with the civil rights movement, the women's movement, the Vietnam war, and the sexual revolution).

15. *See* E. J. GRAFF, WHAT IS MARRIAGE FOR? 230 (1999) (arguing that proposals to change marriage enter the public debate when the underlying economic and social changes associated with the proposed alteration have already happened).

16. Kuykendall, *supra* note 4; Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241 (1998).

17. New cases will arise in states not yet tested, but the inventiveness of litigants will also find new ways of placing pressure on the received construct of biological clarity and legal certitude. *See supra* note 5.

discourse in areas in which the polity tends to stasis and adopts, if not checked, the impulse to foreclose evolutionary change in meanings and to defend meanings from alteration in the midst of a dynamic, evolving society.[18] I draw implicitly on claims that it is a proper goal of the liberal state committed to autonomy to promote "unconstrained discussion" about the merits of competing "moral, religious, aesthetic, and philosophical values."[19] In addition, in matters of deep social divisiveness, courts can play a constructive role in advancing the process of civil decision-making. In fact, courts are good candidates for moderation in every sense of the word because they are in charge of giving reasonable answers to the petitions of litigants and are drawn to do so in the language brought to the surface by litigation; they are not good forums for abstractions and ideological wars over whether marriage is a wise goal for the gay community, or for claims that the recognition of gay marriage diminishes traditional marriage.[20] The commitment of courts to hear what petitioners tell them, in the spoken language, gives them a calling as advocates for realism. The general thesis of Alexander Bickel about the qualities of courts[21] takes on a renewed meaning in light of the movement of our society toward contesting language.

The project of the courts as open forums for petition, but most especially courts' project as speakers, assigns to them a historic role in exploding the vacuum of public speech voiced to celebrate gay marriage. Indeed, it is largely (though not only) the language that is placed at issue in legal demands for same-sex marriage; to a certain extent, in

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18. *See* Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 49 STAN. L. REV. 143, 168 (1996) (citing Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 962 (1995)).

19. Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 403 (1996) (quoting Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 934 (1990)).

20. Ironically, however, courts seek a moderation made up of measured analysis of the implications of the success of feminist and gay challenges to gender roles. The moderation draws indirectly on discourse that is expressed in radical terms. *See, e.g.*, Marilyn Frye, *Some Reflections on Separatism and Power*, reprinted in THE LESBIAN AND GAY STUDIES READER 91 (Henry Abelove et al. eds., 1993); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, reprinted in THE LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993). However much as the courts strive to speak in measured, civil tones, they lack the possibility of disclaiming the radical roots of a revised treatment of the gendered basis of marriage. Yet a wholesale denial of the factual revision in the culture is itself radical.

21. *See* BICKEL, *supra* note 3, at 26.

these cases the court's entire act is speech.[22] What the court says is the main product.[23] Speech is not a rationalization of a result. It is

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22. And the reaction is explicitly to speech. A mechanic at a town meeting voiced a strong view about official speech relating to marriage:

> I believe it's against our constitutional rights to have government and legislation change the word "marriage" to mean something as ill and as foul as same-sex partners. I believe anybody that does so cannot do it in clear conscience, because it is against our constitutional rights to change such a sacred word as "marriage."

Carey Goldberg, *Vermont Town Meeting Turns Into Same-Sex Union Forum*, N.Y. TIMES, Mar. 8, 2000, at A18.

23. By contrast, in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan, in dissent, emphasized a strategy of silence by positing that the Court should decline to speak on moral issues and by claiming that his preferred Court decision would be mainly to accord to married couples a right of silence about their marital lives. The Court's role as a speaker required immense caution, according to the Justice. He argued that if the Court were merely asked to decide in the abstract whether the moral judgment made by the State in forbidding married couples from using contraception was correct, the Court should hesitate long "before concluding that the Constitution precluded Connecticut from choosing as it has among . . . various views." *Id.* at 547 (Harlan, J., dissenting). But the Court had to address a specific outcome associated with the State's power: The police would intrude into the marital bedroom if the Court did not act. 367 U.S. at 521 (Douglas J., dissenting). The Court need not speak, but it must act, according to Justice Harlan. Justice Harlan's disposition to minimize judicial speaking extended to the right of married couples to say nothing: Intruding criminal machinery into marital privacy would "requir[e] husband and wife to render account before a criminal tribunal of their uses of [marital] intimacy." 367 U.S. at 553 (Harlan, J., dissenting). In Harlan's view, once the state disturbed the circumstance of silence by "acknowledg[ing] a marriage and the intimacies inherent in it," stasis should return to the discourse about sexual intimacy unless the State altered it. *Id.* The Court should not speak, and it should protect the boundary of speech that acknowledges sexual intimacy but avoids the airing of details concerning it. Yet Justice Harlan's opinion is an opening moment in intense judicial discourse about sexual practices that has led the Supreme Court to experiment variously with ways of talking about sex. His paean to silence by courts did not undo his own judicial recognition of the discourse lying outside the chosen speech of the State and his evocation of the capacity of the State to adopt speech that is "no more demonstrably correct or incorrect than are the varieties of judgment . . . on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide." *Id.* at 547. Given the speech that has ensued, and the demand for same-sex marriage, state courts lack the opportunity to take resort to protecting citizens from "arbitrary impositions and purposeless restraints." *Id.* at 543. When cases arise that ask for state courts to speak, the courts have less rhetorical room than Harlan to claim a stance of silence yet extend relief. Moreover, Justice Harlan's own claim that he was deferring to the State as speaker is belied by his vetoing the state speech that parsed the morality of marriage as separable from the morality of specific sexual practices—despite his care and claim that it is the State that "spoke marriage" as a public matter and authorized a particular marriage. *See id.* at 553. Justice Harlan resorted to a register of speech of his own about the sacredness of marriage, leaning in the end on the sturdy nonofficial social meaning of the terms "husband" and "wife" to convey a judicial horror at requiring "husband and wife" to account for their sexual conduct. *Id.* Also, the statute was empirically more about the public sphere and the regulation of the speech of

the result.[24] The outcome, in a broader sense, is determined by other forms of social will; state legislatures and voters can veto the practical effect of the court speech by withdrawing the state benefits associated with the term "marriage," but they cannot efface the speech of the court. Moreover, every judicial text that addresses the emerging quest for same-sex marriage "recognizes" gay marriage. As the legislature may not efface the speech of the court, no court has the rhetorical option of zeroing out the speech of the applicants for state licenses to govern their lives as conducted within a framework of marital bonds. These applicants bring to a public discursive space the request for state acknowledgment and public recognition of a rich matrix of pre-judicial facts. The form of the court's reply does not determine whether or not courts will enter into the discursive realm of same-sex marriage, but rather the quality of the public reasoning that the courts' act of speaking will prompt. Courts, and critics of courts, may take various stone-walling strategies. In the end, the court's structural connection to the living language[25] creates an array of linguistic paths, all of which deepen public concern with same-sex marriage but only some of which energize and freshen the language in which democratic policy is made as well as enrich the premises of social cooperation.

II. THE COURTS AS SPEAKERS: ADOPTING THE SPEECH OF LITIGANTS

A comparison of process in Hawaii and Vermont, two states prompted to pay the deepest legislative attention to the quest of gay people for

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birth control clinics than about intruding into the marital bedroom. *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 19 (1997). Thus, Harlan's rhetoric, despite its claim to disdain a court role as a speaker, in reality sought to destabilize state speech and to disrupt a state-mandated vacuum of public speech. Finally, Justice Harlan's description of the state of discourse was quickly belied by the tide of social change, increased openness, and judicial engagement with society that followed. His description of the isolation of courts from discourse does not ring true.

24. In praising a feature of the capacity of courts compared with legislatures, Alexander Bickel makes the opposite point: "The courts are concerned with the flesh and blood of an actual case . . . . It . . . provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates." BICKEL, *supra* note 3, at 26. In the case of gay marriage, the courts excel because they "think words" nobody else will think (or hear) in addition to "thinking the thing" that the words represent. The court's use of words tests the boundaries of words themselves and expands public discourse, while pointing toward policy that attaches words to things pragmatically, rather than dogmatically. Thus, concreteness can attach to words as well as things, expanding Bickel's conception of a useful dialogue of the courts with the political branches for the current era when words are contested and treated much like things.

25. *See* Kuykendall, *supra* note 4.

marital rights and recognition, suggests that a simple contrast of "elitist" judicial activism with democratic legislative process fails to capture the texture of policy-making, or to accurately portray the character, vis a vis popular input, of judicial, legislative, or referenda-driven policy-making. The quality of policy-making in this area depends upon the fortuity of language-enrichment strategies and happy convergences that may emanate from varied public discursive locations. The view of courts as top-down bodies that impose new theories or social experiments is flawed. The courts necessarily become enmeshed in collisions over meaning and cultural symbols: refusing to recognize emerging patterns of practice and meaning is as culturally invasive as adopting the changed usage. When it speaks, the court rearranges the public vocabulary and either enriches or diminishes the register of public speech. So too for legislatures, executives, voters, and other institutions.[26] But the court alone has an institutional commitment to the public language. An incorporative treatment of language is not, in any case, elitist, whatever institution advances the public acknowledgment of new meanings. The courts necessarily participate, even if reluctantly, in building a discursive system with an advancing frontier into which novel terms are admitted to the American territory.

Even though courts inevitably function to expand the boundaries of public language, some judicial discursive strategies work better than others to contribute to the civility and the vitality of public dialogue. Courts destabilize discursive boundaries and open discursive space when they render restrictive decisions that restrain the development of gay rights, making the category visible and contested when it was previously hidden.[27] The effect of the speech, nonetheless, delays the full flowering of gay citizenship and the attendant contributions that might be made by gay persons speaking as members of families engaged in the common project of creating policies to buttress the family as a vehicle of

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26. Either policies seal off the public language from the language in which citizens' lives are spoken, or those who enact policies treat the mission of policy-making as incorporative. *See* Sunder, *supra* note 18, at 148-53.

27. While I am suggesting here that a middle class incorporation of gay sexuality into the organizing speech that the middle class embraces in connection with marriage will be the ultimate result of efforts to suppress it, plainly the theories of Michel Foucault about the effect of nominal suppression of sexual practices and speech as a means of proliferating discourse about sex is relevant. *See, e.g.*, 1 MICHEL FOUCAULT, HISTORY OF SEXUALITY 18 (1978). Because the effort to suppress has passed beyond the explicit effort to suppress same-sex sexual intimacy and into a contest over language itself, the excited category is not transgression but the aspiration to be average. The effect of linguistic veto, thus, may be harder to gauge, but the general point that linguistic vetoes do not work seems clear. But the link to transgression is not present in the gay-marriage speech confusion.

social support and civil engagement. Courts also alter discourse when they impose solutions to controversial claims of gay people for recognition in a manner that voters and legislatures resist,[28] but the effect may create backlashes that delay progress and discredit courts as carriers of a renewed public language. Courts also expand public discourse when they consciously undertake to teach by giving public acknowledgment of new forms of identity and self-description while offering principles of respect and fairness to the polity for incorporating changed meanings and practices.[29]

The job of the courts to participate in forms of dialogue with those presenting claims for recognition gives them an opportunity to model civil treatment of new identities and the revisions in language that accompany expressive identities.[30] This opportunity is particularly present in areas where the contested realm is in large degree the language used to govern our lives.[31] A simple contrast between judicial activism and popular sovereignty slights the teaching function of courts and the mixed strategies of our system for capturing popular opinion and addressing social needs. The immersion of courts in the language brought forward by litigants places courts in a key mediating position relative to social change. Even if courts sometimes deploy some doctrines, such as the First Amendment, to "conceptualize[] speech as static . . . deserving legal protection via the shield of speaker autonomy,"[32] the project of the courts as speakers with a deep immersion in the onrushing tide of language and commitment to explanation makes them a practitioner of "speech as part of a dynamic, dialogic process in which meaning is constantly recreated and contested."[33] Courts, even

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28. *See Baehr*, 852 P.2d at 59.

29. *See Baker*, 744 A.2d at 864.

30. *See* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000).

31. *See* LAKOFF, *supra* note 2, at 100 (arguing that the term "politically correct" is used as a strategy "to maintain control of language at all costs").

32. Sunder, *supra* note 18, at 147.

33. *Id.* Note that plaintiffs have some degree of unchecked power to introduce new terms into public discourse. Just by denominating themselves, as in *Hurley*, *supra* note 18, plaintiffs characterize themselves in multiple and subtle ways without being edited or overruled by the courts. In some irreducible respects, the courts are a service organization that facilitates the printing and circulation of self-descriptions of plaintiffs–a vanity press with access based on filing fees and the ability to frame a claim that can survive the summary treatment of dismissal without any opinions. By contrast, newspapers retain greater editorial control, with unreviewable options of editorial silence. Until 1982, the *New York Times* generally affirmatively rejected the use of the term "gay," even when the party concerned would have preferred the term. George Stefano, *The New York Times vs. Gay America*, THE ADVOCATE, Dec. 9, 1986, at 43 (noting that, at the time of the article,

when conservative, often become early transmission belts for novel terms more easily kept at the margins of the public vocabulary.[34] Courts have used First Amendment doctrine to deny gay and lesbian people access to discursive space,[35] as typified in the Boston parade case, yet the courts themselves powerfully serve as a discursive space into which a vocabulary of gay and lesbian life gains a degree of entry. Taking the claims of litigants seriously, the very basic mandate of the court system, necessarily implicates a degree of openness to linguistic innovation and may place the judicial imagination slightly in advance of the legislative or even popular awareness of new realities. An expansive imagination that results from contact with lived reality is probably not rightly called

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the *New York Times* continued to bar the use of the word "gay" unless it was part of a proper name or direct quotation). *See* BREWER'S DICTIONARY OF PHRASE & FABLE: MILLENNIUM EDITION (rev. by Adrian Room 1999) (describing "gay" as a meaning for "homosexual" favored by "homosexuals" themselves). Yet in 1974, the First Circuit printed the case name, *Gay Students Organization of the University of New Hampshire v. Thomas N. Bonner*, 509 F.2d 652 (1st Cir. 1974), and in 1979 the California Supreme Court printed the case name, *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*, 24 Cal. 3d 458 (Cal. 1979); *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE 8 (1991) (commenting that "[t]he mere bringing of legal claims and the hearing of cases may influence ideas").

The courts have tended to be in the vanguard in the evolving racial group self-reference. Justice Marshall was a key force in legitimizing the term "African-American." In addition, the courts were early in switching to the use of "she" and "her" to refer to hypothetical litigants, influenced not by a calling as usage arbiters or radical feminists, but by the need to rebut the impression that the courts were not gender-neutral by premise and to adopt the practices in briefs. Indeed, the feminist might well argue that the linguistic degendering of hypothetical persons was done to preserve the universally male characteristics of the hypothetical person, by treating the feminine pronoun as the functional equivalent, entirely lacking informational content, as a signifier of the universal. In any event, the court immersion in language as presented by plaintiffs, who posited their alter egos as universal and adrift from the usual expectations as to gender, pushed them to acknowledge the fluctuation in the empirical assumption that unnamed actors are male. Persisting in a convention that the main participants in contested public realms were male ceased to seem editorially sound. The court's service role led to incorporation in judicial texts of an acknowledgment that the hypothetical legal person had assumed an altered persona. In a real sense, the court accepted the editorial choices of litigants without necessarily accepting their substantive claims, bowing to the tide of language but maintaining various substantive jurisprudential boundaries.

This footnote reflects insights about case names and racial self reference suggested by R. George Wright, for which I am grateful.

34. For instance, surrogate motherhood became a widely known practice and term because of a court case that gave it wide visibility. *See* Matter of Baby M, 537 A.2d 1227 (N.J. 1988).

35. Sunder, *supra* note 18, at 144; *see also* Hunter, *supra* note 30, at 54 (arguing that treating expressive identity claims as one of two mutually exclusive doctrinal categories–expression or equality–weakens the values of antiorthodoxy and inclusion).

elitism.[36] In their way, judges may share a life experience of exposure to novelty with classes treated as marginal, such as criminals, sexual minorities, and journalists.[37]

In some respects, the dread of court activism is a fear of the existence of discursive spaces that cannot be sealed off from linguistic innovation. Rhetoric against courts as vanguards of social change, seen most generously, implicates a fear that disembodied logic will efface meanings that enrich and guard the culture. The courts, when they are most denounced, are imagined as bloodless mandarins whose most fearsome effect is the devaluing of the linguistic currency that carries cultural meanings by a studied indifference to embedded meanings. I suggest here that even when flawed in execution, the court immersion in language in an open society is humane and life-enhancing. The stake in courts' discursive interaction with society is the continued vitality of the very language itself.[38] And that stake concerns the fundamental medium for human life and for democratic health.[39]

Because courts constitute a discursive space, judges range across the discursive options presented to them by litigants. Some actively shape their language to incorporate new meanings brought forward by litigants, while others guard the existing meanings and conventions in which gender is discussed.[40] The courts in whole cannot ignore the meanings that litigants assign to their interactions if new meanings persist and recur in legal demands and in needs for mediation. Some judges are happy sponges for language, while others give ground grudgingly to the linguistic realities that the premises of adjudicative contests force to the surface.

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36. *See* Brest, *supra* note 4, at 664-70. Brest analyzes the accuracy of referring to judges as members of an opinion elite and concludes that "judges' attitudes on important social and political issues do not reflect those of the population at large." *Id.* at 669.

37. Alexander Bickel made a point that bears some resemblance to my argument here. He suggested that judges were better than legislators in dealing with "the evolution of principle in novel circumstances." BICKEL, *supra* note 3, at 25. Moreover, he argued that "[j]udges have . . . the leisure, the training, and the insulation to follow the ways of the scholar." *Id.* Whatever resemblance the scholar may have to those at the margins of society, whose language is in advance of the standard speech of the mainstream, it seems clear that Bickel's point meshes well with the insight that judges have a contact with emerging forms of speech and identity that legislatures can more easily ignore.

38. *See* Sunder, *supra* note 18, at 166; *see also* Kuykendall, *supra* note 4, at 431-32.

39. *See* Kuykendall, *supra* note 4, at 433-35.

40. *See* Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 342-43 (1999) (characterizing judicial rhetoric about transsexuals as striving to constitute the identity of the judge by maintaining the "natural attitude" that there are two biological sexes and thus maintaining coherence in the opinions about transsexuals).

The courts, in this sense, are a part of any culture and a critical site for sorting out and interpreting the culture. It is not possible for courts to avoid the effect on the culture created by their role as a listener and cultural arbitrator. Indeed, opposition to forms of expression, and the attempt to erect barriers to certain practices, have been analyzed as a means of ensuring the greater manifestation of a form of transgressive expression.[41] A healthy role of courts is to help the political system and the related social system incorporate change and recognize expression without lending a transgressive aspect to expression. Recognition of gay presence in society is often lamented not just by the anti-gay religious right, but also by radical elements of the gay community.[42] Among radical gay activists, there is nostalgia for status as sexual outsiders[43] with an appetite for stigma that can serve as a basis for an ongoing radical challenge to middle-class sexual ethics and the link of family arrangements to economic life prospects. Courts, when they mediate the language in which gay existence is recognized, do not necessarily only create negative responses by challenging popular moral beliefs in a high-handed way. Rather, they provide a vocabulary in which the factual existence of gay people can be accommodated in a public policy that emphasizes and celebrates routine middle-class values, as well as norms of fairness.

III. THE COURT'S ROLE IN MEDIATING LANGUAGE WARS: ADOPTING THE USAGE OF LITIGANTS IS NOT ELITIST

There is a consistent strain of criticism regarding decisions by courts that intervene in the political process in a manner that overturns legislative and voting preferences.[44] Recent writing by Mark Tushnet,

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41. *See A Preface to Transgression*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS BY MICHEL FOUCAULT 29 (Donald F. Fouchard, ed., 1977).

42. *See, e.g.*, DANIEL HARRIS, THE RISE OF GAY CULTURE (1997) (arguing that the increasing acceptance of gay people harms gay culture by making it blend); *see also Now for a Queer Question About Gay Culture*, THE ECONOMIST NEWSPAPER LTD., U.S. EDITION (July 12, 1997) (reviewing the range of opinions among gays about the virtues of assimilation into the predominant culture); Dale Carpenter, *The Fear of Being Ordinary*, INDEPENDENT GAY FORUM (Feb. 25, 2001) <http://www.indegayforum.org/articles/carpenter7.html> (criticizing the "queer left" for romanticising gay people as "sexual revolutionaries with alien natures and values").

43. *See, e.g.*, RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY 153-70 (1998) (arguing that lesbians constitute a resistance to the traditional family and lesbians should resist being either included in or excluded from the family).

44. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992); *see also* Christopher E.

written from the perspective of a populist wedded to progressive policy and politics, makes a strong argument against judicial review, with specific reference to the federal courts.[45] In effect, he argues that the concept of judicial supremacy mistakenly attributes to judges a superior capacity to interpret and remain faithful to the Constitution and damages democratic policy-making by creating a judicial overhang that causes legislatures to consider the Constitution "inside the courts" rather than the Constitution for which they are as responsible as are the courts.[46] A populist constitutional law, in which voters and legislatures lay claim to equal insight about our basic constitutional premises, will serve us better, according to Tushnet, than reliance on judges to protect minority rights or interpret specifics of the Constitution.[47]

Such a claim presumes a moral reasoning that assumes a political system functions best when it accords general political autonomy to citizens to mediate moral claims and remains agnostic about specific answers. The imposition of answers to morally contested issues sacrifices too much of the principle of political autonomy for the gain it might make in the area of enforcing tolerance and keeping minorities safe from majority opinion. Moreover, the courts may not be consistently more accurate in defining the minority that is being threatened by majority preference.[48]

This view assumes that the fulcrum of majority/minority difference involves a refereeing of Rawlsian autonomy. The courts should only intervene when the damage to autonomy is so great that the principle of autonomy will suffer more from respecting majority autonomy than overturning it. But an emerging body of work emphasizes Rawlsian autonomy, plus teleological inquiry into the goods achieved from the stance of valuing autonomy.[49] In addition, arguments for a liberalism grounded in a second-order preference for autonomy proposes that the

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Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming its Role?* 24 AKRON L. REV. 393 (1990) (reviewing critical writing about the Supreme Court as an activist body).

45. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

46. *Id.* at 54-57.

47. *Id.* at 194; *see also* ROSENBERG, *supra* note 33, at 339 (arguing that litigation misdirects resources to an institution that is constrained from helping litigants, thus siphoning off crucial resources and talent and potentially weakening political efforts).

48. *Compare* BICKEL, *supra* note 3, at 23-28 (suggesting the capacity of courts to "support and maintain enduring general values") *with* Brest, *supra* note 4, at 664 (presenting evidence that judges are nonrepresentative demographically).

49. *See, e.g.*, Martha Nussbaum, *Aristotelian Social Democracy*, in LIBERALISM AND THE GOOD 203 (Bruce Douglas et al. eds., 1990).

liberal State should affirmatively take actions to enhance choice, thus privileging choice at the second-order as a substantive preference of the State over first-order substantive ways of life grounded in tradition, custom, and authority.[50] Challenging tradition, custom, and authority should necessarily emanate from courts, which are presented with autonomy-based objections to the sway of tradition as a block to experimentation, expanded discourse, and deeper choice. In addition to the claim that judges should contribute to state enhancement of autonomy as a substantive good, judges have a calling to referee the policy issues raised by an existing political constitution and structure and to participate in moral reasoning. Therefore, they have more than an equal obligation, as compared with legislators, to infuse the political system with a habit of morally serious reasoning, particularly in the interests of advancing autonomy and protecting the vitality of our public language as a carrier of norms of choice.

Given the background stakes and the capacity of the courts to enrich our public language, a mere norm, as proposed by Tushnet, that places controversial issues off limits for judicial pressure does not predictably improve the quality of public reasoning. On the other hand, true judicial fiat that disempowers the institutions of democratic choice may reduce the commitment of majoritarian institutions to respectful reasoning that incorporates the needs of the entire polity, including unfavored minorities and the norm of enhanced choice for the good of "authored lives."[51] Thus, the real measure of judicial contribution to the polity is in its insistent encouragement of a currency of debate nourished by the wellsprings of change in the language through which the citizens shape their lives and accord them significance. If, as one author has argued, it should be an affirmative norm of the liberal society that "individuals are conceived of as part-authors of their own lives rather than as texts already fully written by others,"[52] there is no deeper service possible from the judiciary than its recognition and promulgation of the language of the citizens' lives that would otherwise be banished from the public realm.

Imposing answers to the contests of language–linguistic fiat, or linguistic foot-stomping–arises throughout the polity. Every branch serves best when it challenges such decrees and fiats relating to our public language. Every branch, including the voters, is varyingly

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50. *See* Gardbaum, *supra* note 19, at 388. In simple terms, it has been said, "Tradition's fine, unless you carry it too far. There comes a time when you have to let common sense take over." Telephone Interview with Mary Kuykendall, September 8, 2000.

51. *See* Gardbaum, *supra* note 19, at 393.

52. *Id.*

susceptible to dictatorial fits set off by fear of change as manifested in the language and in emerging identities.[53] The courts offer an enriched public language if they contribute texts that demand from other branches a teleology bounded by our commitments to equal citizenship and rights. Identities can be accorded respect within an aspirational framework provided by those who inhabit the identities and create a related set of terms and labels for successful community.[54]

IV. JUDICIAL SPEECH AS EMPIRICAL AND DISTINCT FROM THE IMPOSITION OF AN OPINION

Justice Holmes has been criticized for "put[ting] forward a fundamentally impoverished account of legal phenomena."[55] In Justice Holmes' zeal to distinguish law from morals, he tended to portray law as a form of social control, "resting on naked power," without adequate acknowledgment of the law's "general commitment to fairness, generality and neutrality."[56] Thus, it is said, "numbers, (i.e., the legislature), equaled power, and he saw no alternative to accepting the crowd's desires, no matter how wrong he thought them."[57] Justice Holmes is thus said to have taken an elitist view of the judge as a spectator, indifferent to and even disdainful of the errors of mass taste. Given the speech activity of courts, however, the judge is plainly not a passive spectator, inclined to shrug with boredom at the activities and words brought before the courts. The obligation of the judge to speak immerses the judiciary in a struggle over public discourse and makes of the court proceedings a depository of changing societal texts.

In theorizing about the inevitability of the crowd's tastes prevailing, "[Holmes] did not consider that government, and that his very decision

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53. Justice Scalia raised, to deny, the notion that an anti-gay resolution was adopted in a "fit of spite." Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

54. *See Baker*, 744 A.2d at 864 (disavowing the relevance of the religious or moral debate over intimate same-sex relationships but analyzing the behavioral characteristics of same-sex couples for purposes of classifying them as similarly situated or not with opposite couples, thus arguably examining the "teleology" of the same-sex relationship). It is significant that, in *Baker*, the Vermont Supreme Court applied language relating to rights but also noted that access to a civil marriage license "significantly enhance[s] the quality of life in our society," *id.* at 883, and required that the reasons to exclude gay people from marriage needs to be of "sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned." *Id.* at 884. Notably, despite disavowing moral inquiry, the court conducted a legal inquiry in terms that avoided a wooden resort to rights language but instead sought to capture an idea of justice infused with considerations relating to the relative weight of public concerns.

55. Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 225 (1964).

56. *Id.*

57. *Id.* at 249.

as a Supreme Court Justice, could affect the destiny of those beliefs."[58] Holmes said, "[I]f people vehemently want to make different kinds of worlds I don't see what there is to do except for the most powerful to kill the others . . . ."[59] But the commitment of American law and constitutionalism is to find ways to accommodate groups of people with fundamentally differing world views and indeed to head them off from killing one another. A good interaction between the branches, in which each contributes insights about means of reaching accommodations on divisive social issues, is surely beneficial not merely in holding down the body count but breathing life into the ideal of discourse and reducing the various weights of institutional silences[60] and societal intimidation. The recent action of the Senate, whatever its wisdom, in passing hate crimes legislation that covers crimes motivated by an animus regarding sexual orientation[61] demonstrates the commitment of American lawmaking to reducing social conflict by de-legitimizing violence aimed at social difference over which war is sometimes the impulse. Judicial speech, both that which argues against hate crime legislation[62] and that which validates it,[63] joins the public discourse that endorses liberty of opinion and condemns hate-motivated violence.[64] The agreement on de-legitimation does not dispose of role questions about which branch can, by its speech and the outcomes associated with it, best articulate the norms associated with condemnation of violent animus against individuals based on a specific characteristic and with

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58. *Id.* at 255.

59. *Id.* (citing 2 Holmes-Laski Letters 1144 (Howe ed. 1953)). Justice Holmes made a similar point in his dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.").

60. For a description of the general sway of institutional silence, see MARY DOUGLAS, HOW INSTITUTIONS THINK 69-70 (1986), *cited in* ROBERT A. FERGUSON, UNTOLD STORIES IN THE LAW, IN LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 89 (Peter Brooks & Paul Gerwitz, eds. 1996) (arguing that "institutions create shadowed places in which nothing can be seen and no questions asked," and referring to "the processes of the public memory").

61. *See* Direction to the United States Sentencing Commission Regarding Sentencing Enhancements for Hate Crimes, Pub. L. No. 103-322, § 280003; *see also* U.S.S.G. § 3A1.1 (Supp. 2000) (increasing the sentencing level by three when a defendant "intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived . . . sexual orientation of any person").

62. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

63. *See, e.g.*, Regina v. Keegstra, 3 S.C.R. 697 (Can. 1990).

64. *See R.A.V.*, 505 U.S. at 392 (agreeing wholeheartedly with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront [hate] messages in whatever form they appear" but concluding that selectively silencing low-value speech on the basis of content is not permissible as a means).

equal treatment of all citizens. The discourse activated by legislative action and judicial response alters public premises and language.

Legislatures have methods and purposes that direct their members to the art of making policies to serve functional needs of society. Much legislation favors predominant interests, but it arises from the labors of a group anchored to empiricism. Testimony, statistics, hypotheses and demands for responsive laws tether legislatures to the demands created by emerging patterns of living, producing wealth, and organizing work and family. Legislatures do not necessarily in a simple sense act as a conveyor belt for the unfiltered tastes of the "crowd." They apply a melange of principles, political calculations, and legislative art to produce arrangements that facilitate social cooperation. Indeed, according to Mark Tushnet, legislatures are as good as courts at "respond[ing] to real human problems," as in the enactment of Megan's Law to address an actual instance of murder of a child by a previously convicted sex offender,[65] and to the extent the courts do more abstract decision-making, the immersion in practicalities of legislatures may be better.[66] Tushnet also argues that claims for courts as educators or "teachers in a . . . national seminar" ignore the teaching function of the legislature when it, among other things, debates with prospective Supreme Court appointees the true meaning of the Constitution.[67]

But arguments that demonstrate that both courts and legislatures share capacities for forms of reasoning that may protect individuals and yield sound statements of constitutional principle do not put courts out of business. As discussants subject to being drafted by litigants, courts remain responsible for answering questions propounded by litigants. Moreover, they remain capable, in given instances, of prodding the political system to achieve what Tushnet aspires to: popular discussions of constitutional principles conducted by the people, subject to the guidance of political leaders who anchor the discussion to the basic principles of our constitutional law.[68] The ideal of literate, civil, and popular commitment to political decisions based on principle and not merely on vote-counting or political contests about raw preference[69] may be more realistically achievable if courts play a significant role in

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65. *See* TUSHNET, *supra* note 45, at 69.

66. *Id.* at 66.

67. *Id.* at 65.

68. *Id.* at 14 (describing populist constitutional law). For an example of the widespread resistance to mere discussion of gay marriage, see Ross Sneyd, *Remember in November—Backlash Over Vermont Civil Unions Law*, Associated Press Newswires, Sept. 6, 2000 (quoting a state representative who voted for the recognition of civil unions as saying of her constituents, "To some, there is no discussion possible").

69. *See* TUSHNET, *supra* note 45, at 14.

injecting principle into the public discussions of certain subjects. Moreover, the project of identity formation can be assisted by the reasoning medium of the court work method. "[R]epresentation or expression of identity is necessary for that identity to have a social existence."[70] Even though courts may falter in creating a discursive system that gives recognition to the equality claim implicated in quests for a presence of identities in the public life of the country,[71] they nonetheless provide a locus for discourse about new identities expressed in new terms. In the matter of same-sex marriage, courts have great potential to disrupt the evacuation of gay people from discursive space and to push legislatures toward empiricism and functionalism in dealing with the social reality of gay families. While there is some judicial rhetoric to the effect that gay rights are associated with an elite mind set,[72] the reality that many gay families are working class[73] belies such an image and connects the courts who recognize gay families to the needs and voice of those who lack social power.

Thus, courts can and do provide input to the legislative process without in any valid sense becoming "super legislatures" or dictating outcomes that are not in the end a supremely legislative product–a mixture of principles, expediency, and guesswork. Courts perform a valuable assist to legislative process if they help to force a legislature to act legislatively when it has fallen prey to being nothing more than a conveyor belt for prejudice and, in so doing, has abdicated the function of legislation to address social need. The virtual vacuum of state legislative products addressing the need of gay people for laws that mediate their marital and family lives can be fairly described as neglect of a critical legislative function based on an overhang of prejudice and a tradition of rhetorical stone walls regarding gay life. Courts can do what it is only natural they do–promptly engage in discourse, veto the sway of rhetorical voids in public life, and infuse principle into legislative process. Professor Tushnet talks of the "overhang" of judge-made constitutional law that defuses the legislature's seriousness about its own responsibility for constitutional fidelity,[74] but the overhang of

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70. *See* Hunter, *supra* note 30, at 9.

71. *See id.* at 19-20.

72. *See Romer*, 116 S. Ct. at 1634-37 (Scalia, J., dissenting).

73. *See* Lee Badgett, *Income Inflation*, published by the Institute for Gay and Lesbian Strategic Studies and Policy Institute of the National Gay and Lesbian Task Force (New York 1998) (reviewing studies that suggest gay individual and household incomes are equal to or less than heterosexual individuals and households).

74. *See* TUSHNET, *supra* note 45, at 57.

silence regarding the lives of one set of constituents has a comparable weight in terms of legislative deficit.

V. DISCURSIVE CHOICES—RESPECTING AND RECOGNIZING FAMILIES AND THEIR SELF-DESCRIPTION VERSUS IMPOSING A RESULT BASED ON LEGAL PREMISES

A discursive approach by the courts that begins with language–a degree of recognition that speakers have created same-sex marriage[75]–and then imposes on the polity a request for fair treatment of those marriages serves a more constructive discursive role than entitlement reasoning that starts with individual equal rights and then reasons that each sex must have the same rights to marry without regard to the biological sex of the marital partner.[76] Moreover, the claim that the resistance to same-sex marriage arises from sex discrimination, however demonstrable as a matter of analytic rigor and appropriate as an extension of sex equality principles,[77] is not likely to move those who resist same-sex marriage. Aside from seeming potentially hostile to the context that creates a commonsense understanding of the meaning of marriage as consisting of a husband, who is male, and a wife, who is female, the argument also carries the additional burden of challenging received understandings of sex roles and overtly arguing for their disruption.[78]

Marriage is not created by logic chopping or entitlement reasoning or challenges to the male advantages that have gone with exclusive male access to those positioned culturally as wives. Marriage is a social fact reflected in the language brought to the courts by the litigants. Like traditional marriage, same-sex marriage is a social product that has gradually attained social recognition as part of social practice. Courts can be most respectful, both of those seeking recognition of their discursive reality and of the polity to whom the new meaning is novel and threatening, by publishing and speaking new social meanings[79]

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75. *See* Kuykendall, *supra* note 4, at 420-21.

76. *See Baehr*, 852 P.2d at 59; *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 219, 249 (1994) (arguing that formal sex discrimination analysis bars discrimination against gays, including in marriage, and that the homosexuality taboo reinforces male superiority and should therefore be critiqued on the same basis as sexism and attempts to undermine sexism).

77. *See* Koppelman, *supra* note 76, at 284.

78. *Id.* at 235.

79. *See* GRAFF, *supra* note 15, at 249-53 (reviewing the record of change that has altered understandings of marriage).

and then pressing for the fairness principles to be applied to altered understandings.

In one instance, the court appears to devise a new, ungrounded meaning by a wooden, or else radical, application of an equality principle. In the other instance, the court defers to the evolving language and then broadens the reach and deepens the resonance of the court's voice as teacher. When the court appears to be the author of a new meaning by imposing a principle that yields a revision in a word seen as basic, it encourages the view that meaning can be artificially imposed in a singular act of stipulation and authorial control; it thus particularly encourages counter stipulations like the various marriage definitions. The better approach is for the court to acknowledge the meaning that has been made by those who marry. To the extent the court documents and recognizes the spoken lives of its citizens, it reduces the likelihood of majoritarian dictate and defuses the dread of changes in the identities and language that govern our lives.

Aside from considerations involving deep questions of the wellsprings for fidelity to constitutional principles and respect for popular sovereignty, contemporary life may position states in a manner that resembles that of other institutions concerned with reputation. Given the likelihood that the emerging voice of gay people will produce a widespread acceptance of gay "marriage" or civil union, states can arrive at similar substantive resolutions through processes that give either a negative or a positive "gloss" to results that remain either tainted or haloed by the path taken. Courts do a positive act for their particular state, as well as for our political system, if they encourage legislative courage and respectfully deliberative decision-making. They can achieve this result by supplying statements of principle concerning fairness for the guidance of legislatures, with discretion to allow legislative process to occur. They can also legitimize intermediate solutions to claims of right by helping to produce compromises that arise from a positive rather than negative solicitation of perspectives that includes the interests of the rights-seekers as well as the reaction of the opponents of new rights. Finally, if we assume that a principled process supervised by courts provides a good solution to the state counterpart of the *Marbury* tension between the claim of courts to serve as a constitutional conscience and the immanent capacity of the legislature to provide constitutionally sensitive rules, then the right approach by courts to infusing the process with consideration of principle provides a critical service. Courts, acting prudentially but emphasizing principle, can defuse one of the classic political problems of constitutionalism. In the case of the action of the Vermont Supreme Court, which created a requirement of action by the legislature in a state that insulates the

collective product of the courts and the legislature from populist constitutional intervention, the result seems sound. *Vermont's ground rules created a laboratory of speech in which a linguistic fiat could not arrest discourse.*

Modern attachment to image may have some relevance to how a state political system might conceive of its self-interest. States that achieve a positive resolution of the emerging demand for same-sex marital rights receive better press than do states that create a divisive climate perceived as unaccommodating to a segment of the population. Vermont and Hawaii provide an interesting contrast in this respect. Even though Vermont has taken heat for its legislative affirmation of same-sex relationships, giving them the equivalent status of marriage, it has nonetheless produced a far more favorable set of headlines than has the story of the meltdown experienced by the Hawaii political system. From initially being idealized as a haven of tolerance, Hawaii became a large disappointment to gay couples who had imagined flying to Hawaii for marriage and a paradise of acceptance. By contrast, Vermont tourist establishments reported an extremely active period of bookings leading up to the July 1, 2000, date for the effective time of the civil union law.[80] In addition, the history of Vermont's early rejection of slavery is favorably cited as part of a consistent and forward-looking commitment of Vermont to freedom and equality.[81]

In the long run, the states that will be given honor in the histories are those that find constructive paths to meeting the needs of citizens, not those that claim to have stopped social history in its tracks. Only if one takes an apocalyptic view of history is it possible to accept an interpretation of social progress as a moral disaster that will undermine society. In our secular system of government and culture, the incorporation of morality into government has more to do with helping people to create and meet responsibilities and obligations than with attempting to vindicate a stipulated morality based on an all-encompassing and religion-friendly theory of the good.[82] The secular approach to social

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80. Eugene Sloan, *Inns, Lodges Expect a "Boom" in Bookings*, USA TODAY, June 28, 2000, at 2A.

81. *See* Pamela Ferdinand, *Vermont Legislature Clears Bill Allowing Civil Unions: Gay Couples Given Rights Like Those of Married People*, WASH. POST, Apr. 26, 2000, at A3 (quoting an onlooker as comparing Vermont's passage of the civil union law to the state's initiative in being the first to abolish slavery).

82. A theory of the good associated with human sexuality and strongly coincident with the precepts of religious dogma is provided by a group of writers loosely referred to as the new natural law theorists. The core of their claim is that same-sex sexual intimacy is morally inferior because it is not an act of the reproductive kind, which is the only basis for sexual acts that are "noninstrumental." A truly noninstrumental sexual act is one that

change is widely apparent in the case of gay marriage and partnerships, lending support to the viability of an interpretation of the emerging recognition of gay domestic arrangements as social progress. The coordinated decision of the Big Three automakers to offer domestic partner benefits to their workers [83] coincides with other signs of an increasingly relaxed social accommodation of the factual existence of gay people and gay couples.[84] The rhetoric of total moral error–"The day of judgment is coming, folks"[85]–may slow secular change, but prophecies of doom lack the power to disallow the adjustment of policy in light of new living arrangements. Therefore, if we assume that doom is not imminent, state policy-making will be more nearly sound if it takes forms that emphasize positive efforts to accommodate change. Forms of policy-making that free the public discourse from the effect of traditional

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occurs between a married woman and man and is open to reproduction; the result is that children are accepted rather than willed. Any other sexual act is morally inferior, and, by implication, unacceptable morally. At a minimum, according to these writers, the State should express moral disapproval of morally inferior sexual acts and should in no event offer affirmative sanction to sexually inferior practices. Andrew Koppelman has provided a very useful overview of this body of writing. *See* Andrew Koppelman, *Is Marriage Inherently Heterosexual?* 42 AM. J. JURIS. 51 (1997).

83. Keith Bradsher, *Big Carmakers Extend Benefits to Gay Couples*, N.Y. TIMES, June 9, 2000, at C1 (noting the significance of a corporate move to offer domestic-partner benefits in Midwestern companies).

84. *See, e.g.*, Kate Zernike, *Gay Couples Are Accepted as Role Models at Exeter*, N.Y. TIMES, June 12, 2000, at A18 (describing decisions of prep schools to allow gay and lesbian couples to serve as dormitory parents); Thom Nickels, *Gays on TV: Life Beyond Sitcoms*, THE PHILADELPHIA INQUIRER, January 8, 2000, at A9 (suggesting that Wisconsin press treated as "silly" negative comments by politician demanding removal from air of television magazine series that portrayed two gay farmers in Wisconsin); Carlie Steen, *Kate Kendell Speaks on Lessons From the Knight Campaign*, CENTER VOICE, June/July 2000 (describing claim in California by "Radical Right" that opposition to gay marriage was not "anti-gay," while expressing support for domestic partnerships); *Florida Appeals Court Rejects Societal Homophobia in Lesbian Custody Case*, LESBIAN/GAY LAW NOTES (June 2000) (describing decision in *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000) as "important advance for gay parents in a state that has not been hospitable to their claims"); Randal C. Archibold, *Political Memo; For Lazio, Uphill Route for Gay Support*, N.Y. TIMES, June 22, 2000, at B1 (quoting Richard Tafel, executive director of Log Cabin Republicans, Republican gay political organization, describing "a remarkable shift . . . in that candidates across the country now reach out to a group they had previously shunned" and citing meetings with Governor George W. Bush by gay political representatives and first-ever acceptance of Log Cabin Republicans' delegation to a state-nominating convention, with chapter leader pictured shaking hands with New York State Republican chairman).

85. Ross Sneyd, *House Committee Passes Civil Unions Bill*, Associated Press Newswires, March 2, 2000 (quoting Randall Terry in connection with a Vermont house committee passing civil unions bill).

silences are, in this view, better than the forms that fill a rhetorical vacuum with "hysterical"[86] speech, or that leave silence.

VI. THE MERITS OF DEBATE

Professor Bill Eskridge has argued that the presence in anti-gay public animus and rhetoric of the element of the vicious is a consideration against giving vent in public policy to the Kulturkampf referred to by Justice Scalia in making policy about the status of gay persons in American society.[87] The element of the vicious can be masked in some fora, however. The masking permits homophobia to wear a happy face. In statewide referenda, there is a tendency to employ rhetoric that denies anti-gay animus with a claim that it is merely prudent and necessary to "protect" marriage from being diluted by including same-sex couples within its ambit.[88] The result is that gay people are made the subject of an anti-gay solicitation that is disguised with happy talk. There is a particular cruelty to rhetoric that covers disdain with a smile. The rhetorical strategies used against gay people–Unsayings[89] and the religious-based rhetorical program of repetition, flattening, and the attitude of certainty[90]—have great effect in the mass advertising of a referendum. The certitude of homophobia, given a benign face, occupies the rhetorical space and crowds out a reform message.[91]

By contrast, the emerging reform view of gayness, and a willingness to listen to the lives of gay people, has a chance to flourish in a civil setting created by a debate driven by a premise that the State has obligations to provide structures that address spoken lives. The immanent hystericism in anti-gay speech[92] is forced to the surface by a process that begins with a premise of respect for gay citizens. The result is an exposure of the rhetorical underpinnings of the benign anti-gay speech that dominates the discursive vacuum of statewide referenda and mass advertising. The "grammar of gay lives" reaches the ear and

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86. MARK D. JORDAN, HOMOSEXUALITY IN MODERN CATHOLICISM: THE SILENCE OF SODOM 111 (2000).

87. William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2413 (1997).

88. *Californians Prepare to Pass Judgment on Gay Marriages*, Fox News: Edge with Paula Zahn (Mar. 6, 2000) 2000 WL 16092740 (interview with Robert Glazier, Yes on 22 Campaign Spokesman) (describing campaign as "a positive, upbeat attempt to make sure we focus on pro-traditional marriage, not an antigay campaign in any way, shape or form").

89. *See* Kuykendall, *supra* note 4, at 385.

90. JORDAN, *supra* note 86, at 55.

91. *See* JORDAN, *supra* note 86, at 58; Douglas, *supra* note 60.

92. *See* JORDAN, *supra* note 86, at 111.

enters the voice of the state, while the program of rhetorical silencing that has held sway becomes tellingly shrill when a core of civil speech enters the public arena.

In Vermont, when the legislature accepted the mandate of the Vermont Supreme Court to create policy placing gay couples on a legal par with opposite-sex couples who marry, the State experienced a spectrum of political discourse: the populism of the town meetings, with heated exchanges about the court and the legislature and chastisement of the town representative and claims that the direct voice of the people should govern;[93] the civil exchange of legislative debate, with claims by the legislators that they should follow a model of conscience guided by principles of nondiscrimination even if it meant electoral defeat; and national-based, divisive campaigns of professional advocates against forms of social change, including the legal availability of abortion as well as same-sex marriage and gay visibility. Many of the Vermont legislators reacted negatively to the presence, rhetoric, and manner of Terry Randall, the anti-abortion activist from New York.[94]

The town meetings were almost universally opposed to both same-sex marriage and the parallel recognition of civil unions for gay people.[95] The opposition was vociferous, but it nonetheless had the quality of a quarrel among neighbors[96] rather than an apocalyptic confrontation of counter worlds.[97] The Vermont town meetings contained a strong streak of homespun anger that the people's will would be thwarted if same-sex couples received legal recognition of any kind. Yet it can hardly be said that the will of the people had no effect. Towns voted recommendations to the legislature to define marriage as a union between a man and a woman.[98] The legislature did so.[99] Despite a disposition on the part of many legislators to respect the teaching of the Vermont Supreme Court about equality and nondiscrimination and the liberal predispositions of several who favored same-sex marriage, a sense of the politically possible pervaded the legislative process. While some

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93. Goldberg, *supra* note 22, at A18.

94. Ann LoLordo, *Gay Rights Issue draws a fiery foe to Vermont; Anti-Abortion leader organizes opposition to same-sex unions*, BALTIMORE SUN, Mar. 6, 2000, at 1A.

95. *Gay Marriage Towns*, Associated Press Newswires, Mar. 8, 2000.

96. *See* Goldberg, *supra* note 22 (describing exchange of statements at town meeting between state representative who described his vote as a matter of conscience balanced by constituent's right to vote in November and constituent's response, "You'll be out").

97. *See supra* note 59 and accompanying text.

98. *See supra* note 95.

99. *See* An Act Relating to Civil Unions, *supra* note 9.

legislators, and even the Governor,[100] shared with their constituents the notion that popular stipulation and a claim of ageless tradition[101] could control the meaning of a word[102] and that the word "marriage" should be kept exclusive by legislative mandate, there was also a willingness by some to yield to the popular aversion by incorporating into the State's vocabulary the expanded meaning of the word "marriage" that has become part of the culture.[103] In the end, legislators chose to take a Burkean approach[104] of applying independent judgment, educated by the opinion rendered by the Vermont Supreme Court, and expressing a willingness to accept the voter's rebuke.

A common compromise reached by legislative bodies, including city councils when met by gay pressure for domestic-partner ordinances and statutes and counter pressure from opponents of gay rights and recognition, is to create a domestic partner status that is available to any group of two or more people living in an arrangement of shared domestic life.[105] Grandparents and grandchildren are eligible, as are nonsexual roommates, siblings, uncles and nephews, and so on.[106] The purpose is to desexualize the understanding of domestic-partner laws, thus preserving the insistence of conservative theorists that the State not affirmatively sanction same-sex sexual intimacy.[107] Because the anticipated living arrangements covered by these desexed statutes are so broad and varied, the reciprocal obligations are considerably less. Indeed, there is no pre-existing model for these legal units, so the legal content is thin.[108]

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100. Mubarak Dahir, *Profile in Courage*, THE ADVOCATE (May 23, 2000) <http://www.advocate.com/html/stories/812/812_howarddean.asp.> (asserting that "marriage is anything but traditional").

101. *But see* GRAFF, *supra* note 15, at xi (asserting that "the West's marriage history is plenty contentious").

102. Mae Kuykendall, *An Essay on Defined Terms and Cultural Consensus*, 13 J. L. & POL. 199, 200 (1997).

103. *See* Kuykendall, *supra* note 4, at 412; E.J. Graff, *Vermont's High Court Avoids the M-Word and Makes History*, BOSTON GLOBE, Jan. 2, 2000, at C7.

104. *See* Dale Carpenter, *A Conservative Defense of* Romer v. Evans (manuscript on file with author) (arguing that conservative principles found in Edmund Burke can be deployed in support of gay rights). For some voters' reaction, see Sneyd, *supra* note 68 (quoting a Vermont voter as saying "voting her conscience was just uncalled for").

105. *See* Kuykendall, *supra* note 4, at 388 n.15.

106. *See* HAW. REV. STAT. § 572C-2 to -7 (Supp. 1999).

107. *See supra* note 82.

108. A good summary of the jurisdictions that offer domestic-partner registration can be found at <http://www.buddybuddy.com/d-p-reg.html>. The site offers advice, including the warning that registering as a domestic partner may create joint financial liability without providing any benefits.

But in a legislative process dominated by pressure groups and subtle, or blatant, anti-gay rhetoric, it is easy for legislatures to choose a neutered domestic partner arrangement, in which the predominating image is of post- or pre-sexual celibates. Indeed, the "closeting" of gay people once took the form of their being treated as the unmarried family member, in need of domestic arrangements disjoined from sexual liaison. The neutered domestic partner ordinance is a reinstatement of the nearly extinct practice of reading gay people as sexless. The symbolic claims of same-sex couples to status recognition can be conveniently unheard in a legislative process that will happily yield to the submersion of a gay perspective related to dignitary issues. The resentment and underlying viciousness of attitudes about according gay people equal treatment in their fundamental life arrangements readily supports a bland rejection of the petitions of gay people for the creation of an institution molded to their lives.

Interestingly, the Vermont legislature rejected an explicit suggestion that a state recognition of "reciprocal beneficiary" arrangements be extended to any combination of persons, including same-sex couples. The suggestion was the standard form taken by conservative opponents of state recognition of sexual relationships between persons of the same sex. But the frequent appeal of this maneuver of appealing both to resentment that same-sex couples would receive a state benefit not made more widely available had no traction in the Vermont legislature. The legislature chose instead to accord specific recognition to the qualities of gay marriage that give it an empirical resemblance to heterosexual marriage rather than economically based nonsexual arrangements of mainly practicality and mutual need. The legislature, which by virtue of the mandate of the supreme court had immersed itself in hearings that emphasized empirical reality, set aside a special arrangement for blood relatives. Blood relatives could become "reciprocal beneficiaries," providing a smaller range of benefits suited to the wishes of persons sharing a household but not the sense of common fate associated with marriage. In this way, the legislature addressed the actual needs of a type of household, but did so with attention to what made kinship households different from same-sex couples, who have pledged their lives to one another and in many instances created a shared parental relationship with a child, or with several children. Following the lead of the Vermont Supreme Court, the legislature made distinctions bearing a teleological component: The good served by gay unions is not the same as the good served by roommate groupings, in the view of the empirically sensitized and fairness-seeking legislators. Whatever the eventual fate of the provisional answer provided by Vermont to the quest of some people for marital rights for same-sex couples on a par with existing

legal marriage, the Vermont Supreme Court set in motion a process that brought about an unusual effort by a state legislature to document and provide fair legislative treatment for the reality of same-sex marital relationships.

VII. CONCLUSION

In contemporary battles that cluster around a contest over the language, long-standing views about the role of courts assume altered significance. The argument that the U.S. Supreme Court Justices are teachers in a national seminar[109] has become shopworn and encountered repeated critique.[110] But the role of the courts as the institution most drenched in language ensures that the insight retains and even takes on power. As contests over the terms that govern our lives intensify and enter the legislative arena overtly, with majoritarian inclinations to stop certain types of linguistic change that threaten received status differentiations, the courts take on a function of recording language that is otherwise banished from the public realm.

If not teachers in state-by-state seminar, the state judges are at least participants, by choice or not, in a societal debate that proceeds in fits and starts and that tends to suppress an entire vocabulary of marital commitment. Without the courts, the societal debate would not generate texts that confer authoritative voice on the reality of same-sex marital commitments, except perhaps in liturgy and theological tracts. Thus, the courts are a vital infrastructure in the development of a discourse fed by streams of linguistic and social change. They are an infrastructure for keeping our public language vital. The courts are our grammarians in the large sense of nourishers of the genius of democratic speech. They challenge the coarseness of the public vacuum about gay lives by forcing to the surface the idiom in which gay lives are lived. They are thus simultaneously elitist and populist. As elitists, they challenge the emptiness of public language about gay people and infuse the public debate with a language of principle. As populists, they bring to the attention of moral elitists the fact of the same-sex marital idiom. They are a cultural discursive resource, contributing text no other author could write. Perhaps better than any other author, they transcend the myth of the solitary genius and function in the incorporative style to produce texts best explained as cultural pastiche.

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109. E. V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

110. *See* TUSHNET, *supra* note 45, at 65.

In the matter of same-sex marriage, courts generate valuable societal texts that no other source could either create or publish so widely. The texts are valuable for many reasons. They audition as the types of artifact that the Myra Bradwell opinion became: an attempt at certitude that is celebrated in retrospect as a vain expression of cultural certainty and natural fact.[111] As discussants, courts that rush to the barricades against the coming tide of words create strikingly unconvincing speech acts. Instead of stopping the river of speech, they stand as markers of the exhaustion of the trope of gender certitude.[112] Other courts, wedded to neutral principles, experiment with bases for judicial intervention against the majoritarian insistence on keeping marriage exclusive to opposite-sex couples and thus unsettle our understanding of the stipulations by which gender can still trump neutral principles.[113] Overtly prudential and experimental courts, like the Vermont Supreme Court, offer an alternative vocabulary for same-sex marital intimacy that invites a provisional linguistic way station—civil union—between a void of speech and the full dignity of the term "marriage." By recognizing same-sex marital intimacy as social fact, these courts publish a new meaning for the word "marriage" even while allowing the legislature to delay making a conforming entry in its own dictionary of public language.

In sum, courts talk. Their speech takes on a character, by virtue of their being courts, that creates new discursive realities. Though their speech is not the final word, in the end, nothing is the same. Wittingly or not, gracefully or clumsily, courts build the discourse of same-sex marriage. Because words matter, however, forms of speech that guide the political system toward civil discourse are superior. Discourse that combines recognition of the spoken lives of citizens, investigates the secular teleology of intimate bonds, and provides answers that create a framework for legislative response to the empirical reality of same-sex marital arrangements offers a degree of justice, a hope for social harmony, and an opportunity for democratic felicity.

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111. *Compare* Bradwell v. State, 83 U.S. 130, 130 (1872) *with Littleton*, 9 S.W.3d at 231 ("There are some things we cannot will into being. They just are.").

112. *Littleton*, 9 S.W.3d at 226; *see* Kuykendall, *supra* note 102, at 200.

113. *Brause*, 1998 WL 88743, at *3-4.