Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language

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I. The Unsaying Conceit

I propose to describe Unsaying, which is the work of Unsayers. The Unsayer preempts, closes his ears, stifles, hushes, pretends, erases, shuts off the microphone, rewires laws. I am. An Unsayer denies that I can be, misrepresents my facts and my text. The Unsayer believes that his speech can excise the fact of me or you. The Unsayer Unsays and rushes on, hoping to establish a vacuum and end the matter, believing that words can kill, wipe out, destroy and then leave the scene. The Unsayer practices verbal hit and run. The Unsayer auditions to restore the effect of unspeakability, the principal technique of the "knower."
Unsaying is by no means confined to the public sphere nor to those whose own speech is otherwise impoverished. It has its counterpart in private spheres where unwanted facts about children’s lives disappear from family narratives, histories and self-accountings. In families, Unsaying imposes linguistic failure and psychological harm.

Gay lives and same-sex marriage are now something said. The Saying takes place in private and in public. Public efforts to deny same-sex marriages are thus Unsayings that strive to cancel, erase and shut off private and public realities encoded in language. An Unsaying of such magnitude and public nature has systemic consequences that transcend particular harm to an identity.

Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. REV. 915, 954 (1989) (citing Dronenburg, 741 F.2d at 1395–96). Judge Bork adopted the tone of one who knows about matters that may not be spoken; his conclusion denying the application of privacy precedents to homosexual conduct asserted things known that need not be said and must not be said. See Halley, supra at 954.

See, e.g., Jane Futcher, Family Fiction, in Mom: Candid Memoirs by Lesbians About the First Woman in Their Life 140 (Nisa Donnelly ed., 1998) (describing her reaction to stories by her mother, a prolific southern storyteller).

The older I got the more impatient I became with stories [by my mother] that so completely left me out. It wasn’t that she didn’t love me; it was just that her favorite stories, the ones she loved to tell most, the ones she reveled in, were always of heterosexuals, the most rich and famous, and those who, like herself, stayed in the most beautiful hotels . . . . She needed the details of my life as a lesbian to be invisible . . . . [A]ll details were expurgated. My life was right there on the cutting room floor with [other family secrets].

Id. at 140.


See, e.g., Lesbian and Gay Marriage: Private Commitments, Public Ceremonies (Suzanne Sherman ed., 1992) (offering the perspectives of many same-sex couples who have made the decision to, or not to, announce their commitment in a public marriage ceremony); see also, e.g., William N. Eskridge, Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment (1996); Steve Gunderson & Rob Morris, House and Home (1996); Ellen Lewin, Recognizing Ourselves: Ceremonies of Lesbian and Gay Commitment (1998). See also Lambda Legal Defense and Education Fund, The Marriage Resolution (last modified February 11, 1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=142> (providing text of a resolution that has been adopted by, among others, the Washington State Democratic Party). The resolution provides that: “BECAUSE marriage is a basic human right and an individual personal choice, RESOLVED the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities and commitment of civil marriage.” Id. But see Baehr v. Lewin, 852 P.2d 54 (Haw. 1993) (holding that there is no fundamental right to marriage for same-sex couples under the Hawaii Constitution).

A tone of apology attaches to discussions of same-sex intimacy, leading some to assume that the values affected by efforts at suppression primarily affect the sensibilities of a sequestered population.

This Article strives to crystallize the general (public) impact of state efforts to uproot a meaning that has gained a currency and a linguistic normalization that has overcome its genesis in an awkward and once covert variation.

The nature of the particular harm should not, however, be minimized. The particular
Structurally, legal Unsayings of gay marriage\textsuperscript{8} resemble the Black Codes that sprang up after the Civil War. Black Codes attempted to Unsay the application of common meanings of freedom as applied to African Americans.\textsuperscript{9} Before the end of the Civil War, civil codes spoke without reference to race, because the existence of slavery rendered African Americans linguistically absent from neutral language that was boldly predicated on their lack of civil existence. With the emancipation of African Americans, Black Codes began to create definitions and distinctions that re-established, to the extent possible, the meaning of laws as having “neutral” application to the affairs of white people; the law was infused with the “natural” and previously unspecified meaning that had been destabilized by the evolution of language, including that of the law, to include the personhood of black Americans.\textsuperscript{10}

Unsaying is distinct from prohibition and is characteristically a matter of linguistic authority. Many prohibitions on marriage are distinct from “Unsayings”—they render the marriages “absolutely void,”\textsuperscript{11} with no need to attack a usage that has contemporary vitality. An example is father and daughter. The assault is not definitional, but prohibitory—the effect of state action is not to unsay, but to undo. The thing is linguistically recognized and then undone: the marriage is void.

In the case of same-sex unions, Unsayers want to establish a linguistic void. The fight is mostly about a word, not an act.\textsuperscript{12} Couples are not arrested for participating in a ceremony of same-sex union.\textsuperscript{13} Despite the existence of sodomy laws, control of conduct is not the driving cultural force in the anti-marriage backlash. The substitution of domestic

meaning and sense of self that inhere in exchanges that work to communicate an inner life has been tellingly described in connection with the immigrant experience and the costs of assimilation. See Eva Hoffman, Lost in Translation: A Life in a New Language 143 (1989).

\textsuperscript{8} Traditional definitions of marriage are enacted as Unsayings, addressed at the fact of grass-roots meanings and judicial respect for, and consequent incorporation of, such meanings into official discourse.

\textsuperscript{9} See Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values 114 (1997) (describing efforts to reinstate subordination of black people by defining the civil status of former slaves).

\textsuperscript{10} See id. at 114–15, 146–47 (describing the use of Black Codes to control family and labor of freed slaves).


\textsuperscript{12} See David Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, 450 (1996) (“Whatever the context of the debate, most speakers are transfixed by the symbolism of legal recognition.”). See also Richard L. Abel, Speaking Respect, Respecting Speech 1 (1998) (claiming that the struggle for respect is central in contemporary political life and “everywhere I looked, collectivities were . . . fighting with words and against words”).

\textsuperscript{13} For an example of the critical importance of the word “marriage” in the American debate about same-sex marriage, see Presbyterian Church Panel Backs a Pastor Who Blessed Gay Couples, N.Y. Times, Feb. 3, 1999, at B5, which describes the recent decision of the regional board of one denomination to authorize the performance of same-sex unions so long as the word “marriage” is not used.
partnership statutes demonstrates that, despite the careful distinctions of "the new natural law theorists"¹⁴ that domestic partner ordinances recognize nonsexual living units and avoid giving a state blessing to sex,¹⁵ the social reality is growing state and cultural sanction of the same-sex union, lessening of official state sanction against same-sex sexual activity,¹⁶ and relaxing of theoretical arguments favoring state criminalization of same-sex contact.¹⁷ Thus, the "wordy" nature of the debate calls for attention to its linguistics and the phenomenon of Unsaying. Gay lives and marriages test the outside limits of official Unsaying in our time and place.

A. Summary of Argument

Drawing upon the image of Unsaying, this Article argues that official enactments—in particular, the Defense of Marriage Act ("DOMA")—that seek to undo a usage that has gained currency through concrete embodi-

¹⁴ Andrew Koppelman, Is Marriage Inherently Heterosexual? 42 AM. J. JURIS. 51, 52 (1997) (using this term to describe a group of writers who have developed "the most sophisti-
cated version of the claim that marriage is necessarily heterosexual").
¹⁵ See Robert P. George & Gerard V. Bradley, Marriage and the Liberal Imagination, 84 GEO. L.J. 301, 301, 320, n.60 (1995) (emphasizing that the state should do nothing to confer a stamp of approval on homosexual activity, which is said to be "intrinsic-
ally non-marital and immoral"). By enacting domestic partnership statutes, municipalities have seemingly conferred a stamp of approval on gay relationships. These statutes attempt to provide a status analogous to marriage that allows same-sex partners to be registered as a living unit. These ordinances do not generally confer any benefits, but they afford official recognition of the permanence and seriousness of committed same-sex relationships. Gerard Bradley has denied that domestic partnership statutes, properly drawn, have that effect. See Gerard V. Bradley, Remarks at Debate on Same-Sex Marriage with Andrew Koppelman (Mar. 2, 1998).

Bradley's stance accords with a trend to broaden domestic partnership ordinances to include any two (or more) people living together in a shared domestic arrangement. For example, in an effort to de-link domestic partner statutes from official recognition of same-
sex unions as an entity resembling marriage, the Detroit City Council recommended that domestic partner benefits be accorded to a wide range of familial arrangements, see Shea Howell & Jan Stevenson, Detroit Council Okays DP Benefits, BETWEEN THE LINES, Apr.
16, 1998, at 1. By resolution, the council urged that any of the following receive the health benefits that are now provided to an employee's spouse: (1) a spouse, (2) a domestic part-
er of the same or opposite sex, provided that the employee and the partner: (a) have lived together for at least six months, and (b) are responsible for each other's welfare on a con-
tinuing basis, and (3) a parent, grandparent, sister, brother, or an adult child, provided that the relative: (a) is under 65 years of age, (b) lives in the employee's household, and (c) is the employee's "dependent" as defined by the IRS. See id.
¹⁶ See Powell v. State, 510 S.E.2d 18 (Ga. Sup. Ct. 1998) (invalidating the state's sod-
omy law, the very law that has served as the national symbol of legally enforced moral rejection of same-sex intimacy). By overturning the law upheld by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986), Powell strikes a critical blow to the legal regime of state enforcement of a moral bar on the forms of intimacy that bond same-sex couples.
¹⁷ The new natural law theorists have relaxed their view of the importance of state sanction of gay sex, articulating various qualifications of the interests served by, or pru-
ment in lives lack linguistic credibility. As efforts to embargo a word's meaning that dictionaries of usage would recognize and to claim that traditional meanings repose unaffected by new usages, legal Unsayings of gay marriage function as linguistic failures that signal a policy-making failure to absorb linguistic change. I suggest that the forlorn nature of the linguistic enterprise implicates constitutional values.\textsuperscript{18} The project is one of de-authorization of a subset of marriage speech that a significant number of citizens deploy for self-description and that a significant number of other citizens respect and adopt.

One objection to my claim—that the state should not enact meanings with a purpose of Unsaying a meaning embodied in lives—is that the state must constantly define terms to put citizens on notice of their rights and obligations.\textsuperscript{19} But, in the usual case, the state adopts a definition to achieve a simple utility—that of precision and thus notice and predictable application.\textsuperscript{20} The very oddness of the state effort at Unsaying, indicated by the deployment of strained definitional machinery labeled as a form of linguistic defense, identifies the state speech as non-utilitarian and the usage problem as other than generic to the code-writing enterprise.

This Article will be a linguistic exercise. I begin by considering the discursive location of gay marriage speech, noting both its weak presence in public discourse and its richness in concrete usage. I argue that its nature merits recognition and respect. Next, in Part III, I review some of the analytic benefits of focusing on language clarification, namely, the link between health in the state’s relation to linguistic evolution and the health of the democracy, the liberty values implicated by efforts to disapprove an emerging usage grounded in citizen efforts to construct lives and accorded respect by religious communities, and the American tradition of resistance to prescription of their language. I situate various arguments relating to gay marriage in a linguistic prism. Litigation about state marriage codes raises questions of plain meaning that crystallize the linguistic fact that marriage has attained a broader meaning than male-female unions, but concede that the state may make a narrow meaning plain. Arguments about the practical deprivations inflicted by a restricted meaning of marriage can be seen as a collective narrative undertaking to build the contemporary record of gay marriage as well as an additional public instance of American “fairness” speech. An argument about the common ownership of gay marriage speech by all speakers de-emphasizes the particularity of gay identity. Locating analysis of gay

\textsuperscript{18} I leave to a later article a full development of the constitutional significance of the failure to incorporate a living language into the language of the state.

\textsuperscript{19} See Letter from Andrew Koppelman to Mae Kuykendall (Oct. 8, 1998) (on file with author).

marriage in contemporary usage directs attention away from appeals to
history and toward the linguistic facts exploding around us in the vibrant
medium of American talk.

In Part IV, I examine the many registers of speech about same-sex
marriage, observing that the discourse ranges so extensively over forms
of discourse, civil and uncivil, that it seems fair to rate the quality of the
speech. While there is no implication that any speech about same-sex
marriage should be suppressed, I suggest that state marriage speech
should be drawn from speech that has a concrete embodiment in the lives
of those who construct marriage speech to communicate associational
meaning and to build communities. Anti-marriage speech lacks
affirmative content and is freighted with total visions that fail to accord
recognition to meanings speakers create by speaking about their own
lives and those of their friends and neighbors. Part IV concludes with the
claim that the meaning of marriage is located in the speech of the cele-
brants of marriage.

Part V reviews the way in which individual and collective speech
creates marriage. Individuals marry by speaking; communally, marriage
is infused by meaning through a participatory and evolving speech pro-
ject in which citizens take turns according one another “their day” as
speakers in marriage ceremonies that incrementally alter the collective
understanding and the meaning of marriage. Marriage has evolved toward
a dispersion of authority and away from “top-down” control. Gay mar-
rriage speech is analyzed as a subset of all marriage speech, not different
in kind or linguistically inferior. Gay marriage speech is sincere and is
not in any rigorous sense “mimicry” of heterosexual marriage speech.

Part VI surveys the richness of marriage speech, exploring contra-
dictions in the general social usages about marriage. Gender-related
usages that correspond to male-female roles, such as standard forms or
speech engaged in by salesmen, persist with varying degrees of accep-
tance and resistance. Individual speakers verbally resist the authority of
others to deploy the marital label in ways that violate their grids of
meaning. Nonetheless, the perceived flux in understandings about the
comparative appropriateness of partners do not, in the case of opposite-
sex marriage, lead to state language policies designed to limit offensive
deployment of the state marriage terminology. The rudimentary theories
of marriage that float about in usage and resistance do not become
official. Yet, the dispersion of speech about heterosexual marriage also
characterizes same-sex marriage speech, which enjoys wide currency
beyond a homosexual ghetto and has the same complexity and contradic-
tion. This complexity militates against state efforts to freeze meaning
along gender lines in the single category of gay marriage speech, despite
the discomfort of some listeners with this variant on marriage speech.

Part VII describes the phenomenon of Unsaying, and contrasts it
with Voice. Unsaying, in the case of gay marriage, is an attempt to make
a linguistic fact disappear and thereby “defend” earlier gendered conceptions of marriage that render the application of the term to presumptively egalitarian marriage linguistically strange. It is also an effort to defend an earlier state of affairs in which gay people were denied civil existence and any presence in public discourse. The Ex-Gay movement is described as an effort to Unsay the existence of gay people and to deflect the identity speech that has given gay people a persona.

Part VIII reemphasizes that marriage occurs as a form of expression, with idiom replacing canon as an historical matter in the West. Voice has consistently defeated Unsaying where a dispersed population embraces a usage at odds with state codes. The ordinary practice is to absorb new usage in the case of the state and, by analogy, in contemporary reference material and dictionaries. The contemporary rule for usage is incorporative rather than prescriptive. Unsaying is perverse, consisting of a willful refusal to hear or to acknowledge. Unsaying requires pretending not to understand. Finally, it is suggested that courts have recognized gay marriage speech because judges gradually accommodate the common speech.

Part VIII summarizes the political harms of Unsaying and posits that these are of constitutional significance. This Part argues that, because the early harms against gays did not politically injure either them or the polity, those harms were in some way less serious. Invisibility was so deeply imbedded in the culture that it might be seen as pre-political. The explosion of gay speech, answered with a legal Unsaying in the marriage context, requires the overt use of linguistic manipulation and forms of artifice that inflict gratuitous harm on individual gay people and that harness public policy to attack the self-confidence of the citizenry at large in their project of collective definition through common making of meaning in daily speech. Marital codes that seek to freeze public meanings about intimate associations are at odds with the experimentation and robustness, indeed the orneriness, of American speech.

**B. A Linguistic Exercise**

This Article situates the controversy over gay marriage in the realm of language—it treats the matter as a usage debate in which an unusual attempt is made to trump the authority of non-conforming speakers. The Article locates insights about marriage in the record of speech, private and public, and argues that the critical fact about gay marriage is the reality of its being spoken, and the accompanying ordinary expectation that the state will absorb the expanded meaning.

Critical insight is drawn from the analogy to practices in preparing records of usage in the twentieth century. Despite this sense that the methods of the dictionary maker provide guidance to healthy state practice, the argument of the Article is not only linguistic. In no sense is the argument a simple one about plain meaning. Rather, the Article makes an
argument about language and situates it in a moral context. The Article uses observations about the character of language and usage generally, gay marriage speech specifically, and relaxed incorporation of popular terminology into the state’s vocabulary, in order to crystallize a larger, morally based argument about the harms of state attempts to discourage the citizens from making meaning.21 Thus, the effort to restrict the meaning of marriage is an ill-advised policy that creates unusual effects in the relationship between language and state action. Indeed, the Article maintains that the project of “defending” marriage through the manipulation of language is itself bad policy.

II. The Wide Range and Quality of Speech about Same-Sex Marriage and about Gay People

In a sense, the subject of same-sex marriage is drenched in competing discourses and, as a political matter, inundated by waves of majoritarian speech that drown out minority perspectives.22 The Voice of gay


marriage speech is a soft one in the public square. This Article nonetheless will argue that the language that constructs same-sex marriages through the grounded speech of participants is richly embodied in lives and in the lexicon of common usage. Its effacement from the state’s vocabulary, even absent attempts to punish speakers for disapproved usage of the term,23 is inconsistent with our constitutional system and our democratic traditions.24 In contrast, the rejection of marriage does not arise from comparably rich speech, nor is it a tribute to democratic principles. However apparently emphatically voiced, the refusal to “hear of” gay marriage arises from arguments, reactions, and claims that are abstracted, empty of richness, and lacking in the texture and connection to personal and community needs,25 all giving democratic speech its strong claim to incorporation in civil codes. The instatement of a prior, implicit meaning of marriage in statutes as an official Unsaying enacts a dead language26 to govern a living people. Therefore, claims of a democratic


23 For one conspicuous example of a successful effort to punish the expressive incidents of a same-sex marriage, see Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc) (dismissing Robin Shahar for truthfully answering a personnel form of her employer, the Attorney General of Georgia).

24 The arguments in this Article appeal to a constitutional tradition that resides in the expectations and practices of citizens to exercise a wide-ranging and vigorous liberty of conscience, speech, and meaning-making. See Michelman, supra note 21 at 1518. The expectation is that a deeper recognition of the values harmed by restrictive redefinitions of marriage will change understandings of the wisdom of such state enactments.

25 The entire panoply of recent heavily contested reactions to the emerging visibility and voice of gay persons has a definitively odd characteristic. See, e.g., Romer v. Evans, 517 U.S. at 620, 633, 635 (1996) (expressing the idea that the law was unprecedented, and including statement that Colorado’s Amendment 2 is “divorced from any factual context from which we could discern a relationship to legitimate state interests”); Commonwealth v. Wasson, 842 S.W.2d 487, 490, 501 (Ky. 1992) (noting that, in attempting to provide a rational basis for Kentucky’s anti-sodomy law, the state took “bits and pieces from the testimony of [the other side’s] expert witnesses out of context and disregard[ed] their overwhelming [contrary] evidence” and gave “simply outrageous” justifications); JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 85 (1999) [hereinafter HALLEY, DON’T] (referring to “lexical volatility” in describing the Hardwick articulation of conduct in terms of a status and the military’s configuration of status as conduct); Janet E. Halley, Romer v. Hardwick, 68 COLO. L. REV. 429, 451 (1997) (referring to the Romer Court’s attribution to the Colorado voters of “a kind of blithe insouciance about the range of their action”); Koppelman, supra note 14 (describing DOMA’s choice of law provision as “strange” and as changing the law, to the extent it does, in “capricious and indefensible ways”); Kendall Thomas, Corpus Juris (Hetero)Sexualis: Doctrine, Discourse, and Desire in Bowers v. Hardwick, 1 GLQ: J. LESBIAN & GAY STUD. 33, 39 (1993) (describing Justice White’s language in Bowers v. Hardwick as “an exemplary instance of the ‘paranoid style’ in American constitutional law”).

26 See JOHN MOORE, YOU ENGLISH WORDS 202 (1961) (“The only words of fixed form and meaning are dead ones, ‘Arch.’ and ‘Obs.’ The others, which continue to reflect our
propriety to enacting legal forms of disrecognition of same-sex marriage and validating against challenge legal negations of grass-roots voice by same-sex couples are mistaken. State recognition of same-sex marriages serves democracy as well as liberty.

The sense in which I use the term “democracy” in this Article combines the roughly voiced and uncowed American tradition of autonomy over the self with theories that emphasize dispersion of power and not mere majoritarianism as the font of self-governance. Robert Dahl’s conception of pluralist democracy, as summarized by Professor Carlos Santiago Nino, is apt: “Pluralism favors a dispersion of popular sovereignty in different mechanisms of expression and in different centers of representation.” Professor Nino emphasizes that deliberative democracy is valuable because it is the best method to gain access to social knowledge of moral principles. This justification for democracy provides the basis for criticizing its failures when certain of its prerequisites are not met. These failures are not results of the tension between rights and popular sovereignty, but are shortfalls in the democratic process itself.

In this Article, I strive to heighten an understanding of the common interest of all citizens in protecting the primary role of the dispersed citizenship in fashioning and using a language with a meaningful relation to the underlying facts, practices, and premises of their lives and to the language of official proceedings.

III. Focusing on Language

A. Language as a Central Analytic Category in the Marriage Question

Language is central to the construction of intimate meanings and thus to democratic health. Language enables speakers to mark relationships as marital in nature, whereas resistance to its development and re-

27 Standard recountsings of the emergence of a claim for same-sex marriage consistently describe the grass-roots pressure that defied the wishes of gay legal strategists. Typically, a couple filed a lawsuit, against the advice of gay legal organizations. Cf. Halley, Don’t, supra note 25, at 62 (describing disjunction between gay litigation strategies that exploit status protections by denying link of gay status to sexual conduct and gay political movements, “which have sought to endorse, not abandon, same-sex eroticism”).


30 See id. at 107.

31 See id. at 138 (listing these conditions as including “the free and equal participation in the process of discussion and decision; the orientation of the communication toward justification; the absence of frozen and insular minorities; and the existence of a proper emotional setting for argumentation”).
interpretation by speakers stymies standard democratic progression and impoverishes public speech. The overall function of language as the common property of speakers and the repository of human concerns brings language as a category to the forefront of analysis of same-sex marriage. Language growth and change are essential factors in linking marriage-speech to healthy democratic practice.

Critically, marriage is embodied in the speech of those who participate in it. First, the words spoken in a marriage ceremony create the scope and definition of that particular marriage. Second, the usages that cluster around marriages and around the idea of marriage continually alter and embody the social meaning of marriage. Without the ongoing spoken interpretation of participants, marriage would lack the richness of meanings that make it a basic reference point for organizing an understanding of social relations. The social knowledge concerning marriage is, at any time, vastly richer than the limited social information captured in statutes about marriage or marriage practice. The law says far less than the people know and speak, refraining in the usual case from official speech that would drown out private evolutionary meaning. Typically, the limited speech of legal codes adjusts to accommodate evolutions in the linguistic medium in which they exist, with a gradual absorption of everyday usages into the statute.

Efforts to suppress such an accommodation of contemporary usage about marriage are thus an unusually deep assault on language and on grass-roots authority over a matter of common property. Language grows. Its development and adaptation to the interpretive needs of speakers are standard manifestations of democracy. An effort to curtail the meaning

32 Indeed, in writing "against homosexual marriage," James Q. Wilson seized upon language: "Neither a gay nor a lesbian couple can of its own resources produce a child; another party must be involved. What do we call this third party? A friend? A sperm or egg bank? An anonymous donor? There is no settled language for even describing, much less approving of, such persons." James Q. Wilson, Against Homosexual Marriage, in SAME SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 143 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (emphasis added).

33 See BERGEN EVANS & CORNELIA EVANS, A DICTIONARY OF CONTEMPORARY AMERICAN USAGE at v (1957) ("[O]ne of the most fundamental [facts about language] is that language changes constantly."); see also MOORE, supra note 26, at 202 ("Language . . . is ever-changing: no more settled than the sea or the sky.").

34 These claims are about democratic and constitutional health, and, as such, are as much an appeal to the makers of law and policy as to the judiciary. Legislators bear equal responsibility for fostering constitutional values. See Cass R. Sunstein, Homosexuality and the Constitution, 70 IND. L.J. 1, 23–27 (1994).

35 In his 1955 William James Lecture, J.L. Austin chose marriage as an example of a performative sentence. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 5–6 (2d ed. 1975). The example benefitted from the then-uncontroversial context of performative statements about marriage. Austin was able to specify with confidence the circumstances in which a performative sentence regarding marriage would succeed. See id. at 8–9 ("[I]t is essential that I should not already be married with a wife, living, sane and undivorced, and so on . . . .").

36 See infra notes 113–115 and accompanying text.
and constructive capacity of an individual speaker or group of speakers attacks the common project of fashioning and refashioning language for human needs, depletes linguistic resources and adaptability, and limits the spiritual resources of the people.\textsuperscript{37}

The analytic linchpin of the tussle over the definition of marriage is therefore language itself: its role as a medium in which marriage comes about, its ownership by users, and its poverty when deployed as a negation. The attempt to edit out of the official lexicon a class of people and thereby elevate an approved meaning\textsuperscript{38} is harmful to the people affected and to the project of self governance. The official act is an embargo—one applied to a word.

Such an embargo on marital language harms the values relating to language as the common property of a free people. It intimidates timid speakers, undermines the liberty interests imbedded in claims by speakers about their marital life, and severs a body of regulation from the spoken life of citizens. The result is to render speakers unsure of their authority to deploy words, to encourage speech bullies to punish undesired speech with official sanctions, and to place a cloud of state disapproval over a portion of some citizens’ vocabulary. An embargo on a word makes the regulations of the state wooden; suited to a bureaucracy that depends upon stipulated meanings.\textsuperscript{39} The language of the state, under conditions of embargo, excludes the signs and symbols of a large set of citizens for a fundamental aspect of their lives.\textsuperscript{40}

Language as an analytic focus highlights the odd symbolic character of anti-marriage legislation. The reenacted codes resist a new usage. Both the federal Defense of Marriage Act ("DOMA")\textsuperscript{41} and similar provisions enacted at the state level\textsuperscript{42} function not as aspects of usage but as efforts to undo a historical emergence of gay speech into the public arena. Thus, as demands on democratic policy-making, the increasingly strange proposals\textsuperscript{43} for "coded" verbal harassment and silencing do not merit peer

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\textsuperscript{37} The emerging concern with the death of languages provides an occasion for the articulation of the spiritual features of a minority linguistic "property." \textit{See}, e.g., Nancy C. Dorian, \textit{Book Review}, 70 \textit{LANGUAGE} 797, 800 (1994) (quoting and critiquing the view that "each language still spoken is fundamental to the personal, social and ... spiritual identity of its speakers"). The issues that cluster around the at-risk nature of "linguistic isolates" differ substantially from those relating to gay marriage speech, in particular the question of the value of assimilation of ethnic minorities and the unfavorable impact of emerging communication technologies on threatened languages, \textit{see id.} at 798–801, but the core insights about the spiritual value of linguistic richness resonate in the matter of gay marriage speech.

\textsuperscript{38} \textit{See} Mae Kuykendall, \textit{An Essay On Defined Terms and Cultural Consensus}, 13 \textit{J.L. \\ & Pol.} 199 (1997).

\textsuperscript{39} \textit{Id.} at 201–02.

\textsuperscript{40} Slavery was an instance of enforcing linguistic conventions that deprived a group of persons of access to the language of the state or, indeed, of common humanity.


\textsuperscript{42} \textit{See DOMAs, supra note 22.}

\textsuperscript{43} \textit{See, e.g.,} Carl Weiser, \textit{Legislatures Band Against Gay Union; State Rush to Void}
status with expressive and affective construction of marriage and family. Realistically, each legislative success further compromises the democratic legitimacy of the marriage naysayers.

B. Language, Democracy, and Liberty

Thinking about language as a vibrant, organic component of democracy, which adjusts daily to new realities, is a useful conceptual enrichment of the democracy, as defined above. Democracy is not consistent with a project to cordon off a portion of the language. The effort to erect a barrier between the speech of the users of language and the official codes of the state disrupts the natural democratic flow of common usage into the glossary of public life.

Language itself has figured in twentieth century concerns with state intermediation of the lives of citizens. It is well-recognized that authoritarian regimes attack language as a prime target and as a means by which to suppress popular sovereignty. Language is the medium in which we most successfully claim our democratic selves, resisting standardization or instruction by our “betters” in the refinements of grammar. Recognizing language itself as a principal figure in the marriage question sharpens the sense in which basic democratic values are at stake. One sees, putting aside the specific context, that the policing effort required to embargo from state recognition words used in daily life underlines the democratic project of self governance. The American tradition of pithy speech particularly defies prescribed codes of usage. This

Hawaiian Precedent, Tennessean, Mar. 30, 1996, at 7A (describing a proposed Alabama law that would have imposed a $1,000 fine for anyone legally entitled to officiate who performed a same-sex marriage ceremony).

44 Textualism is not entirely at odds with this claim. While plain meaning arguments might freeze the meaning of a previously enacted statute, they do not by their nature argue that old meanings must be reenacted. A textualist could favor legislative clarification of the term “marriage” in state codes to incorporate a changed meaning.

45 See supra notes 29–31 and accompanying text.

46 Professor Mellinkoff posited this principle: “[T]wenty years ago I proposed a thesis: ‘that the language used by lawyers [should] agree with the common speech, unless there are reasons for a difference.’” Mellinkoff, supra note 20, at 423 (quoting DAVID MEL- LINKOFF, THE LANGUAGE OF THE LAW at vii (1963)). See also EVANS & EVANS, supra note 33, at vi ("The best that anyone can do is to say how [a word] is being used, and this is what a grammar should tell us.").

47 See GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1948) (containing a character who is a government philologist and whose job is to narrow the range of thought by creating the new official language, Newspeak). See also DOUGLAS LITOWITZ, LEGAL WRITING: ITS NATURE, LIMITS, AND DANGERS, 49 MERCER L. REV. 709, 726 (quoting Orwell’s character on the goals of Newspeak). While Newspeak is primarily concerned with effacing linguistic heritage, the project of restriction of linguistic resources has equal force when directed at the future of language.

48 “Political language . . . is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind.” GEORGE ORWELL, POLITICS AND THE ENGLISH LANGUAGE, in SHOOTING AN ELEPHANT AND OTHER ESSAYS 77, 92 (1950).

nation's legacy rejects a class division that shames common speakers for ignorance of prescribed grammars.\textsuperscript{50} Adding claims about morality does not undo the American propensity for self-expression.\textsuperscript{51}

**C. Translating Other Arguments into a Framework that Emphasizes Language**

Viewing language as the analytic key allows a number of the stronger arguments for recognition of same-sex marriage to be thought about in ways that heighten, or, where they are powerful on their own, give further context to their theoretical power.

\textsuperscript{50}For example, the poetry of Walt Whitman captures the idea of a democratic voice in the sounds of the commonplace. Whitman wrote and lectured on the importance of an American voice embodied in the spirit of free people: "There is no week nor day nor hour when tyranny may not enter upon this country, if the people lose their supreme confidence in themselves,—and lose their roughness and spirit of defiance." \textsc{Walt Whitman}, \textsc{Walt Whitman's Workshop 58} (Clifton Joseph Furness ed., 1928). Retrospectives of the American literary voice often remark on the intrusion of a rough voice challenging the gentlemanly conventions of Europe. See \textsc{Ralph Waldo Emerson}, \textsc{The Best of Ralph Waldo Emerson: Essays, Poems, Addresses 22–3} (1941).

We have listened too long to the courtly muses of Europe. The spirit of the American free man is already suspected to be timid, imitative, tame . . . . We will walk on our own feet; we will work with our own hands; we will speak our own minds . . . . A nation of men will for the first time exist, because each believes himself inspired by the Divine Soul which also inspires all men.

\textit{Id.} The power of Mark Twain is commonly explained in terms of his freedom from convention and his brashness, "an innocence poised between skepticism and ignorance." James D. Cox, \textit{Introduction to Mark Twain, Life on the Mississippi} 13 (1984) (describing the "wild . . . humor in [Twa" in's] authorial presence that threatened to annihilate conventional moral, aesthetic, and literary values"). Thus the American democratic tradition is composed of an insistent demand for our own voice—to be spoken and to be unshamed.

\textit{See Evans & Evans, supra} note 33, at vi (stating that "[t]he common man, even the common educated man, has had no desire to be 'superior' in some mysterious way" and has thereby resisted Latin-based grammatical rules). There is arguably a class element in the willingness of gay men and lesbians to "come out" and in the willingness of same-sex couples to apply the language of matrimony to their lives. The social and economic stakes may be higher for upper middle class persons to make a visible statement that appropriates to their lives the usages of a set of class-encoded gender and caste conventions. \textit{See Elizabeth L. Kennedy & Madeleine D. Davis, Boots of Leather, Slippers of Gold: The History of a Lesbian Community} 87 (1993) (describing working-class lesbian bar culture in the 1930s, 1940s, and 1950s). The most strongly voiced of the coming out stories by lesbians often contain a raw assertion of voice, the sort of sturdy working class claim to resist suppression of the grammar of their lives by economic masters or arbiters of taste. \textit{See Julia Penelope, Class and Consciousness, in Out of the Class Closet: Lesbians Speak} 36 (Julia Penelope ed., 1994) (expressing resentment of "demeaning stereotypes and judgments passed on our dialects").

\textsuperscript{51} \textit{See Penelope, supra} note 50.
1. The Relevance of the Greek Philosophers' Views of Homosexuality

In Romer v. Evans, the trial court heard testimony on the status of homosexuality in the writings of the ancient Greek philosophers in order to consider the thesis that no society had ever treated homosexuality as an acceptable variant of human sexuality. Professor Nussbaum asks, "[W]hat difference does it make whether [the political philosopher testifying on the Greek philosophers' view of homosexuality] got it right?" Professor Nussbaum asserts that a clear understanding of Greek philosophers' treatment of homosexuality removes the sense of inevitability from contemporary treatments of homosexuality. Greek texts show us "moral argument of great rational power." However, it is the text that is critical, not evidence of behavior. The text is our common property. Professor Nussbaum works to prevent Unsaying of an important part of our heritage of speech and thought.

The history of what other cultures at other times did in a particular situation is not persuasive as to good conduct or good policy. What is critical is the restoration of the linguistic heritage of all speakers and evidence of the work of the Unsayers. A documented history of same-sex speech resituates its speakers in the continuing human project of language. It allows for contemporary adaptations of the still vibrant but suppressed idioms of our forebears in the language we use to describe our lives and recognized partnerships.

In her summary of the relevance of ancient philosophical tradition to homosexuality in our time, Professor Nussbaum demonstrates the effect of locating contemporary negations of homosexuality in a richer textual site, enhanced by the emphasis she places on specifying ancient meanings. The expansion of vocabulary rescued from ancient texts sets imagination loose and revitalizes contemporary speech about a set of human perceptions and meanings long under siege.

Tellingly, Professor Nussbaum demonstrates that a careful study of Greek texts includes the rescue of text about sexuality and same-sex intimacy; translators have excised and masked the Greek speech about homosexuality. Thus, the Greeks are important not merely for their capacity to offer reasoned arguments but for their language. More successfully than today's Unsayers, the censoring translators have wrongfully depleted the linguistic estate of democracy as heirs of the intensely human speech of the Greeks. The Greeks are our forebears as democratic

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53 Id. at 1531.
54 Id. at 1597–1601.
55 Id. at 1537.
56 Professor Nussbaum notes that "we admire [the Greeks] as a successful culture and
speakers, playing with language to find a match for their observations; not content with occlusions but in search of expression and the apt description of human moments. They are not merely our teachers but our companions in the enterprise of language. To understand their views on homosexuality is to defend our linguistic resources from assault and to restore the full lexicon that enriches and echoes contemporary speech.

2. The Vermont Marriage Litigation

The Vermont marriage litigation\(^5^7\) brought to the fore similar arguments about usage, but applied them not to language but to legislative intent. An amicus brief signed by professors of statutory construction and legislation,\(^5^8\) which made these arguments, pointed out ways in which a broader meaning of marriage has become current,\(^5^9\) even in the speech of anti-homosexuals. The writers of the brief marshaled this linguistic evidence as a means of precluding a plain meaning reading of the nominally ungendered Vermont marriage statute. The brief acknowledged that in states with a clear legislative record of animus against gays, the meaning of marriage in the restated marriage codes would be unambiguous.\(^6^0\) This litigative strategy suited the legal environment. It was possible in Vermont to argue that the failure to redefine marriage rendered its meaning potentially broader, in line with trends in usage. Yet, marriage might have a lesser meaning somewhere else.

Situating the matter of marriage still more solidly in language as the repository of democratic freedom would raise the power of the argument and explicitly attack the idea that the state may enact strained meanings of marriage at variance with a received usage.\(^6^1\) An emphasis on the centrality of language to the construction of marriage creates an insistence on the state’s respect for language as common property and de-emphasizes overtly strategic concessions concerned with such matters as judicial role.

the source of some of our deepest ideas and most cherished cultural artifacts.” \(\text{Id.}\) at 1598.


\(^5^8\) Brief Amicus Curiae, Professors of Legislation and Statutory Interpretation, \(\text{Baker}\) (No. 98-32).

\(^5^9\) See infra notes 150–154.

\(^6^0\) Professors of Legislation and Statutory Interpretation, \(\text{supra}\) note 58 (referring to the Commonwealth of Virginia).

\(^6^1\) Referring to evidence that the \textit{normative} debate about same-sex marriage has produced a \textit{linguistic} consensus in which a formerly marginal use of the term is normalized, the brief states: “We are uncertain as to [the evidence of usage’s] ultimate legal significance.” \(\text{See Brief Amicus Curiae, supra}\) note 58. The brief appears to argue that, at least in Vermont, it is evidence that the marriage provision of the state code is ambiguous. But such an argument shows little sign of holding the day for long, as states re-enact marriage codes to narrow the meaning of marriage for the legal code. \(\text{See DOMAs, supra}\) note 22.
A claim regarding language insists that plain meanings in state codes that unsay marriage are *linguistic failures*, infused with the logical contradiction of asserting that the meaning of marriage is both certain and fragile, characterized by a vacuum of content about the human arrangements that are the predicate of the legislative project, and burdened with the paradox of affirming as inevitable a meaning that is conceded to be in flux. A definition of marriage that governs intimate understandings and frustrates embodied meanings arises from a policy process in which language serves not as a conduit for affirmative claims for information about signification, but as a tool for disrupting a communicative activity. Despite the endorsement of a majoritarian process, the plain meaning of the DOMAs is deficient because it is not nourished by a democratic dialogue in which healthy speaking keeps the process honest.

The linguistic claim about democratic values maintains a consistency of argument, claiming that legislative meanings are suspect when they attack citizens' language-making. By contrast, the Vermont brief on statutory construction presents the argument that a bare desire to cater to prejudice is not a valid purpose in Vermont, because the common meaning of marriage, being various, creates the basis for a statutory construction by judges divining meanings by emphasizing purpose. Yet the brief concedes that, in other states, the plain meaning of the anti-marriage codes precludes purposive arguments. In statutory construction, language is only incidental to the analysis, allowing an entry point for certain arguments, depending on whether the state's approach to official speech is despotic or easy-going. But one may as well object to the state's taking on the linguistic persona of Humpty Dumpty: "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." Emphasizing the despotic and unconvincing character of state-enacted limiting definitions highlights the fact that the principal wall against the ordinary application of standard doctrines requiring even-handed and non-discriminatory state laws is linguistic foot-stamping—a dictatorial stipulation of meaning by state decree.

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62 Cf. Austin, supra note 35 at 14 (performative speech that fails analyzed as *infelicitities*).
63 See generally Peter Berger's comparative point about neoorthodoxy in religion: "The tradition is affirmed *anew* after an interval when it was not affirmed. The problem is, quite simply, that it is very difficult to forget this interval." Peter L. Berger, *The Heretical Imperative* 68 (1979).
64 See Nino, supra note 29 at 124 (discussing role of intersubjective discussion in a deliberative democracy).
65 See supra text accompanying notes 60–61.
3. Situating Practical Concerns and Concerns about Fairness in Narrative

Recognition of the centrality of language in constructing marriage also gives a context to the frequent enumeration by gay activists of practical concerns, bringing to the fore the commonality between same-sex couples and opposite-sex couples. Enumerations of unfairness in the allocation of benefits accorded to opposite-sex married couples but denied to all same-sex couples creates a growing written record of the spoken lives of same-sex couples, and records another instance of the demand for fair treatment. It also builds an argument about fairness to be deployed in the rarefied syntax of constitutional argumentation or the earthy currency of responsive legislative policy making.

4. De-Emphasizing Identity by Rescuing the Collective Ownership of Language

A focus on language as the carrier of ineradicable meanings about same-sex intimacy, and about the meaning of marriage, also has the virtue of de-emphasizing identity categories, which are themselves receding as a result of critical treatments by scholars and the messiness of life in our democracy. Clearly, it is the language as spoken by all citizens, not specific carriers of identity, that infuses the democracy with a set of meanings that cannot be Unsaid. Saying is brought to life through speech that constructs and respects units of living, but it is not particularized thereby or made an artifact or mere expositor of identity.

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67 For a typical conservative critique of "identity politics," see Christopher Lasch, The Revolt of the Elites and the Betrayal of Democracy 17-19 (1995) (prophesying doom for the "spirit of free inquiry and open debate" under the conditions of identity politics). For a pro-privacy refutation of the argument that privacy should be imagined as protecting identity, on the grounds that claiming an identity as a basis for a right to privacy gives legitimacy to invidious classifications, see generally Rubenfeld, supra note 49, at 782. Rubenfeld argues that resistance to the standardization of identities by state injunction is the heart of privacy, rather than the protection of identities. Id. at 805. Janet Halley also makes a strong argument that gay litigative groups should avoid making identity arguments that adopt a view of gay people as a minority distinguished by a stable, natural identity, Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 Stan. L. Rev. 503, 503 (1994).


69 Focus on language, rather than identities, thus weakens the reasoning that "a ban on same-sex marriages is ... close enough to the mark [for intermediate scrutiny] ... since virtually all applicants for same-sex marriages will be homosexuals [and] ... forbidding such marriages is a proxy for withholding legal recognition for homosexual relationships." Craig M. Bradley, The Right Not To Endorse Gay Rights: A Reply to Sunstein, 70 Ind. L.J. 29, 34 (1994).

saying, on the other hand, derives from an insistence on such a particularity of identity that the very language can be policed to vindicate the imperatives associated with preferred identities. 

5. The Present versus the Past

The heckler’s reaction to widespread usage of the term “marriage” by participants in same-sex unions may cause some users of contemporary language to cast about for historical validation in order to buttress their freedom to fashion language that describes and enhances their lived experience. It is commonplace among gay conversation groups, if marriage is mentioned, to announce that a book has been written that reveals evidence of same-sex unions in the early church. It is also commonplace to hear suggestions that, somewhere else, usually unspecified, there is a homophile paradise in which speakers revel in a rich vocabulary of inclusiveness and comfortable integration of the entire range of vocabulary with which an ideal world of verbal subtlety might describe the intimate and associational lives of all people. Such speakers appear to believe that evidence of historical usage by specific authoritative speakers, since forgotten, or of better societies with variant usage, provides firmer support for forms of contemporary speech than the vitality of language formation and deployment by living Americans. The persuasive aspect of such rhetorical appeals to better times and places appears considerable in the hold it has over some portion of gay people’s imagination concerning a possible vocabulary of intimate association. In its nature, however, it mistakenly concedes that usage is the property of someone other than speakers, proposing that linguistic disputes be resolved by appeal to outside sources of expertise. Adjudication based on such forms of certification would be a version of the science court, sitting to decide esoteric controversies among purported experts. The appeal is to the meanings that may have existed among people who are not living, about which evidence can only be indirect and reconstructive, rather than to the rich palette of usage of living American speakers. Such appeals to prior

laws and the military ban on “telling” with the point that the “protection of individual autonomy and liberty [fostered by the First Amendment] engenders collective benefits in the body politic” (emphasis added)).

71 See Karst, supra note 68, at 294 (referring to the desire of those in dominant positions to believe in the legitimacy of their status).

72 See JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994).

73 See, e.g., William N. Eskridge, A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1422 (1993) (referring to the suppression of same-sex marriage by “[c]ultures, such as that of the recent West”).

74 Cf. Koppelman, supra note 14, at 56, n.25 (arguing that historical evidence cannot refute morally based arguments that marriage is inherently heterosexual).

or other usage is surely the product of the heckler’s success at intimidation. The beleaguered speaker suffering the verbal attack on his right to speak, or her capacity to be heard, musters courage by calling for the assistance of a powerful protector, that is, through an appeal to someone who can shush the heckler and confer approval on the speech being shouted down. A better approach might be to keep speaking, with the vividness, vigor, confidence, and saltiness of the common man and with the aid of other contemporary speakers, using their lung power and inventiveness as the creators and masters of their own idiom. It may not be entirely inapt to suggest that trash television participants have a greater impact on the release of linguistic energy, the evolution of usage, the defeat of the heckler, and the vocabulary of the possible than the most learned debate about usage in the third century. Language wraps itself around life. It grows, changes, and challenges. The keepers of the past have never decreed what users may say or how they may fashion words to their needs. It is to life that the living turn with curiosity, to hear who others are, to absorb the words they use for themselves, and to adjust to the new.

Moreover, the accumulation of communicative capacity through user-controlled electronic media further underscores the vibrancy of living speakers as the master of language. There is a disjunction between the visibility of contemporary usage and the official claim to withdraw terms from valid use. Speakers using, bending, and innovating language create an explosion of speech in the rich, collaborative, and sovereign environment of contemporary media.76 The most powerful veto of official de-authorization is the vibrancy, volume, and visibility of the living language.

Indeed, the references to same-sex meanings in historical usage are readily overwhelmed by the gendered nature of references to marriage. Historical texts exhibit a casual association with an idea of males as the subject in discussions of marriage as a social creation in which participation is voluntary. The tone in these texts conflates “man” as human with man as male, thus rendering marriage as a human choice available to men.77 The reasons cited against marriage are those of a depressive—if

76 Cf. Toni Massaro, Gay Rights, Thick and Thin, 49 Stan. L. Rev. 45, 108 (1996) (citing Richard Rorty, Contingency, Irony and Solidarity at xvi (1989), to support the proposition that “deothering” gay men and lesbians through description of them, as well as redescription of “us,” is a task “not for theory but for genres such as ethnography, the journalist’s report, the comic book, the docudrama, and, especially, the novel”).

77 Typical marriage quotations in compilations consistently position the male as human, faced with a confounding choice. The lesson of history is archaic—a set of linguistic conventions that has faded rapidly since the 1950s in the United States. See, e.g., quotations in Respectfully Quoted: A Dictionary of Quotations from the Library of Congress (Suzy Platt ed., 1992):

“Hic that hath wife and children hath given hostage to fortune, for they are impediments to great enterprises . . . .” Francis Bacon, Of Marriage and the Single Life, the Essays on Counsel Civil and Moral of Francis Bacon 20, 22 (Fred A. Howe ed.,
the woman is fair, the person entering the marital state must be ever vigilant, but if she is not fair, he must suffer her presence. In a modern context, the writing appears to be from a genre of male self-help, but in the historical annals of usage, it displays a still vigorous idea that the term marriage applies to a choice with which males are presented—whether to enter into a domain where women are located by default. The increasing linguistic freedom of females to deploy self-description and claim subject status in speech and in general usage has etiolated the older usage in recent years but scarcely eliminated it. The commonplace humor of the 1950s, in which males were portrayed as the prey, or the hapless captive, of females has faded to a large degree, rendering marriage culturally gender neutral with respect to the grammatical locus of choice and resistance. However, remaining expectations that marriage is a state that women require and men resist still receive unexpected and vigorous resurrections.

Contemporary usage is a much more reliable and vibrant source of complexity, neutrality, and linguistic range in the deployment of terms for intimate associational choice than is evidence of past arrangements rotating upon a verbal axis of male choice and resistance. The “ownership” and application of words in everyday living is indeed not a matter of exposition or even rhetoric; it is a matter of “hardwiring” the language that is common property of its users to fit the circumstances of their lives, thus precluding the imposition of official meanings. Peer culture has its strongest expression in the words it uses, not the ideas it expresses. The world changes imperceptibly but profoundly with the command taken by each successive set of speakers, obliterating the past and rendering archaic the speech of the dead, their authority moot with their silence and their culture vanished with the evaporation of the linguistic medium in which they made their way and described their practices.

1908).

"I have always thought that every woman should marry, and no man." BENJAMIN DISRAELI, LOTHAIR 109 (1870).

"A gentleman who has been very unhappy in marriage, married immediately after his wife died: Johnson said, it was the triumph of hope over experience." JOHN BOSWELL, BOSWELL'S LIFE OF JOHNSON 128 (L.F. Powell ed., rev. ed. 1934).

78 See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS FROM THE LIBRARY OF CONGRESS, supra note 77.
IV. Registers of Speech about Same-Sex Marriage—Listening to What People Say

A. A Cacophony of Voices

The legal skirmish over who may marry brings forth discussion of many matters that the polity traditionally referees: the possession and conveyance of property,\(^{80}\) distribution of government entitlements and burdens,\(^ {81}\) the status of the sexes,\(^ {82}\) judicial roles in social policy,\(^ {83}\) equal protection of citizens,\(^ {84}\) and the government regulation of sex.\(^ {85}\) The debate about same-sex marriage implicates moral theory,\(^ {86}\) constitutional values,\(^ {87}\) doctrinal rationalization,\(^ {88}\) and jurisprudence.\(^ {89}\) All of these take place in distinct registers of speech, which locate same-sex marriage

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\(^{81}\) See, e.g., 42 U.S.C. § 402(b), (c) (1994) (defining "wife" and "husband" for the purpose of determining entitlement to old-age and survivor social security benefits); see also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1384 (1998); Chambers, supra note 12.


\(^{85}\) See Feldblum, supra note 84, at 312–39 (discussing Lord Devlin’s view of the state’s role in regulating “private morality”); see also Finnis, supra note 17, at 1 (state’s role in punishing “immoral sexual acts” by consenting persons).

\(^{86}\) There is a line of writing by proponents of both gay rights and gay marriage arguing that gay same-sex intimacy is morally good and should be defended on that ground. See, e.g., Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); see also Feldblum, supra note 84, at 331–35 (arguing that “gay love is good”). Moral arguments that same-sex is immoral are numerous. See, e.g., Finnis, supra note 17.


variously in a vocabulary of practical needs, fairness, sexual roles, democratic theory, legal precedent, and morality. The linguistic environs of the debate are poorly zoned: it is extremely hard to anticipate what type of linguistic structure might crop up in the neighborhood. Indeed, even Miss Manners has opined as to the proper zoning of speech about same-sex marriage, suggesting that it is suitable for dinner table conversation involving adults, college-age children, and much younger children.\textsuperscript{90}

The subject of marriage invites discourse at virtually every level of generality or concreteness, high-mindedness or bottom line mentality. It is a regular part of the Jerry Springer-style shows\textsuperscript{91} and sophisticated philosophical seminars;\textsuperscript{92} in one place intensely personal, in another place abstracted beyond the ready grasp of all but trained philosophers. The debate ranges across categories of discourse and forms of civil or uncivil expression and display. A cacophony of voices locates the debate in aspects of the material, the immediate, or the ethereal. Opposition to same-sex marriage is expressed in many voices: scathing anti-gay diatribes\textsuperscript{93} and equally scathing gay, especially lesbian, denunciations of the institution of marriage as inherently evil.\textsuperscript{94} It seems fair to make some judgments about the quality, even the integrity,\textsuperscript{95} of the speech.

\textbf{B. Generalizing Language—"Cracker Barrel" Philosophy}

The common rhetorical component of the popularized naysayers is generalization—theorizing, "Cracker Barrel"\textsuperscript{96} philosophy—on which a

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\textsuperscript{90}See Judith Martin, \textit{Miss Manners: Dining with a View or Two}, WASH. POST, Sept. 2, 1998, at D7. Her advice was influenced, however, by an assumption that "the discussion of gay marriage has to do with whether it should be legal, not how it is consummated." \textit{Id.}
\textsuperscript{91}But see George & Bradley, supra note 15 (organizing analysis of same-sex marriage around such terms as "nonmarital orgasmic acts," "oral or anal sex acts," "penile-vaginal acts," "consummation," "individual gratification," and the like). Perhaps Miss Manners would counsel caution in including the new natural law scholars at one's family dinner hour.
\textsuperscript{92}See Tasneem A. Grace, \textit{Fans Say "Springer" Is a Refreshing Slap in the Face}, POST-STANDARD (Syracuse, N.Y.), May 7, 1998, at C1.
\textsuperscript{94}See, e.g., \textit{Hatewatch: Anti-Gay Groups} (visited Sept. 2, 1998) <http://www.hatewatch.org/gay.html> (links to several anti-gay groups). Examples of anti-gay sites include "S.T.R.A.I.G.H.T." (Society to Remove All Immoral Godless Homosexual Trash) and "God Hates Fags."
\textsuperscript{95}See, e.g., Victoria A. Brownworth, \textit{Tying the Knot or the Hangman's Noose: The Case Against Marriage, in Too Queer: Essays from a Radical Life} 133 (1996) (asserting that "these two institutions [the military and marriage] . . . are predicated on the most repressive, oppressive, and dangerous aspects of society [and] are inherently heterosexual").
\textsuperscript{96}See generally Thomas R. Nilson, \textit{Ethics of Speech Communication} (1966) (summarizing standards for judging the ethics of discourse).
\textsuperscript{97}In 1991, the Cracker Barrel restaurants announced a policy of refusing to employ homosexuals on the grounds that it was "inconsistent with [Cracker Barrel's] concept and values . . . and with those of [its] customer base." See Norma Wagner, \textit{Gay Activists Target
binding conclusion would be predicated. Marriage is either too good for people of the same sex, or too bad. In both instances, the proposed consequence is mandatory—no person may marry another of the same sex. The visionaries among rejectors who claim marriage is bad may present an image of the destruction of the institution and its replacement by a utopian socialization of many of the benefits tied to marriage, but the practical reality is a negation. The non-visionaries just do not like marriage and do not want gay people to participate in it. Responses from gay advocates are invariably respectful, with replies broken into arguments that explain marriage as a good thing, or not all bad. However civil the treatment within the gay community of the message of naysayers to marriage, the rejection of marriage arises from total visions that impose command frameworks over the construction by individuals of intimate associational descriptive terminology and personal, affiliative, and group interpretations of their broader meanings in society. The operational mode bulldozes language.

C. Natural Law Scholars—Is Anybody Listening?

Natural law scholars present the most serious effort to construct an argument to suppress recognition of the speech acts of marriage participants. In addition, the arguments disregard the speech of partici-


98 See Paula Ettelbrick, Since When is Marriage a Path to Liberation?, OUTLOOK NAT'L GAY & LESBIAN Q., Fall 1989, reprinted in SAME SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, supra note 32, at 164.

99 See, e.g., Chambers, supra note 12, at 485–91 (considering specific practical doubts by gays and lesbians about the benefits of same-sex marriage). One of the primary litigators on behalf of gay marriage rights has also made the obligatory bow to radical objections to marriage. See Evan Wolfson, Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 570–71 (1995) ("I join here in this intra-community discussion despite my belief that the time for a debate over whether lesbians and gay men should seek our equal marriage rights has passed . . . [I]t seems to me that we must now unite . . . .")

100 See Ruth Colker, Marriage, 3 YALE J.L. & FEMINISM 321 (1991) (in which Colker concedes her participation in a heterosexual marriage and supports opening up marriage to lesbian and gays but does not encourage the lesbian and gay community to make such legislation a high priority).

101 This Article, with its focus on the medium of language and the temptation to use terms such as "speech act," can be placed near literary theory concerning the social construction of language and the terminology of speech act theory. While all of this lurks in the background and carries potential for developing or altering insights in this Article, over-intellectualizing is at odds with the effort of this Article to evoke a constitutional tradition that is best understood through reflecting on the anti-democratic consequences of disregard of speech grounded in the lives of citizens and which may be eff ectuated by the use of common sense and goodwill in legislative bodies unconcerned with literary theory.

102 By engaging respectfully with these arguments, Professor Koppelman has forcefully demonstrated their ultimate failure. See Koppelman, supra note 14, at 92–95.
pants in same-sex marriages, in the sense that nothing reported concerning human good is used in the construction of the understanding of intimacy presented by natural law proponents. The words of gay people are discounted as a source of knowledge or insight. While the natural law work is infused with a highly developed set of linguistic conventions and modes of discourse, it nonetheless contains a core linguistic vacuum: the virtually complete absence of the texture of the lives and speech of the primary subject treated in the material. This vacuum is a constant presence in the anti-gay marriage discursive range; a throwback to a time when gay people did not occupy a subject, or agency, status in public discourse but were only the object of speech dominated by distancing, and degrading, locations. This vacuum undermines the status of speech as a useful input in a modern democracy constructed by incorporative strategies drawn from ideals of respect and dignity. To indulge in mild anti-intellectualism, or anti-clericalism, the civil quality of the debate between natural law scholars and their critics is lost on the typical outsider to their learned debate, who is unprepared for the irrelevance of outside perspectives on personal authenticity and norms of inclusion.

103 John Finnis affirmatively attacks the perceptual capacity and the speech capacity of gay persons to create insights about the good of their lives, arguing that same-sex sexual relationships are destructive to the personalities of the individuals involved. See Finnis, supra note 17, at 1067. See also Nussbaum, supra note 52, at 1525 (discussing Finnis' views, drawing primarily on his affidavit provided in the Colorado Amendment 2 case). Finnis' claim is derived from a view of the unique capacity of male and female bodies, when united, to perform a "reproductive-type" act. See, e.g., George & Bradley, supra note 15, at 301–02. This view is also softened by occasional concessions ("whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their sexual acts" Id. at 314). Nonetheless, the nature of the claim neglects both self-reporting and self-knowledge as a source of insight.

Despite its philosophical rigor and partially respectful tone, the natural law work of Catholic scholars appears at first blush to be a throw-back to the discredited work of psychiatric professionals, whose generalizations about individuals with an attraction to the same sex were based on an absence of contact, or knowledge about, the majority of "homosexuals," that is, those who had not sought psychiatric treatment. See RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981). Koppelman has provided distinctions, however, that suggest that Professor Finnis should not be assimilated into the older psychiatric pathologizing of homosexuality. See Koppelman, supra note 14, at 84.

104 See Finnis, supra note 17, at 1067; Nussbaum summarizes Finnis's response to evidence from Greek texts of the goods that arise from same-sex sexual relationships as the bare assertion that "[s]uch people are in the grip of illusion." Nussbaum, supra note 52, at 1601. Nussbaum also describes Finnis, in his Colorado affidavit, as "individual[ing] actions extensionally, not taking into account the thoughts of the parties about the sort of act they are committing." Id. at 1602.

105 See Butler, supra note 5, at 853–60 (describing the emergence of gay narratives into the public arena).

D. Listening Works Best

Anyone who reasons about or discusses same-sex marriage will discover a place somewhere on many registers of speech on the subject: same-sex marriage may be an interesting illustration of a point about political theory, or it may be a speaker's lifelong, all-consuming cause. It may be a catalyst to discuss something else, such as one's theory of the good in heterosexual marriage, or the evils of monogamous commitment supported by legal encouragement and linked to the distribution of social goods. But the register in which the meaning of modern day marriage, including same-sex marriage, is fashioned is that of a true open discourse—the register of democracy. It is this register in which marriage occurs—that of its celebrants, those who announce to all the world, "We are married," and to one another, "I do." Listening to the celebrants is a direct means of certifying the meaning of "marriage."

V. The Imbeddedness of Marriage in Language

A. Speech Creates Marriage

In contemporary American society, and in most cultures in history and the present, marriage has the common feature of occurring through the spoken participation of the parties entering into a particular marriage.\(^{107}\) In the simplest sense, it is spoken. Marriage comes into existence as an artifact of language that imposes a layer of interpretation over intimate conduct.\(^{108}\) Marriage exists because people say so through a series of spoken declarations. Their speech creates their marriages and invests their relationships with a dignity assigned by interpretation.

The speech of the marriage ceremony is both formulaic and spontaneous; modern ceremonies are dominated by language tailored by the participants. Archaic components persist in part—declarations of permanence are made by participants reassured by the availability of ready exit—while others have been substantially edited away. Few women promise to "obey" their prospective spouse. Yet all routinely promise that the marital bond created through speech is unbreakable. The language of ceremonies reveals the archaic components participants still celebrate.

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\(^{107}\) In the Roman Catholic Church, a marriage arises by the couple's act of marrying one another, not through any statement by the presiding priest, such as, "I now marry you." "A Roman Catholic priest at a marriage ceremony will never say, 'With the authority vested in me, I now pronounce you husband and wife.' It [is] not his pronouncement, it [is] the couple who marry one another." Father Robert L. Arpin, in *LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES*, supra note 6, at 241, 244. See also AUSTIN, supra note 35, at 5–6. Cf. Tyldesley, infra note 180 and accompanying text.

while creating an oral record of the rejection of gender norms as a pervasive component of marital aspiration.109

The speech of the ceremonies creates the understanding that the two participants have become a married couple and shapes the social understanding of what that statement means. The recurring social ceremony involves repeated enactments of a series of statements that are internalized and given significance by those attending and listening to the repetitions and variations. Marriage ceremonies provide continual affirmation of speech as a human act vested with high significance and moral agency and affirm the importance of questing for understanding of human bonds.

B. Marriage Speech—Persistent, Politically Evolving, Collaborative

The continuing cultural prominence of weddings as a communal act constitutes a visible celebration of spoken vows as an act of great seriousness and moral moment, in which two participants alter their personhood through speech done in a public setting and fashioned by them. The resurgence of weddings underlines the persistence of a need to situate marriage in an oral statement that provides a definitional and interpretive overlay to the verbal conclusion that two people are married.

In some sense, those who listen to the spoken words are hearing an evolving social encryption of the symbolic codes of marriage. This occurs through a continuing and explicitly democratic collaboration of speakers creating the usages of marriage and listeners absorbing and reflecting the deeply sensed grammar of marriage. It is a linguistic undertaking that is part of an ongoing creation controlled by the choices of a revolving collective of persons taking turns as arbiters of usage and as objects of their fellow citizens’ indulgence as featured speakers on “their day.”

Marriage ceremonies are now similar to old-fashioned civic orations: a moment for the common person to have her say.110 Rather than, “What it means to be an American,” the marriage ceremony as an oration addresses, “What marriage means to me.”111 While decriers of change might

109 But see Gustav Niebuhr, Baptists Amend Beliefs on Family, N.Y. TIMES, June 10, 1998, at A1 (reporting Southern Baptist Convention’s declaration that a woman should submit herself graciously to her husband’s leadership).

110 See DAVIS, supra note 9. In constructing her argument about family autonomy and “Motivational Stories,” Professor Davis compiles historical accounts of “abolitionist weddings” in which women who were active in abolition politics entered into marriages in conjunction with public ceremonies that affirmed values of equality and autonomy for women and rejected the state laws of marriage that subjected women to the loss of legal personality. Professor Davis tellingly comments on the wedding of Lucy Stone and Henry Blackwell: “The wedding was intended as a public political act.” Id. at 47.

111 “The [marriage] ceremony was symbolic, so we thought it was important that our symbols be correct and right on. We wrote everything, with the exception of the rabbi’s sermon. We wrote from our hearts, and that involved a tremendous amount of soul-searching, and rewrites, and time.” David Craig, in LESBIAN AND GAY MARRIAGE: PRIVATE
view this as alarming and disintegrating,112 it is reassuring to believers in the genius of democracy. It unites by rites of participation that authorize and celebrate speech. It has the liberating potential to give lives their voice and achieve democratic change.113 Indeed marriage celebrations have created the basis for alterations in the institution, both socially and legally.114

The history of the institution of marriage in the West is consistent with the contemporary claim of the common speech to be the proprietor of the term. Marriage has evolved in the direction of individual control over its incidents and its symbolic significance. Interpretation has moved away from the church hierarchy and toward the participants, from canon law to civil adoption of common usage.115 Historical trends validate the status of marriage as embodied in speech organically connected to lives.

C. The Parity of Gay Marriage Speech

Gay people have joined the chorus of speech, participating in the spoken communal life of intimate bonds through marriage ceremonies with the same elocutionary range as heterosexual marriages. Gay people draw on prescribed liturgies, using existing marriage protocols in whole, virtually unchanged,116 or deploy coinages, narratives and expressions that, like heterosexual couples, they devise to discover and communicate social meanings arising from their capacity as speakers and their understanding of marriage. In a variety of religious traditions, presiding persons officiate in ceremonies for same-sex couples using the same language as for opposite-sex couples. The speaking of prescribed forms in new contexts is itself a highly personal and intensely voiced contribution to the record of democratic speech.117 The act of claiming the text makes it one's own, transcending mere recitation.

The naysayers to marriage call marriage ceremonies "mimicry" of heterosexual practices; however, "to mimic" another rather than to claim

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112 See, e.g., Lasch, supra note 67, at 17–19 (decrying balkanization of opinion).
113 See Davis, supra note 9, at 47 (confirming the democratic significance of wedding ceremonies and situating the confirmation in the activities of a historical vital instance of American democracy as an agent for change, self governance, and human enrichment).
114 See id.
115 See John Witte, Jr., Consulting a Living Tradition: Christian Heritage of Marriage and Family, 1113 Christian Century 1108 (1996); see also Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443 (arguing that family law has become increasingly privatized over the last 25 years).
116 See Ceremonies of the Heart: Celebrating Lesbian Unions 133 (Becky Butler ed., 1990) ("We changed the vows a little and put in nonsexist language, but for the most part it was a traditional church wedding.").
117 "I like stretching the meaning of the term [marriage], taking a term that has traditionally been heterosexual and changing the meaning for us." Frances Fuchs, in Lesbian and Gay Marriage: Private Commitments, Public Ceremonies, supra note 6 at 189, 191.
authenticity is a speaker’s choice, not an attribute that can be imputed by an observer or listener to one speaking with a sincere purpose. Intensely felt and earnestly intended speech is not in the affective register of imitation. Indeed, the idea that conduct or speech undertaken without irony constitutes “copying” behavior is similar to arguments directed in the past at racial and ethnic minorities and other outsiders, whose assimilation to majority was greeted derisively before being accepted as an ordinary transition into prevailing customs.118

The speech in which gay marriages are made is not derivative, artificial or inauthentic. Rather, it is the morally charged speech of citizens constituting a foundational institution of the democracy and intensifying their individual citizenship by combining voices to create a vividly manifest and organically valid constituent of our common life. No amount of mockery can undo their speech or defeat its effect as a democratic oration. Like other marriages, gay marriage is imbedded in language, arising from the command of citizens over speech and altering common meanings in the unfolding of democratic voices.119 Marriage is a story which multiple voices participate in telling about themselves.

D. A Quibble: Is Gay Marriage Speech an Infelicity?

If gay marriage speech is sincere and thereby not artificial or imitative, is it nonetheless what J.L. Austin called an infelicity,120 a performative speech that simply does not work? One can address the question globally: Do we see immediately that the speech is unable to create the intended effect? We could make such a conclusion only if we adopted the same circular reasoning that once served to rescue judges looking for an easy answer to same-sex litigants who had applied for a marriage license.121 For the most part, that answer has exhausted its capacity to per-

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118 For example, see the nineteenth-century realist novel by William Dean Howells, The Rise of Lapham 152–89 (Don L. Cook ed., 1982) (1884) (containing a famous dinner party scene in which the pretensions of a paint manufacturer to rise into Boston Society are disastrously undone by his lack of understanding of the social customs of the class he is attempting to enter and the social unease and incongruity that results).

119 Sylvia Law argued 10 years ago that the thinking and speaking of gay people and women about their experience creates “new voices” with an impact on religious and scientific thought on homosexual behavior. See Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 187. Referring to a “new understanding” generated by collective consciousness-raising of women and gay people, see id. at 206, she highlighted the effect of the mainstream media on sexual openness, see id. at 207. The factors constructing such voice have only intensified and accumulated during the last 10 years. The Unsayers undertake to delete the social meanings constructed and altered by the record of contemporary, intensely voiced democratic speech. While the ability to coerce the lives of gay people has substantially dissipated, as well as the ability to erase the presence of gay people, see id. at 212, Unsayers still attempt to suppress signs in the public record of the voice that has changed mainstream speech.

120 See Austin, supra note 35, at 14.

121 See Richard D. Mohr, The Case for Gay Marriage, 9 Notre Dame J.L. Ethics &
suade, although, of course, the natural law theorists maintain that marriage is definitionally, inherently, and in every-other-way opposite sex.\textsuperscript{122} Yet J.L. Austin did not peg his analysis of infelicities to such arguments concerning intrinsic meanings. We know that the social and legal meaning of marriage has not been so stable as has been thought.\textsuperscript{123}

Thus, if Austin has anything to offer on the point, it must be his specific argument and not just an appealing and learned-sounding term for the fading claim that marriage means heterosexual coupling and nothing else. As it happens, Austin used marriage as an example to illustrate both a performative act and an infelicity. An infelicity occurs when one of six conditions specified by Austin for a performative to be "happy" and to do the thing the performative purports to do does not occur.\textsuperscript{124} Two of these relate to sincerity and have been disposed of above in the description of the intent of persons engaging in gay marriage speech.\textsuperscript{125} The other necessary conditions are concerned with convention—the existence of "an accepted conventional procedure having a certain conventional effect[ ]" and the understanding that "the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked."\textsuperscript{126} Austin cites as instances of infelicities in a marital performative act the problems (in the case of a shipboard marriage ceremony) "that we are not in a position to do the act because we are, say, married already, or it is the purser and not the captain who is conducting the ceremony."\textsuperscript{127} Austin's example is instructive primarily for preserving an unselfconscious record of the background confidence with which conventional assumptions about marriage could be deployed. Austin was not referring narrowly to legalistic conventions but to cultural conventions; conventions that persist in the matter of uncontested marriage speech. A performative worked if it was supported by conventions of meaning, which were, and are, matters of general agreement.

\textsuperscript{122} See George & Bradley, supra note 15, at 301, 305 (arguing that the intrinsic value of marriage is realized by sexual acts of a reproductive nature).

\textsuperscript{123} See Mohr, supra note 121, at 221 (describing the "definitional failure" in state codes of marriage).

\textsuperscript{124} See Austin, supra note 35, at 14-15. The six conditions are (1) participation in a conventional procedure that includes the utterance of specific words, (2) the participation of the appropriate persons and existence of particular circumstances, (3) correct execution of the procedure by all participants, (4) complete execution of the procedure by all participants, (5) participants actually have the requisite thoughts and feelings and intend to go through with the requirements, and (6) participants subsequently conduct themselves according to the requirements.

\textsuperscript{125} See supra text accompanying notes 110-112.

\textsuperscript{126} Austin, supra note 35, at 14-15.

\textsuperscript{127} Id. at 16.
By contrast, the background assumptions in today’s marriage speech render the example risky. If the performative would not fail in the case of two people of the same sex for simple reasons of convention and consensus, then the performative does not fail in any simple sense. Gay people marry one another, within the meaning of marriage speech with wide currency. Such failures as occur have to do with a willful refusal of some listeners, including state legislative bodies, to respect the change in background convention about marriage meaning that has occurred. Thus, Austin’s example is revealing, not as an illustration of gay marriage speech as an infelicity, but as a lesson in the background cooperation involved in adjusting convention to match the meanings of those who speak with sincere intent. In Austin’s example, law was assumed to match usage.

VI. Contradictions and Complexity—Archaic Forms and Contemporary Understandings of Marriage

The social meaning of marriage is complex and cannot be readily summarized. Indeed, it has the quality of a spoken, communal work of art, which cannot be comprehended in a single perceptual moment. Understanding marriage requires a lifetime of observation and reflection on the marriages one knows, the usages one hears, and the expectations one forms. Marriage is heavily embedded in an oral tradition, where shifting meanings resonate in jokes about being married, celebrations of marital bonds, and lamentations of the confinement marriage brings. This complexity is a quality of its being imbedded in language, emphasizing the sovereignty of dispersed speakers over the definition of marriage and the undemocratic nature of Unsaying official definitions. Archaic gender forms persist while contemporary understandings coexist; antiquated usages are tolerated because they lack importance given the real speech of marital life. Marriage speech is known to be secure in the tongues of the people.

128 See Boswell, supra note 72, at 9 (“It is nearly impossible to formulate in a precise and generally acceptable way what is meant by ‘marriage,’ either by modern speakers or in ancient texts.” (citing Ellen Kandoian, Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life, 75 GEO. L.J. 1829, 1861 (1987), which states that “[t]here can be no single answer to the question, what does marriage mean; each culture must seek its own answer.”)).


130 See, e.g., Davis, supra note 9, at 6 (noting impossibility of capturing history and culture in their complexity) (citing Louis O. Mink, Narrative Form as a Cognitive Instrument, in The Writing of History: Literary Form and Historical Understanding 129, 135–41 (Robert H. Canary & Henry Kozicki eds., 1978)).

131 A well-cherished and equally well-worn joke from recent times belonged to the comedian Henny Youngman: “Take my wife—please!!”
A. Defining the Married Self—Friends, Forms, and Strangers

The psychological comfort and social status associated with marriage derive from a common belief that two people have altered their relationship in a manner that redefines their collective personality and reconfigures their own and others' perception of their individuality and their autonomy. Those who have married have experienced the emerging awareness of institutional weight that alters their common awareness of who they are. The novelty of calling another "husband" or "wife" gradually dissipates as the participants in a marriage are validated by outsiders treating the relational terms as genuine embodiments of an altered essence. The traditionally gendered aspect of marriage has lent simplicity and the reinforcement of literalness to the power of language to alter understandings of the persona of those who have married. In the lexicon of gendered marriage, "wife" and "husband" gain the same sense of grounded meaning as "brother" and "sister" or "mother" and "father." They seem to be a part of the naturally occurring relational categories brought about by concrete facts. The weight of "wife" and "husband" as experienced by participants is further augmented by its confluence with the terms "mother" and "father" and, at least in the past, its close connection to the terms "Mr." and "Mrs." 132

The sources of collaboration in deepening the meaning of the term to participants are rich and varied. The enclosure of two people in an arrangement that has a key characteristic of privacy and exclusion is recognized by many subtle signs, such as stylized treatment of the couple as a unit for purposes of communication with either party in personal matters. There is an expectation of a common will expressed through either of the parties to the marriage, and the expectation of coordination in the making and implementation of social plans.

Printed forms continually reinforce the significance of the marriage status, while communicating a deceptive simplicity and uniformity re-

132 Indeed, in the author's personal memory, these binary concepts of marriage and gender were explained as conveying social information about the understandings of Clute, Texas in 1953. Adults in Clute were married and their sex was identified with their marital title. See Telephone Interview with Mary E. Kuykendall (Feb. 7, 1999). My family's neighbor, Mr. LaBeth, was a man, a husband, and a father. Our other neighbor, Mrs. LaBeth, was a woman, a wife, and a mother. It was important to remember to call him "Mr." and call her "Mrs." Mr. LaBeth's younger brother was not married. We were told to call him "Bo."

The distinctions required memorization by the initiate and led to embarrassment and hesitation in addressing or referring to either of the LaBeths and utter refusal to call an adult "Bo." With repeated personal practice aimed at complying with the linguistic authority of Clute adults, the sense of novelty and the perception that adults had arbitrary power to mandate odd distinctions dissipated because of the pervasiveness of the adult usage in Clute. Yet, in rolling the strange phrases over my tongue, there was a lurking sense that the language was mine and, with the experience and command I would accumulate as a speaker, someday I would find my own words to describe the world my parents were interpreting for me.
lating to the underlying marital narratives. Marital status commonly appears as a type of fundamental identifying characteristic on par with age, sex, and citizenship. Forms precipitate a type of coerced speech, in which users are drafted as speakers assigned a vocabulary with a fixed set of reference points resistant to qualification. For gay people who have formed an intimate partnership but do not have the option of state-sanctioned marriage, the choices of married, single, or divorced all constitute distortions. Even for a gay person with no attachment, the choice of “single” constitutes a partial distortion, since it negates an inapplicable category. It also implies an openness, at least as a linguistic matter, to becoming resituated in the form’s vocabulary into the choice of “married.” Gay people fill them out, knowing their spoken lives are untouched.

In addition, forms sometimes have imbedded in them a special vocabulary and logic relating to an affirmative female response to the marital data point. A woman’s status as married raises distinct issues on some forms, such as, “Do you work outside the home?” The form of this location locates the woman in “the home,” from which, according to the species of social usage preserved in the form, she has a qualified capacity to emerge. The preservation of such usage in an environment like a university medical center may contain a class component, pursuant to which information about the typical married female form user’s status as a worker “outside the home” is deemed to match the underlying usage in a manner that yields useful information by prompting further questions, perhaps about patterns of purchasing insurance. Female married law professors are classified on such a form as “working outside the home.” Thus, the social knowledge apparently imbedded in the ubiquitous standard form contains archaic usages at odds with concurrent common usage. Professional women tolerate them, returning from the odd moment of distorted speech to their living speech. More traditional women may be reminded of their enclosure in a gendered marriage.

Nonetheless, forms communicate to their users rudimentary theories of marriage and preservation of usage relating to gender roles (with a likely subtle connection to class norms). The frequency with which individuals in the information age fill out forms provides a quasi-ritualistic occasion for reinforcing the social process of investing the marital status

133 University of Michigan hospital form.

134 Assuredly, egalitarian marriages exist in which women do not see their circumstance as enclosure. Nonetheless, contemporary understandings include that element of the arrangement between men and women in some marriages. When a man works and his wife remains at home, it is common that her friends visit during the day and leave in late afternoon to avoid interfering with the evening hours. This practice is a remnant of an earlier clear understanding of women’s status in marriages. See, e.g., NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 99 (1999) (quoting Thomas Jefferson’s view that a wife was “confined & subject”).
with central significance in the vocabulary of personal identity. The same form that accords a female "speaker" a choice of de-emphasizing marital status by choosing "Ms." as her title typically reinstates variants of social usage by questions relating to marital status, which, in some instances, figure special expectations regarding the married female as compared with the married male. Such forms bear a quasi-official status, keying off concepts that lurk in social usage but also adopting a state-sponsored vocabulary to create arrays of data hypothesized as being relevant to the purposes for which forms are used. In tracking the state's vocabulary for marriage, forms preserve usages that overemphasize gender as a linguistic presence in contemporary life and even refute substantial components of the gender neutrality of other state sponsored speech.

In conversation with strangers, participants in marriage interweave references to their marital status casually, sometimes with prompting and sometimes without. In rural America, it remains common for a man to approach a woman by asking, "Is your husband in?" If he is approaching to ask about performing construction work on the roof of her house, he is more likely to ask to speak to her husband than if he is approaching to sell her magazine subscriptions; although any decision to direct household resources toward a non-routine purchase may still trigger, in some areas, a request to speak with the woman's husband, who is presumptively incorporated into the woman’s personal identity, sense of personal autonomy, and usage unless she rebuts the expectation. The form of the rebuttal could be to assert personal autonomy in directing collective resources, competence in negotiating the purchase of and

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135 The significance is reinforced in adults, see id. For a discussion of the way such significance is reinforced in children, see supra note 132.

136 Variations reported to have occurred recently in Tomball, Texas, include, "Where's the boss?" and "Where's the man?" Telephone Interview with Mary E. Kuykendall (July 15, 1997). Such a usage has deep roots. See, e.g., Boswell, supra note 72, at 11 ("A further complication in analyzing [Greek terminology regarding marriage] is presented by the fact that the common words for 'husband' and 'wife' were simply the nouns for 'man' and 'woman' (cf English, 'I now pronounce you man and wife.'").

137 In a telephone call received in Ann Arbor, Michigan, a salesman of aluminum siding asked the female answering the phone, "Is the man of the house going to be home tonight?" To the response, "Why are you calling?", the man answered, "I would like to make an appointment with you and your husband to discuss aluminum siding for your home." Telephone conversation between Cheryl Zupan and salesman (Sept. 26, 1998).

138 A reported rebuttal that occurred in Alpharetta, Georgia, a suburb of Atlanta, approximately six years ago took the form of a vociferous statement concerning comparative earning power and mastery of mechanical objects in the household. A salesperson rang the doorbell. The resident of the household, Londi Sue Harmon, answered. The salesperson said he would like to demonstrate a vacuum cleaner to her and her husband. He asked if her husband was "presently" home. Ms. Harmon asked, "Why do you need to speak to my husband?" The salesperson said he wanted to explain the financing and operation of the vacuum cleaner to the "breadwinner" of the household. Ms. Harmon responded by saying that she made twice as much money as her husband, not to mention that he was "clueless" as to the operation of a vacuum cleaner. She then closed the door and ended the encounter. See Interview with Cheryl Zupan in Ann Arbor, Mich. (Sept. 25, 1998).

At one time, the salesperson, today's reliquary of speech, embodied a cultural
supervision of the completion of male-identified tasks such as construction work, or the disclosure of the identifying characteristic of marital status by revealing its nonexistence.

Confidence in usage sometimes varies from formal recognition of the marital status. Speakers occasionally betray a sense of implausibility in their validation of a marriage that keepers of ritual and law have certified. For instance, disparities in age can make speakers reluctant to deploy the terms to apply to a legal union between two people who depart from the standard expectation of a marriage blessed by the longest strand of usage, that is, a marriage contracted in youth between a man and a woman of approximately the same age, with any seniority being in favor of the man and no greater than two or three years, and with such marriage producing children.\(^{139}\)

Families are replete with instances of resistance to accord the status of "wife" to a subsequent spouse who appears, as a result of various discordant characteristics, to create an anomaly in usage; formal rules extend the status without restriction to persons not prohibited by any formal disability, of which there are few. Such acts of verbal resistance within families to the marital choices of family members confirm the role of outside collaboration in investing the term marriage with meanings, while also entrenching the autonomy of consensual individual choices to apply the term to a two person relationship and the neutrality of the state in mediating usage within a wide parameter. Friends, forms, and strangers have their say and are shrugged off; people know that individual choice holds sway over the affective and constructive language of their marriages.

**B. Heterosexual Marriage Speech: Marginalizing Official Speech**

The neutrality of the state, in the context of marriages with an uncontentious pedigree in usage, that is, heterosexual marriage, is of con-
stitutional significance. Communitarian referees of usage, dissatisfied with such a state of affairs, have begun pressing the state to undo indirectly such neutrality by creating a more nuanced standard vocabulary for marriage, for example, by creating a “covenant” marriage, imagined to be the type of marriage the ending of which they resist with noncollaborating usages. Such efforts to weaken the neutrality of the state constitute struggles over usage; the individual authority of users who are participating in a marriage is placed under community pressure to restrict the linguistic flexibility with which they may deploy and re-deploy the term marriage. The existence of heightened nuance in the state vocabulary narrows the autonomy of the individual user and strengthens the ability of outsiders to reject deployments of the term that they regard as anomalous or arbitrary. But it is only intimate associates who gain linguistic power over usage by heterosexuals through a deepening of the state vocabulary of marriage; the roofer who approaches a household will carry with him a neutral vocabulary of marriage derived from ideas about gender. Such an outsider draws from the usages of commerce as influenced by deep presumptions about gender and male empowerment, without regard to the linguistic credibility of a particular joint project to create either intimate or community meanings concerning a common identity. The same intimate associates who might raise a linguistic resistance to a particular claim to marital status are often more like the salesperson, according the presumption of marital dignity in a manner entirely neutral as to any factor other than gender. Thus, the state has a limited ability to enact a general vocabulary of marriage for use in ordinary civil life among the heterosexual majority: meanings remain firmly situated in the tongues of speakers, who respond to a complex variety of circumstance and context.

The perceived flux in baseline meanings accorded to marriage by the conduct and speech of citizens has prompted at least one governmental effort at intervention in the vocabulary of marriage used by heterosexuals. Both the relative impermanence of contemporary heterosexual unions, compared with former social practice, and a background need to shore up heterosexual marriage, compared with the allegedly inferior union of same-sex partners, has pointed some toward an enhanced vocabulary of opposite-sex marriage. Some “marital language policy” is

140 See Loving v. Virginia, 388 U.S. 1 (1967). Loving can stand for the principle of state neutrality and the autonomy of two individuals to invest their relationship with meanings and legal consequences carried by the term “marriage.” However, the constitutional significance of the capacity of individuals to create meanings associated with the intimacy and protection of marriage is evoked throughout constitutional discourse. See, e.g., Turner v. Safley, 482 U.S. 78 (1987) (regarding right of prisoner to marry); Zablocki v. Redhal, 434 U.S. 374 (1978) (involving right of deadbeat dad to marry); Meyer v. Nebraska, 262 U.S. 390 (1923) (regarding right to marry, establish a home, and bring up children).

141 See, e.g., Covenant Marriage Act, LA. CIV. CODE ANN. art. 102 (West 1998).
based on the perceived need for a reinforcement of the meaning of marriage thought to have been at the core of social practice in the nineteenth and early twentieth century.\textsuperscript{142} In this regard, the movement to create contract commitments to "old-fashioned" marriage are aimed at reinforcing the idea of marriage with a definitional component of permanence, which reinforces traditional ideas that sexual relations must be monogamous and standard.

The concern about permanence is generally articulated in connection with the production and nurturing of children, an activity associated with heterosexuality. A marital grammar of permanence carries a strong imprint of opposite-sex meanings, and, indeed, of socially enforced male access to a given female.\textsuperscript{143} Despite this, the language as mediated by authoritative constitutional guardians implicitly forecloses definitions that qualify access to marriage by the willingness to bear children; it is unclear that the state could create a status of marriage restricted to persons who agreed in advance that the continuation of the status was conditional on child-bearing.\textsuperscript{144} Moreover, it is not clear that general usage as deployed by ordinary users would tolerate the creation of heightened marital statuses distinguishing among heterosexual marriages on the basis of personal identity characteristics other than gender.\textsuperscript{145}

Thus, in the lexicon of heterosexual marriage, attempts at state speech contain elements of incoherence that reduce the volume of the speech. The incoherence has its deepest source in the effort, however inexplicit, to reinstate opposite-sex norms tied to the rejected legal and social regime of male control over the grammar of marriage. State efforts to "respeak" heterosexual superiority are out of sync with a trend toward an officially sex-neutral vocabulary of marital rights and obligations.\textsuperscript{146} The

\textsuperscript{142} This definition of marriage is enshrined in the Encyclopaedia Britannica of that era: "Marriage . . . may be defined . . . (b) as a physical, legal and moral union between man and woman in complete community of life for the establishment of a family." ENCYCLOPAEDIA BRITANNICA (11th ed. 1911).

\textsuperscript{143} See Katharine T. Bartlett, Gender and Law: Theory, Doctrine, Commentary 22 (Aspen 1993) (citing Sir Matthew Hale, 1 The History of the Pleas of the Crown 628 (1 Am. ed. 1847) (1736)) ("[T]he lawful husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.").

\textsuperscript{144} See Loving, 388 U.S. 1; see also Meyer, 262 U.S. 390.

\textsuperscript{145} It is of course true that the core usages concerning marriage do tolerate some restrictions on formal access to the status as granted by the state. Consanguinity is the traditional basis of a restriction recognized in state statutes. See Ottenthalme, supra note 11, at 19-41.

\textsuperscript{146} For example, the requirement that men support their families is as a formal matter a gender-neutral requirement of financial responsibility. Rules against sex discrimination have invalidated differential treatment of spouses, in matters such as pensions, based on sex. Men may now be conceptualized as, and given the legal benefits of being, dependents. See, e.g., Orr v. Orr, 440 U.S. 268 (1979) (requiring that alimony be gender neutral).

The doctrine of necessaries is a good example of courts' struggle over the old gender-related support doctrine. Under common law, a husband had a duty to support his wife,
volume of "reinstating speech" overall about heterosexual marriage is strong;\textsuperscript{147} yet, it is decisively marginal. Its marginality results from legal and social norms of sex equality that have transformed the grammar of marriage. A critically large social formation of a grammar of gender equity is expressed in the daily speech of verbal women,\textsuperscript{148} court decisions unpacking relationships and marriages that did not follow any prescribed grammar of sex roles, legal norms of nondiscrimination, and social practices imbedded in the speech of men claiming the liberating aspects of the new grammar of sexual roles. Thus, there will not be a clearly expressed state revival of a traditional vocabulary of heterosexual marriage. That fact renders the reinstating language of the Unsaying enactments on gay marriage coherent by contrast, but unpersuasive and inflexible. The gay marriage codes are symbolic restorations of a grammar governing a subject matter not affected by their enactment. As such, they lack the legitimacy of legislation grounded in a sincere purpose to respond to an identified need,\textsuperscript{149} as measured by simple features of the linguistic medium in which a state grammar of intimacy might arise.

\textbf{C. Same-Sex Marriage Speech beyond a Homosexual "Ghetto"}

The ability of anti-homosexual political forces to marshal majoritarian support for a "defense" of straight marriage and the continuing assumptions about the relation between gender and marital status and between marital status and gendered roles does not preclude the extension of new usages into a general vocabulary of marriage. "Friends, which was not reciprocal. The husband provided support and the wife provided services. Under the doctrine of necessaries, a third party who provided necessaries for the wife could recover from the husband. Recently courts have struggled with the gendered aspect of the doctrine. See, e.g., North Ottawa Community Hosp. v. Kieft, 578 N.W.2d 267 (Mich. 1998) (discarding the doctrine). Other courts have revised the doctrine to be gender neutral. See, e.g., North Carolina Baptist Hosps. v. Harris, 354 S.E.2d 471 (N.C. 1987).

\textsuperscript{147} See, e.g., \textsc{William J. Bennett}, \textit{The Death of Outrage: Bill Clinton and the Assault on American Ideals} (1998) (explaining the need to put sexual conduct "under ritual and marriage vow").

\textsuperscript{148} See, e.g., Interview with Cheryl Zupan, supra note 138.

\textsuperscript{149} They suffer the linguistic costs associated with insincere speech. See \textsc{Orwell}, \textit{Shooting an Elephant and Other Essays}, supra note 48, at 88–89 ("The great enemy of clear language is insincerity. When there is a gap between one’s real and one’s declared aims, one turns . . . to . . . exhausted idioms . . . .").

I have previously noted the evacuation from restated federal marriage code of any aspirational content for the reinstated tradition of marriage. See Kuykendall, supra note 40, at 204–05. The aspirational content of marriage required a Procrustean bed to achieve a fit between the heterosexual practice of serial marriage and the assertion of traditional content by the exclusion of same-sex pairings. Slicing off norms was necessary before a traditional definition could be promulgated that would include all heterosexual marriage and exclude all homosexual marriage. But see \textsc{Lynn D. Wardle}, \textit{Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage}, 39 S. Tex. L. Rev. 735, 768 (1998) (arguing that claims for same-sex marriage provide an opportunity for proponents of "covenant heterosexual marriage").
forms, and strangers" do not only deploy traditional meanings to infuse relationships with an embodied set of meanings. They also adopt the self-definition of participants in marital units, including gay people. Despite the ease with which gay marriage can be marginalized in general political discourse or overlooked in specific instances of common usage, the absorptive characteristics of the language nonetheless bring it into usage. The complexity of the concept of marriage and the proliferation of informal defining locutions brings gay marriage into general circulation, beyond the confines of a gay linguistic ghetto.

Archaic patterns of usage persist in informal communications about marriage. Simultaneously, the evolution away from norms of male superiority and toward gender parity in marriage points general usage toward a sufficiently ungendered meaning of marriage as to include all unions of intimacy and nurturing that are intended as marriages. Usage that recognizes same-sex partnership as marriage is spreading among heterosexual speakers. Unsayers sometimes forget themselves, responding to the meanings that are applicable to the circumstances they encounter. A Baptist deacon, on his way home from the funeral of his brother’s same-sex partner of thirty years, compares the families that he and his brother "married into." The child of a conservative Catholic father adopts the usage “stepmother” in referring to her mother’s same-sex partner. The White House press office releases a joking nonconfirmation that “Barbara Streisand is going to marry Princess Di on Martha’s Vineyard this weekend.” These forms of anti-gay marriage codes are frequently used to define heterosexual marriage as a subset of a larger term, thereby acknowledging the term marriage as having a common currency that includes same-sex unions.

The complexity of the social understanding and the evolving meaning of marriage defeats the efforts of heterosexual speakers to quarantine the words of marriage from the domain of same-sex relationships. The immersion of all speakers in language draws them into using words that describe the realities they encounter. It is often noted that the language of commerce readily assimilates the expansion of meanings relating to marital customs. Average speakers, motivated by descriptive require-

159 See Interview with Donald Hebert in Chicago, Ill. (July 1996).
152 See, e.g., ARK. CODE ANN. § 9-11-107 (Michie 1997) (“All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts in this state. This section shall not apply to a marriage between persons of the same sex.”).
153 See generally Kuykendall, supra note 38 (discussing the irony of defining a term statutorily to assert that its meaning derives from a consensual understanding).
154 See, e.g., CEREMONIES OF THE HEART: CELEBRATING LESBIAN UNIONS, supra note 116, at 139. (“We also went to Hudson, a local department store, to register for the bridal registry. There were four couples, including us, and they just stuck Anna with the men and
ments of speaking about friends and relatives in same-sex unions, the profit motive, and their usual immersion in contemporary usage, cannot resist the expansion of their vocabulary to accommodate the complexity and evolutionary nature of the term "marriage."

As speakers reshape the term to describe their own conventionally gendered lives, they accept its reshaping by their contemporaries to apply to their comparable circumstances. The broader meaning of the term marriage penetrates the vocabulary of heterosexuals because of its functional application to the world they encounter and its patterns of conduct and affective meanings that their social nature draws them into describing, recounting, and evoking. Moreover, heterosexuals accommodate the deepening of the spoken texts of gay lives—the open references to "partners"—with adoption of such gay usages to describe their own marriages. It is not rare to hear an opposite-sex spouse described as someone's partner, creating ambiguity about the marital relation but affirming by a linguistic stance an idea of gender equality and homosexual parity. It is now a linguistic commonplace to require clarifications of terms of intimate association used in casual reference to domestic circumstances.

VII. The Method and the Futility of "Unsaying"

A. Unsaying

In marriage generally, the self-definition of participants creates meanings that cannot be erased, and in a democracy, the usages of participants constitute Voice with a factual, constitutional, and spiritual priority over oppositional voices, the speech of Unsayers. In her "Motivational Stories" that isolate the construction of the Reconstruction amendments, Professor Davis captures the spirit of Unsaying in quoting a slave master's response to a slave's speech asserting agency: "'I will make you know that I am master of your tongue as well as of your time.'"155 She captures the power of language to create Voice that is "too strong to be resisted by anything less than implacable prejudice."156

The reaction against same-sex marriage takes a form with heavily psychological components. It is a form of repudiation of the authority of speakers from whom one does not want to hear—a recognizable interaction to anyone who has participated in familiar arrangements in which an authoritarian figure mediates acceptable constructions.157 The reaction does

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155 See Davis, supra note 9, at 97 (quoting James W.C. Pennington, The Fugitive Blacksmith 2 in FIVE SLAVE NARRATIVES (William Lord Katz ed., 1968)).
156 Id. at 107 (quoting a man's appeal to his slaveholding brother to heed the cries of parents separated from children).
157 In a family with an alcoholic parent or authority figure, the term "alcoholic" and references to events that establish a family history of dysfunction become embargoed from
not take the form of discourse between speakers equally authorized to deploy language or report experience. They come to rest experimentally on a claimed superiority for opposite sex couplings that is stipulated, arising only from claims about the quality, religious in character, of opposite- sex sexual intercourse. The reports of same-sex couples occupy a void, displaced linguistically by the inarguable and unprovable claim of superiority and exclusivity for opposite-sex sex; its assertion precludes space in the world for Voice that offers accounts of same-sex sex.

It is a reasoned filibuster, taking up discursive space but also seeking to occupy psychological space that shuts out same-sex speech. It is most effective in the presence of those against whom it is used, because it silences by astonishing. The realization that no report of lives bears upon the discourse about lives renders them speechless. It is also effective with those who know nothing of gay lives, because it rejects the unheard and maintains a boundary in which gay lives are unspoken.

B. Unsaying versus Notsaying

The democratic nature of society renders the stupefaction of the gay speakers a partial success only, leaving the vital spaces of free speech open, the channels of improvisation, adaptation and idiom functioning. Gay speakers need not always face down carriers of linguistic conventions that squelch. Where once their speech was confined to a nether- world of secret signs and symbols, today they have the increasingly open channels of mass communication and the unconstricted closets. Because the society is open, strategies to destroy Voice fail. In the open society, techniques of filibuster do not construct lives or constric meanings; the language is too lively and the experience of freedom too hardy to allow for the enemies of grass-roots speech to eliminate the organic growth of language. By contrast, in a total environment such as the military, there is success in affecting the construction of common mean-

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family discourse. See Christian McEwan, Growing Up Upper Class, in Out of the Class Closet: Lesbians Speak, supra note 50, at 245 (applying the term "not-saying" to her family's rules of silence concerning her father's alcoholism).

158 See Koppelman, supra note 14 (according great respect to the arguments of the natural law scholars as being secular in character despite their roots in religious reasoning, but ultimately suggesting that the core claim about the superiority and even goodness of marital sex derives from its role as a sacrament in Christian theology).

159 See supra notes 1-7 and accompanying text.

160 See Cole & Eskridge, supra note 70, at 330 (referring to the First Amendment's insistence that groups receive "public space" for their "identities and voices"). But see supra text accompanying notes 67-71 (arguing that the common language belongs to all citizens and not to identities).

161 See Butler, supra note 5, at 853-60 (describing emergence of a positive gay narrative).
ings:162 organic meaning is driven underground; shadow worlds exist, with dual lives mediated by competing languages.163

In the wider society, the reaction against same-sex marriage is more patently pathological because it is transparently unreal. The efforts of the linguistic despot are vain in the wider arena of democratic speech. The form taken is Unsaying, attempted in an arena of open and healthy speech.

In the military, the form is Notsaying, a form that can succeed in a total environment—the thing that cannot be heard is not said, not spoken in any public sphere of the unhearing entity.164 While speakers still manage to find hidden cells, where speech matches meaning and tracks lives, the undertaking is fugitive and subtracted from the common life of the total community. All speakers become "draftees," speaking only prescribed words. Because draft armies work as well as volunteer, the linguistic war of the usage despot wins the battle at hand.

Resistance is utterly futile, because it is met by the instant deletion of the speaker. Those left behind exist within a genuinely impoverished linguistic world; like the proverbial child isolated from human speech, they suffer developmental disabilities that render their speech inflexible, less subtle, resembling that of subjects whose perceptual world is delimited.

Thus, banishment of speakers works but is impractical outside the military. Indeed, despite a sense that the suppression of slave speech worked because the control was despotic and total, the slave society and the owning society had permeable boundaries that allowed slave speech to create democratic meaning.165 The slave society could not afford the banishment that serves the military’s goal of editorial control. The Black Codes followed physical liberation resulting from political emergence.166

In similar fashion, the evolution of the language of marriage to include gay people has precipitated the enactment of “homosexual codes” for marriage intended to re-instate a prior but unstated meaning that had prevailed as a result of the de facto civil nonexistence of gay people. Indeed, the prior language of marriage assumed the civil nonexistence of one participant, the woman.167 The attempt to reinstate a meaning that could be taken for granted when gay people had no civil existence telescopes linguistic, legal, and psychological history, bringing to the surface anxieties about “marriage” as a union of equals having a parity of legal rights and comparable continuity in civil society. The linguistic resistance

164 See Halley, Don’t, supra note 25 at 125–31 (discussing how the military's conflation of status with conduct creates an irrebuttable presumption of homosexuality).
166 See Davis, supra note 9, at 114.
to a marriage of patent equals is anachronistic, a revival of the sense that marriage could not be a union unless the civil existence of one person—identified categorically by gender—vanished. The existence of gay people as parties to marriage magnifies the existence of women—a linguistic fact terrifying to the Unsayer, wedded to the state-sponsored editorial elision of various categories of humanity and speech. The redefinition of marriage is a complicated attempt to "make something true," or perhaps more accurately, to make something "not true," about gender, using presumed authority over state usage to "heckle" and harass the common speaker. It is also an attempt to decree the immutability of a word.

C. The Unsaying Conceit

Thus, the reaction against marriages between people of the same sex is more than Naysaying. Naysaying doubts, resists, discourages. Naysayers about same-sex marriage say courts should not recognize it against popular will, because the danger is too great. Naysayers claim the time is not right. The form of the re-enacted marriage codes, and the anti-gay movement, is Unsaying.

Unsaying is deeper than censorship; censorship acknowledges, advertises and relishes the vitality of the speech it suppresses. Unsaying claims speech did not happen and denies that it can happen. Arising from fear, Unsaying stakes out a stance of nonchalance, inevitability, and closure. Before the advent of mass communication that empowered speakers protected by fundamentals of liberty, Unsaying had success: it concealed simple truths. In contrast, censorship never closes shop, searching for the exciting speech the censors must read, reread, and then forbid. The Unsayer has no comparable salacious interest. The wish to expunge is unfeigned and total.

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168 See supra notes 136–138 and accompanying text (customary treatment of males as the subject in the marriage narrative); see also Sandra M. Gilbert & Susan Gubar, 2 No Man's Land: Sexchanges 34 (1989) (describing male anxiety triggered by the possibility of female political and literary power).

169 See Moore, supra note 26. Despite obvious differences in the extent of oppression implicated, the underlying psychology in the enactment of Black Codes and Defense of Marriage Acts is similar: a belief in an entitlement of superior status that has been undone by the progression of democratic thought and speech. The Black Codes contested the legitimacy of changes in usage created by stories of natural right and oppression, see Davis, supra note 9 at 62, backed by military force and incorporated into the vocabulary of democracy. The defense of marriage acts contest the legitimacy of judicial incorporation of the citizens' language which courts encounter in addressing the spoken realities presented by litigants. In both cases, the mode of contestation is the Unsaying of what has become linguistic fact organically connected to the living vocabulary and common life by which the constitutional democracy is constructed.

170 See generally Sunstein, supra note 34 (discussing arguments regarding discrimination on the basis of sexual orientation).

171 But see supra note 90 (describing natural law scholars' concern with bodily details).

172 A possible counter example is the suppression of speech about lesbianism in the
D. Unsaying and the "Ex-Gay" Movement

The open society has created gay speakers and open speech. Same-sex marriage is a usage fact, having circulated into vocabularies and broken the bonds of identity speech. As a result, Unsayers feel great desperation. A recent desperation ploy has become increasingly visible—if the existence of gay people and gay conduct cannot be concealed because of the hardness of speech, symbolic figures can be given visibility to Unsay identity. Authentic speech can be erased by inauthentic speech, created by the artifices of political propaganda.

The speech of gay Speakers who have spoken their lives is co-opted and rendered a nullity. The emergence of a gay identity did not happen, early twentieth century, in particular the censorship of The Well of Loneliness and the trial of its author, Radclyffe Hall. See People v. Friede, 233 N.Y.S. 565 (N.Y. Magis. Ct. 1929) (holding that the book harmed public morals and offended public decency and therefore violated the Penal Law which makes possession of such a book a misdemeanor). In that instance, the point of censorship was to confirm that thoughts about women's sexual agency could not be spoken, heard or comprehended. See Jane Marcus, Sapphistry: The Woolf and the Well, in LESBIAN TEXTS AND CONTEXTS: RADICAL REVISIONS 166 (Karla Jay & Joanne Glasgow eds., 1990) for a description of the Hall trial as a trial of lesbianism and not just literary free speech. Marcus describes the relationship of Virginia Woolf's, A Room of One's Own (1929), which used the actual name of the presiding magistrate in the Hall obscenity trial, to the trial of Radclyffe Hall, and Woolf's successful strategy to "seduce[e] the woman reader and taunt[] patriarchal law just this side of obscenity." Marcus, supra at 164. Hall was punished, not in an effort to bring the forbidden to the surface for the sake of titillation, but as part of a reaffirmation of unspeakability. Woolf was rewarded, or not punished, for seizing the opportunity to write that which could not be comprehended, except by those of her women readers whom she successfully seduced. It seems reasonable to say that censorship and Unsaying converged. The tone of rejection, however, was affected by the ideological element of rejecting and ending female agency about sex.

The language of desperation creeps into accounts of the Ex-Gay advertisements. See, e.g., Andrew Sullivan, They've Changed, So They Say, N.Y. TIMES, July 26, 1998, at A15 ("The campaign is clearly a desperate gambit to change the terms of the debate about homosexuality, a debate the religious right has been steadily, inexcorably losing for two decades."). In the summer of 1998, a flurry of ads by the religious right presented the figures of Anne and John Paulk, a married couple said to be former homosexuals, cured of their former belief in an identity as gay and now proponents of a new and more authentic identity as heterosexuals. Exposition and cancellation were the premise of the ads of identity. The narrative underlying the exposition was immediately brought into question: the inauthenticity of the former gay identity possibly arose from its retrospective manufacture rather than its prohibition by the creator. See Margaret Carlson, Praying Away the Gay, TIME, July 27, 1998, at 16 (suggesting that the claim by Anne Paulk of a former gay identity may not be convincing). But see Sullivan, supra note 173, at A15 (appearing to accept self-report of ex-gays at face value). See Toward Hope and Healing for Homosexuals, Advertisement, N.Y. TIMES, July 13, 1998, at A11 ("I'm living proof that Truth can set you free."). The ads offered and cancelled identity speech in one communicative moment mainly intended to erase the entire identity. While the ads shared some features with "coming out" speech, in which gay people disclaim their former "default" identity as a delusional time brought about by the rigging of the culture to favor heterosexual identity, the rhetoric of the ads differed because they involved a total displacement of a competing vocabulary of identity. The ads occupied a symbolic realm of assertion that all gay identity can and must be undone, and, by the medium of the ads, has been Unspoken.

175 See generally NILSEN, supra note 95.
despite its having happened, because a subsequent Speaker has spoken over the data file. The Ex-Gay movement saves speech commonly regarded in the gay community as counterfeit, in the computer file over the genuine speech: erasure and replacement occur simultaneously. Phony identity speech undoes identity and all related speech.

The Ex-Gay movement is a movement to steal words and identities, not mainly to reform persons or alter conduct. It is not a modern day temperance movement, with a person-to-person mission of change. It is rather an editorial quest, a last redoubt of the failing Western project of expunging the cultural record of one part of humanity and giving effect to a strong aversion to "homosexuals." The effort is in vain, although damaging to individuals.

The history projects of gay people render expungement of the proliferating hard copies and widely imbedded electronic records of their archives technologically undoable. No global search and replace will wipe them out. The proliferating therapies of authenticity makes the psychological erasure of gay people and the reversal of the acceptance by other speakers of the natural linguistic incidents of their existence undoable. The speech of same-sex love is not Unsaid, not by the efforts of the propaganda arts or the setting among us of impostors.

VIII. Voice, Marriage, and the Living Speech

A. Pre-Voice Embodiments of Marriage

In other cultures, the complexity of marriage has been wholly imbedded in expressive conduct. In ancient Egypt, it is claimed that marriage took place wholly through expressive conduct that indicated that two people had become a marital unit; there was no religious ceremony

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176 The large amount of social psychological research documenting the aversive reaction of test subjects to persons labeled "homosexual" is well summarized by the materials in Part III: Homophobia, in Gayspeak: Gay Male & Lesbian Communication 115 (James W. Chesebro ed., 1981).


178 Indeed, even "after 200 years of social rejection, religious condemnation, legal prosecution, and more recently, intensive psychotherapeutic conversion programs [as of 1981], homosexuality has not disappeared." Gayspeak: Gay Male & Lesbian Communications, supra note 176, at ix. Given the renunciation by the therapeutic community of conversion efforts and their replacement by coaching in the adjustment to managing the aversion of the sexual majority, the possibilities of talking the fact of gay individuals and the speech attendant on their existence out of the record are weak.

179 See Carlson, supra note 174.
and no legal ceremony. The existence of a marriage was recognized through the process of active social interpretation that recognized altered personhoods by way of symbols adopted by couples; speech had a smaller role, in that a spoken ceremony did not provide the critical marker by which the couple was read by others. But the key expressive impetus to the social conclusion that a marriage existed emanated from the couple and was expressive in nature, fraught with symbols and signs that had contemporary vitality in investing the idea of marriage with social meaning.

Professor Davis has written about the expressive manifestation of marriage in a subject population, the American slave, deprived of all legal recognition of family ties. Dubbing the accounts of slave ceremonies to memorialize their legally null marriages "Motivational Stories," in contrast to "Doctrinal Stories," Professor Davis emphasizes the evolutionary nature of social practices, which each person's cumulative contribution plays a role in altering. While Professor Davis emphasizes that "cultural forms" are altered by "individual acts of meaning," language is the medium in which this alteration occurs.

B. Marriage and Voice: Other Contexts

Evidence, often obscure and fragmentary, of past practice of same-sex marriage, or other culture practices, is not a Saying in our time and our place. It is not Voice. While capable of persuading the persuaded, it is part of the litany of argument, an element of voices. It is good to know, and perhaps an affirming litany among those asserting Voice, but also not an analytically powerful center of reasoning about democracy, citizenship or liberty. It has the odor of pedantry about it, the practice of lecturing from the perspective of anthropology about the contingency of social practices. That voice never persuades in a democracy because it is not Voice. At its best, it helps to dispel literalism that takes the known as the universe. It also provides illustrations of the capacity of Voice to emerge and be heard.

Voice has been recognized in other contexts concerning marriage. New Mexico "briefly prohibited first cousin marriage from 1876 to 1880." The need to assimilate the usage of a significant and dispersed part of the citizenry, however, limited the ability of code writers to en-
force a marital vocabulary at odds with widespread understanding of the institution. "Pressure from the Spanish community probably underlay the repeal of the cousin marriage prohibition four years later . . . ." The Saying in that time and place overcame the wish to unsay. Voice was more powerful than oppositional voices, the plaint of the Unsayers. The prohibition on conduct gave way and Voice defeated Unsayers.

C. Marriage—Idiom: A Living Speech

Evolution of marriage in the West since the medieval period is a record of Voice prevailing over clerical, scholastic or dogmatic prescriptions. The command structure of marriage provided by the mere talk of theologians and canon law authorities has yielded to the forms of marriage created by the emerging Voice of the participants. With each evolutionary moment, official prescription has given ground to idiom. Idiom, needless to say, attains its strength in democracy with the sovereignty of the human capacity for speech. The effort to arrest the idiom seeks to instate a dead language in place of the living tongue of citizens, contrary to the spoken basis of American democracy. The language of restated marriage codes is indeed dead, reaching back to a linguistic past never imbedded in the statutes and revived not by speakers with an organic connection to the speech of matrimony, but by aspiring scholastics. Indeed, the language of theologians with a connection to the vibrant and emerging language of commitment contains a growing Voice of commitment, integrity and intimate connection. This living speech is absent from the lifeless words of the new codes. A living legislature is ironically capable of enacting the extinct by virtue of a demagogic appeal to the Unsaying instinct of a majority, a majority that in the critical sense in this discursive exchange is "silent." If silence has ever been a virtue in a majority, in this majority it is the feature that repeals its right to rule.

The language of the restated marriage codes is archaic. Such language lacks currency with other related usages. Marriage has been degendered in legal language; marriage has been made only contractarian; marriage emphasizes emotional bonds. The new marriage codes are anachronistic insertions that do not mesh with any other aspect of the marriage regime, certainly not with the spoken language of large and growing formations of speakers, nor with the cultural and constitutional aspiration to human rights expressed in language drained of gendered limitations. The degendering of the collective belief in the possible is

185 Id.
186 See Witte, supra note 115.
187 Id.
D. Recognition of Usage: Never Radical

A state’s recognition of contemporary usage, embedded in Voice, cannot be a “radical” alteration of accepted usage; to the contrary, it is an adoption of usage and thus a form of fidelity to constitutional and democratic ground rules. Speakers rule by adapting language to fit lives. Lives, including the spoken and written record of their being, are not at stake in the constitutional ground rules of American democracy. While usage of the past may have been successful in suppressing the spoken evidence of certain lives, contemporary usage has injected them into the life and language of the democracy. The radical proposal is to cordon off speech that has broken the bounds of silence and irrevocably altered received meanings. Incorporating into state usage a widespread component of contemporary usage is by no means radical, but an ordinary democratic process. Such incorporation is a feature of the prevailing rules for linguistic recognition and documentation of acceptable variations of word usage. It is ordinary and basic to acknowledge the constantly changing character of language. “[N]o one can say how a word ‘ought’ to be used. The best that anyone can say is how it is being used, and this is what a grammar should tell us.”

By analogy, the American Heritage Usage Panel of the American Heritage Dictionary draws upon a broad group of those most immersed in the evolving language—educators, writers and public speakers. Its Third Edition Usage Panel included contrasting cultural figures—Erica Jong and David McCord, Andrea Dworkin and Alfred Kazin. Its method

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188 In describing the "definitional failures" that characterize efforts to establish dictionary meanings of marriage, Richard Mohr describes the telling discovery that "It took a gay case to reveal what marriage is, but the case reveals it, at least as legally understood, to be nothing but an empty space—delimited only by what it excludes—gay couples." Mohr, supra note 121, at 221.

189 But see Wardle, supra note 149, at 768 (arguing that legalization of same-sex marriage entails a radical rejection of marriage by redefinition and replacement).

190 See Butler, supra note 5, at 853.

191 See, e.g., EVANS & EVANS, supra note 33, at v. Titles of recent bills that have been considered or adopted in Congress demonstrate the practice of relaxed incorporation of new terms; recent titles include the Internet Gambling Prohibition Act of 1998, H.R. 4427 105th Cong. (1998), Intermodal Surface Transportation Efficiency Act of 1997, S. 1173, 105th Cong. (1997), and the Telephone Slamming Prevention and Internet Connection Act, H.R. 2112, 105th Cong. (1997).

192 See id. at vi.

193 The recourse here to the example of the dictionary, one hopes, differs from the uncritical use of dictionaries to divine authoritative meanings. See Ellen P. Aprill, The Law of the Word: Dictionary Shopping in the Supreme Court, 30 Ariz. St. L.J. 275 (1998). This article applies principles of lexicography to show that "dictionaries are not as authoritative, precise, or scholarly as we... often assume." Id. at 275. Of course, if dictionaries are not authoritative statements of meanings, query the authority of legislated meaning.
precludes an insistence on freezing usage. The project is to capture social knowledge that is reflected in meanings and shades of meanings. Definitions attempt to incorporate factual information about the manner in which a word is being used and thus do not attempt to preclude the alteration of a term by disallowing observed changes in the range of meanings of a word. The modern dictionary is neither crudely majoritarian nor pedantically prescriptive. It strives to capture Voice and thereby to serve as a record of language and meaning.

IX. Conclusion: Common Sense and Legal Unsayings of Marriage

Unsaying of gay marriage is bad policy that creates harms. Unsaying marriage (1) fails to draw upon the strengths of deliberative democracy; (2) intimidates and undermines speakers; and (3) encourages state censorship of marriage speech. The enactment of a restrictive definition of marriage, emptied of the infused by the property in the term by various users, raises barriers to a normal assimilation of the language of people into the language of the state. The resemblance between heterosexual marriage speech and gay marriage speech highlights the nature of harms and the infirmity of the Unsaying enterprise.

First, marriage speech generally: marriage speech is constructive—it creates the meanings to which the common understanding of marital bonds attaches. Marriage speech is joint and not merely individual—it requires the simultaneous declarations of two people. It is effective, in that it alters the social understanding of two people as being no longer separate. It is thus transformative. Marriage speech is complex and contradictory—social meanings persist, evolve, and clash. It is contested. Individuals undertake acts of resistance to individual applications of marriage speech perceived as anomalous. Marriage speech is collaborative, involving oratorical participation by the couple, a presider, witnesses, and an approving and attentive audience. In that sense, it is one of the participatory rituals of our culture. Marriage speech is dispositive; two people's marital declarations trump the verbal resistance of disapproving friends and family.

Gay marriage speech is similar in kind, except that it is effective without being dispositive of rights. Like heterosexual marriage speech, it

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194 See Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc) (affirming Attorney General's right to withdraw employment offer from person who disclosed her participation in a same-sex marital union).

195 A recent example of another culture's willingness to validate a marriage that was being "Unsaid" by an individual act of culturally based resistance occurred when a Pakistani court ruled that a couple was married, and thus not guilty of adultery, despite the claim that her father had precluded their marriage by binding her in advance to a cousin. See Disputed Marriage Validated in Pakistan, N.Y. TIMES, Feb. 19, 1999, at A10.
is participatory, constructive, effective and complex. Because gay marriage speech is subject to cultural sneers, it is worth noting that it has no linguistic features marking it as a lesser marriage speech. It is not mimicry, because it is sincere. It is effective because it overcomes cultural resistance and succeeds in creating a social understanding that the personalities of two people have been joined. It is certified by a vibrant contemporary speech and does not need the aid of historical reconstruction. It is common; by no means is it rare. It is part of the linguistic resource of the entire culture, not merely a confined set of speakers who have devised an argot with no wider cultural standing. Cultural resistance—unsaying by some hearers—is not even unique to gay marriage speech. Its most distinctive linguistic difference is the abandonment by the state of a normal posture of neutrality toward sincere declarations of marital union.

The harms of withdrawing from gay marriage speech are individual and collective. Individuals are confused about their linguistic authority to deploy terms infused with intimate and religious meaning to describe their affiliative activities. A key communal rite is leant an air of contraband, where citizens experience uncertainty about the propriety of a community-centered ritual of definition. The policy models citizen timidity rather than robust participation in creating meanings. The state enactments that legally de-authorize the speech have the effect of making state speech less credible, because the state vocabulary arises from a negation, is not nourished by the common speech, and is linguistically tortured. The state enactment resists the vitality of the living speech. It opposes the innovations of citizen speech. Policy-making lacks the foundation associated with responsiveness to the needs of citizens, as expressed through their involvement in linguistic evolution. A state linguistic intervention constrains the application of other precepts, such as equal protection and anti-sex discrimination, by creating a stipulated linguistic stopping point for the application of general principles. The state enactment throws a word out of public spaces, insisting upon the Unsaying of marriage in legal arguments for gay marital rights.196

The Unsaying of gay marriage is linguistically unsound. It attempts to freeze the language spoken by the participants in a vibrant democracy noted for its linguistic vitality. Although its harms are serious and raise questions of constitutional dimension, its ultimate infirmity is a violation of common sense. While the constitutional dimensions of the legal Unsaying of marriage may be subject to debate, common sense arguments carry weight. The American regard for common sense and for the hardy

196 See Appellants’ Supplemental Brief, Baehr v. Anderson, No. 91-1394-05 (Haw. Feb. 23, 1999) (arguing that, under principals of sex-discrimination, the Hawaii constitutional amendment allowing the Hawaii legislature to reserve marriage to a male and female should not withhold “the rights and benefits concomitant to marriage” from same-sex couples).
traditions of the American citizen speech can be activated by an exposition of the inappropriateness of official efforts to cut off the evolution of meanings.