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2006

Democracy's Handmaid

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Recommended Citation
Tsai, Robert L. "Democracy's Handmaid." Boston University Law Review 86, no. 1 (2006): 1-64.

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ARTICLES

DEMOCRACY'S HANDMAID

ROBERT L. TSAI*

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Democratic theory presupposes open channels of dialogue, but focuses almost exclusively on matters of institutional design writ large. The philosophy of language explicates linguistic infrastructure, but often avoids exploring the political significance of its findings. In this Article, Professor Tsai draws from the two disciplines to reach new insights about the democracy-enhancing qualities of popular constitutional language. Employing examples from the founding era, the struggle for black civil rights, the religious awakening of the last two decades, and the search for gay equality, he presents a model of constitutional dialogue that emphasizes common modalities and mobilized vernacular.

According to this model, metaphors, metonyms, and other idioms serve as integral features of democratic institution-building. An especially resonant metaphor spreads democratic ideology efficiently and aggressively. The composition helps to create the appearance of political rule as continuous and timeless. It also renders law accountable to the people – by reestablishing the terms of community through this language device in the course of litigation and public debate, ordinary citizens can redirect the very path of higher law. In short, popular language legitimates constitutional regimes and builds support among the people themselves.

INTRODUCTION: A PLACE FOR THE FIGURATIVE IN A REPUBLIC

I.

Come muster, my Lads, your mechanical Tools,
Your Saws and your Axes, your Hammers and Rules;
Bring your Mallets and Planes, your Level and Line,
And Plenty of Pins of American Pine;
For our Roof we will raise, and our Song still shall be –
A Government firm, and our Citizens free.

II.

Come, up with *the Plates*, lay them firm on the Wall,
Like the People at large, they're the Ground-work of all;
Examine them well, and see that they're sound,
Let no rotten Parts in our Building be found;
For our Roof we will raise, and our Song still shall be –
Our Government firm, and our Citizens free.

. . . .

V.

Our *King-Posts* are Judges – how upright they stand,
Supporting the *Braces*, the Laws of the Land –
The Laws of the Land, which divide Right from Wrong,
And strengthen the Weak, by weak'ning the Strong;
For our Roof we will raise, and our Song still shall be –
Laws equal and just, for a People that's free.

. . . .

IX.

Huzza! my brave Boys, our Work is complete,
The World shall admire *Columbia*'s fair Seat;
It's Strength against Tempest and Time shall be Proof,
And Thousands shall come to dwell under our ROOF.
Whilst we drain the deep Bowl, our Toast still shall be –
Our Government firm, and our Citizens free.[1]

During a fireside chat with the nation, a popular president declares that "the only sure bulwark of continuing liberty" is a strong government and an informed citizenry.[2] In a path-breaking ruling, the Justices of the United States Supreme Court decry the "romantic paternalism" inherent in so much of the country's history of sex discrimination, which "put women, not on a pedestal, but in a cage."[3]

What unites these examples is a common cultural background – a political fellowship, if you will. Every country has its peculiar discursive practices, part of the political knowledge that its citizens have inherited. Drawing on a deep reservoir of constitutional thought, Americans have made their collective will known. What truly makes these statements sing, however, is their prominent use of figurative prose. As enduring as they are powerful, metaphor and metonym have served generations of lawyers and activists in the daily practice of democratic self-governance.

As the ratification debate reached a crescendo in those crucial months between the fall of 1787 and the following spring, the Framers of the U.S. Constitution enlisted a potent image – schema of the human body – to portray a new set of relationships between the people and their government. These leading men warned against the "dismemberment of the Union,"[4] appealed to the "great body of the people"[5] rather than to existing institutions, and

[1] "A.B." [Francis Hopkinson], *The Raising: A New Song for Federal Mechanics*, PENNSYLVANIA GAZETTE (Phila.), Feb. 6, 1788, *reprinted in* 2 THE DEBATE ON THE CONSTITUTION 169-70 (Bernard Bailyn ed., 1993).

[2] Franklin Delano Roosevelt, Fireside Chat (Apr. 14, 1938), *in* FDR'S FIRESIDE CHATS 111, 118 (Russell D. Buhite & David W. Levy eds., Univ. of Okla. Press 1992) ("Therefore, the only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and a people strong enough and well enough informed to maintain its sovereign control over its government.").

[3] Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion). As Sam Bagenstos has argued, the mobilized vernacular of second-wave feminism captured here has been recycled with great success by disability rights advocates. *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 16 n.59 (2004) ("[T]he disability rights movement plainly drew on the feminist movement's argument that paternalistic policies placed women on a 'pedestal' that was in fact a 'cage.'" (quoting *Frontiero*, 411 U.S. at 684)).

[4] THE FEDERALIST NO. 1, at 7 (Alexander Hamilton) (Modern Library ed., 1937).

[5] THE FEDERALIST NO. 39 (James Madison), *supra* note 4, at 243 (defining a republic to

presented the proposal as a "republican remedy for the diseases most incident to republican government."[6] In this way, they sought to counter Anti-federalist warnings that the Union would "prostrate all the state legislatures," which the Anti-federalists described as the collective "soul of a confederation."[7]

In our own time, competing metaphoric models of the First Amendment have propelled the creation of a robust free speech culture. This has occurred as individual expression has been variously conceptualized as a valuable commodity to be traded, as a worthy analogue of legislative debate, or as an incendiary device to be extinguished. Each of these embodiments of legal doctrine has not only remade our substantive commitments at crucial moments; at a basic level, each device has also helped to cement the centrality of popular language to democratic practice.[8]

Once we begin to recognize the ubiquity of common ways in democratic discourse, several pressing questions emerge. First, what are we to make of the instinct of advocates and citizens to joust over metaphors as ardently as they cross swords over principles? Second and more broadly, what role does metaphor play in shaping our sense of political community? Third, can a robust role for judges be justified within the complicated polyphony of constitutional dialogue?

The gap in the literature – as well as the tantalizing opportunity for inquiry – is best illuminated by toggling between the vantage point of the political thinker and the rhetorician. All too often, political theory takes linguistic processes for granted; language theory, for its part, sees politics as simply another arena for ordinary expression. Neither goes far enough in elucidating the significance of this basic unit of constitutional knowledge.

To borrow from Jefferson,[9] we might call metaphor *democracy's handmaid* – for it is central to matters of democratic design and, to a remarkable extent,

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be "a government which derives all its powers directly or indirectly from the great body of the people"); *accord* THE FEDERALIST NO. 46 (James Madison), *supra* note 4, at 304 (explaining that all forms of American governance are "dependent on the great body of the citizens of the United States").

[6] THE FEDERALIST NO. 10 (James Madison), *supra* note 4, at 62.

[7] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 525-26 (1969).

[8] ROBERT L. TSAI, ELOQUENCE AND REASON: CULTIVATING FREEDOM OF EXPRESSION (forthcoming 2007) (manuscript at x, on file with author); *see also* Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 235 (2004) (analyzing how the metaphors of fire, assembly, and marketplace collectively cultivated our free speech culture).

[9] Thomas Jefferson, First Inaugural Address (May 4, 1801), *in* STEPHEN HOWARD BROWNE, JEFFERSON'S CALL FOR NATIONHOOD, at xvi (2003) (laying out a vision of governance that emphasized the "encouragement of agriculture and of commerce as its handmaid"). In playing upon his usage, I intend both to highlight Jefferson's provocative language and to invite consideration of democratic culture beyond merely the "essential principles" Jefferson and others have espoused. *Id.* at xv.

subservient to popular will. Metaphoric models of constitutional life signal what democracy means in each generation; how the promise of democracy is to be fulfilled; and why it is an idea worth fighting for. While the starting point may be semantics, the ultimate object of concern is not simply how legal language is arranged, but rather how comprehension facilitates the formation of a democratic culture. My conception of democracy is therefore necessarily a thin one – revolving, as it does, around dynamics of political self-understanding, evaluation, and implementation. While the account of governing discourse I offer is consistent with more robust conceptions of democracy (even ones that change over time), alone it is capable of neither justifying any particular substantive commitments nor ensuring just outcomes.

My effort to sketch a theory of constitutional vernacular unfolds in four movements. Part I situates metaphor at the intersection of democratic theory and the study of ordinary language. It then strives to reconnect the popular and poetic elements of language with the political processes that generate and sustain a democratic ethos.

If law is treated as a cultural product rather than as a set of rules,[10] then metaphor cannot simply be seen merely as a problem-solving technique in an isolated dispute. Rather, we should treat it as a vehicle whose primary importance is to reinforce democratic values. Part II examines metaphor's core functions in a modern republic. Metaphor not only confronts the problems of time and the forces of disunion, it also increases popular control of law and repairs disjunctions in political community. In order to illustrate these points, I shall evaluate the mobilized rhetoric of the founding era, the civil rights movement, and the religious revival of the last quarter century. I also consider the centrality of metaphor to the juridic segregation and reintegration of sexual minorities.

Once we grasp the state-building function of democracy's metaphors, it may be wise to rethink the process of legal change. Part III explores the significance of a discursive theory of constitutional law by juxtaposing it with leading accounts of constitutional change. I find that a decentralized rhetorical model offers a superior account of the relationships among the actors who claim to act on the people's behalf. Within this model, judges act principally as language builders. In this capacity, judges shape and test the tools by which our foundational commitments are contested.

Finally, Part IV anticipates objections to an account of democratic governance that elevates the role of constitutional vernacular. I scrutinize and ultimately reject two criticisms: first, that judges are not authorized to speak in figurative terms and second, that rhetorical creativity should be reserved for political actors alone. A vision of decentralized dialogue, I conclude, is neither frightening nor utopian but one that fits comfortably within our political

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[10] *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 77 (2003) (arguing that "law is both a cultural product and a vehicle for the regulation and discipline of culture").

tradition.

I. FROM DISCURSIVE PRACTICE TO CONSTITUTIONAL DESIGN

A. *Interdisciplinarity as Opportunity*

The democracy-enhancing qualities of figurative language have been neglected for too long. This inattention is somewhat surprising because political theorists certainly have a fondness for dialogic models of governance. Bruce Ackerman's provocative theory of dualism splits the atom of self-rule into ordinary and higher lawmaking in an effort to derive authentic "conversation between generations."[11] Barry Friedman believes that he has solved the countermajoritarian difficulty by relaxing Alexander Bickel's major premises so as to envision that "the Constitution is interpreted on a daily basis through an elaborate dialogue."[12] Everywhere one turns, speech-modeled theories of law and politics abound.[13]

Yet the interactive process envisioned by constitutional theorists – if it is articulated at all – nearly always assumes the grandest of scales. Dialogue is less explicated than it is employed as a heuristic device to portray the political system as generative of public reason in a more or less orderly fashion.[14] For the democrat, principles for governance ultimately sustain and legitimate the legal order. Turning from ideal theory to the actual governance of large scale democracies, Robert Dahl elaborates his five basic precepts of democracy[15]

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[11] 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 23 (1991); *see also* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 3-6 (1988). *But see* JED RUBENFELD, FREEDOM AND TIME 47-49 (2001) (criticizing speech-based models of democracy as "presentist").

[12] Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81 (1993). Friedman rejects Alexander Bickel's major assumptions that (1) the Constitution was designed to facilitate rule by present political majorities and (2) judicial pronouncements are, for all practical purposes, the final word on a subject. *Id.* at 582-83.

[13] Democracy as dialogue is by now an ingrained model of constitutional thought, even as it has inspired many departures from its agreed-upon starting point. *See, e.g.*, FISHER, *supra* note 11, at 3 (contending that constitutional law "is a process in which all three branches converge and interact with their separate interpretations"); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 241 (2001) (claiming that federalism cases "reveal both striking continuities and marked new notes in the ongoing constitutional dialogue about federalism"); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 86-87 (1985) (exploring the various models of constitutional lawmaking).

[14] *See, e.g.*, JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 10-11 (1982). Habermas has advanced the idea of "communicative rationality," by which subjects pragmatically relate to one another, reach collective agreement as to claims of validity, and thereby transform their society.

[15] Dahl identifies five elements of any true democracy, regardless of size: (1) effective participation; (2) equal suffrage; (3) enlightened understanding; (4) control of the agenda;

into six conditions that must be met before any modern country can justifiably call itself democratic: (1) elected officials; (2) free, fair, and frequent elections; (3) freedom of expression; (4) access to alternative sources of information; (5) associational autonomy; and (6) inclusive citizenship.[16] Of these six principles, two are concerned with the mechanisms of popular control of government through suffrage (1, 2); two are concerned with ensuring the overall availability of information (3, 4); and the remaining deal with two institutional preconditions for self-rule: autonomy and equality (5, 6).

Under the liberal tradition exemplified by the Dahlian approach, democracy is both defined (in that it may be said to exist) and sustained (in that it may be said to survive beyond its birth-moment) according to formal criteria. The necessity of "enlightened understanding" of democracy is, to be sure, acknowledged.[17] But it is largely taken for granted, hopefully (and at best, indirectly) prodded by rules that protect spheres of individualism.

John Hart Ely's magisterial work, *Democracy and Distrust*,[18] echoes this preference for organization. Ely's starting point is that the Constitution is "overwhelmingly concerned with . . . process writ large."[19] His representation-reinforcing model encourages courts to parse governing texts so as to facilitate popular government; where persistent majorities have perverted the political system, it is the judge's obligation to restore fairness.[20] Although Ely goes wrong in suggesting that such a role can be considered in any way value-neutral, he properly sees the Constitution as a roadmap for governance. Nevertheless, Ely – like Dahl before him – never ventures beyond a structural (and mostly majoritarian) account of democracy.[21]

This is a shame. For democracy is more than the mechanics of policymaking; it is greater than the sum of its precepts. Democracy is an entire way of life: distinctive manners of speaking, recurring modalities for relating

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and (5) inclusion of adults. ROBERT A. DAHL, ON DEMOCRACY 37-38 (1998).

[16] *Id*. at 85-86. Dahl calls a modern democracy that adheres to these precepts a polyarchy. *Id.* at 90.

[17] *Id.* at 37 (describing the requirement for "enlightened understanding" to be that "[w]ithin reasonable limits as to time, each member must have equal and effective opportunities for learning about the relevant alternative policies and their likely consequences").

[18] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[19] *Id*. at 87. Ely does acknowledge that a number of the provisions in the document deal with individualistic concerns, which he characterizes as "process writ small." *Id*.

[20] *Id.* at 86. Ely is no proponent of untrammeled majoritarianism. He believes that courts are justified when they intervene on behalf of discrete and insular minorities because doing so enhances self-rule. As always, the devil remains in the details as to when a political measure has unfairly skewed the political process.

[21] Ely nowhere admits that the conception of democracy he favors – rather than, say, strict majoritarianism or a more robust role for judicial intervention – is itself a substantive value choice. Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 754 (2004).

to others, and penetrating frameworks through which to perceive the social world.[22] A culture of self-empowerment is not merely a byproduct of politics; rather, the cultivation of a democratic disposition lies at the very heart of constitutionalism. Linguistic infrastructure and political architecture go hand in hand. To the extent that theory misses these features of democratic existence, it fails to account for the rich, everyday vehicles by which promises are kept over time.

If the democrat's vantage point can be unhelpfully panoramic, the rhetorician's perspective is all too often oddly telescopic. Attention is trained upon grammatical structure in splendid isolation, with only the emotive features of language on display.[23] Northrop Frye, for example, has called "the starting point of metaphor" its ecstatic quality, "the sense of identity of an individual's consciousness with something in the natural world."[24] Others share this primal sense that ordinary language lays bare the hidden depths of the soul and the simpler, unadulterated social order that lies beneath the grime and clutter of modern existence.

In this humanistic glow, law looks, sounds, and behaves like everyday speech. Legal reasoning is understood as imaginative rather than linear, and is itself built upon metaphoric models that flourish in ordinary discourse. Behold: as the human face of law ascends, the institutional dynamic of law recedes. The judge is thereby stripped of his ceremonial garb, revealing him to be no different from the man on the street.[25]

But this demystification comes at a high price. For law then becomes as expansive as the human mind, which is to say that it extends everywhere and nowhere in particular. The jarring result is to replace a disfavored form of textualism with another, less familiar, semantic game.

The greatest casualty of too hard a turn toward the philosophy of the mind may be our conception of the relationship between politics and language. Consider James Boyd White, who rightly views law as a creative medium through which we organize ourselves in communal arrangements.[26]

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[22] CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 10 (John Ferejohn, Jack N. Rakove & Jonathan Riley eds., 2001) ("A *constitutional culture* is a web of interpretative norms, canons, and practices which most members of a particular community accept and employ.").

[23] *See, e.g.*, Diana Williams-Whitney et al., *Metaphor Production in Creative Writing*, 21 J. OF PSYCHOLINGUISTIC RESEARCH 497-509 (1992) (summarizing a research study in which writers produced metaphors related to intensely emotional experiences).

[24] NORTHROP FRYE, MYTH AND METAPHOR: SELECTED ESSAYS, 1974-1988, at 111-112 (Robert D. Denham ed., 1990).

[25] *Cf.* Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 4-5 (2004) (describing a judge as a "[s]ituational magician" adept at "[s]chematic sleight-of-hand").

[26] JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS, at xi (1994).

"[A]uthority is a subject of art" because "authority is created by an act of art."[27] Yet a closer look reveals that White undertakes an ambitious reconceptualization of law itself: he urges us to see law "not as a bureaucratic but as a rhetorical process."[28]

One danger with the pure law-as-rhetoric model, however, is that even as it purports to ground law as a creature of culture, the account threatens to decouple the constitutional actor from the very processes that generate public culture. Society cannot do without institutions. In the story of Genesis, God exists before the Israelites demand a king.[29] Similarly, in ideal theory we are asked to imagine a pre-law environment too brutish to abide;[30] everyone else is born into a world ruled by organizations and nation-states. A people cannot speak or act except through or in opposition to existing forms of political authority.

While there can never be total escape from the bureaucratic forces that seek to mold our lives, one can never be fully content with the state of affairs. This gives rise to the civic dilemma facing the citizen of every constitutional democracy.[31] She is always negotiating obligations, pulled between her desire to be free from existing manifestations of authority and her duty to obey. Constitutional discourse, in turn, is always about perfecting, subverting, or transcending political institutions.

Another difficulty with the unadulterated rhetoric model is that bureaucracies generate their own modalities, each with their own priorities and pathologies. Institutions are as much the masters of language as they are subject to linguistic dynamics.

For the most part, accounts of the deep structures shared by constitutional language and democratic politics remain incomplete. Steve Winter, who has done much to renew scholarly interest in the internal structure of legal

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[27] *Id.* at 276.

[28] James Boyd White describes rhetoric as "the central art by which community and culture are established, maintained, and transformed . . . [with] justice as its ultimate subject." *Id.* at 684; *see also* James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, *in* LAW AND LITERATURE: TEXT AND THEORY 5, 17 (Lenora Ledwon ed., 1995). White describes his own reading of legal language as "profoundly *antibureaucratic*." *Id.* at 17.

[29] 1 *Samuel* 8:6 (New Jerusalem) ("So give us a king to judge us, like the other nations.").

[30] THOMAS HOBBES, LEVIATHAN ch. XIII (J.M. Dent & Sons 1947) (1651). Hobbes' pre-law world was the fearful state of nature occurring at the beginning of time in which no moral constraints prevented man from using force to secure creature comforts, material gain, and personal glory. *Id.*

[31] The Israelites' demand for a king is, in fact, their second important act of self-liberation from their God-creator (the first being the willful disregard of a direct order not to eat of the forbidden fruit). *Cf.* 1 *Genesis* 2:17 (New Jerusalem). In order to live in the world and among other nations, they wished to organize themselves in familiar political forms. In their eyes, this would engender internal identity and external respect.

language, treats metaphor as central to law because it orders the imagination.[32] He rejects a vision of law that rests on raw politics and leads to radical indeterminacy,[33] but at the cost of making political processes seem strangely irrelevant. In his account, where law is in all critical respects like ordinary language, the habits of mind take center stage. Winter aptly realizes that cognitive theory leads to the "democratization of the imagination," but this tantalizing insight remains mostly undeveloped.[34]

B. *Recovering the Political*

Reorienting metaphor within constitutional politics captures its myriad functions in higher lawmaking. When I say that I intend to reclaim the *political* dimensions of metaphor, I do not mean that metaphor contains a naked partisan core, but rather that it aids institution-building and is subject to changes in political ethos. Where White hopes that institutional and policy studies can be subsumed within the study of rhetoric,[35] I urge the inversion of this relationship: legal rhetoric is best understood as a species of foundational politics.

Anchoring constitutional language in democratic theory serves two ends. First, it shifts our study of legal language away from individual comprehension and toward issues of institutional design. Doing so adds complexity to our understanding of constitutional change. What seems possible rather than fanciful to ordinary Americans and their leaders is not merely a matter of lexical arrangements, but a function of the political and social conditions of the day.

Second, anchoring constitutional language in democratic theory also places metaphor and other language devices on sounder theoretical footing. The primary defense of poetry in law is that it is simply unavoidable – a tactic that Kenji Yoshino has called the "ineradicability" defense.[36] This recalls Winter's primary strategy: with George Lakoff and Mark Johnson,[37] he insists that because "metaphor is an essential aspect of human rationality, there can be no difference in kind between the 'rigors' of reason and the demands of poetry."[38] But if, as I argue, not all metaphors are alike in function, then the power of the ineradicability defense wanes. Moreover, as Yoshino rightly argues, even if

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[32] STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 12-16 (2001).

[33] *See id.* at 309-313.

[34] *See id*. at 21.

[35] James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

[36] Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1839 (2005). Expositing what he calls the "Platonic paradigm," Yoshino argues that law justifiably excludes poetics that promote falsity, irrationality, and are themselves too seductive to be countenanced. *Id.* at 1860-68.

[37] *See infra* note 53.

[38] WINTER, *supra* note 32, at 68.

poetry cannot be totally banished from law, this provides at best a thin justification for art's role in statecraft.[39] The challenge taken up by the rest of this article is to provide a virtuous and energetic defense of popular constitutional language.[40]

As *Marbury v. Madison* teaches, law is not law unless it sets itself in opposition to politics.[41] For law to exist, the language of principle must continually be carved out of the realm of expediency.[42] Law also could not exist, however, if its symbiotic connection with politics were entirely severed. After all, it is the political sphere that grounds the interpretive enterprise, sets the outer boundaries of legal possibility, and gives judicial utterances texture and bite. This, too, is a lesson of *Marbury*, but only to the careful reader.[43] Ultimately, once judges read law, political processes validate, erode, or supplant juridic conceptions of law.[44] It is this twilight between law and politics that popular constitutional language inhabits.

Ordinary language complements doctrinal architecture in the formation and maintenance of political community. Every constitutional metaphor constructs a portable vision of democracy and signals what the people's place within the political order is to be. The metaphor shows us why a particular conception of self-determination is worth our allegiance; it demands eternal vigilance on its

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[39] *See* Yoshino, *supra* note 36, at 1859 ("[P]oetry will only be permitted if it can affirmatively show that it can fulfill state functions.").

[40] With Yoshino, I contend that metaphor "should not be banished because it has the capacity to serve, rather than merely to subvert, the proper ends of the state." *Id*. at 1839. I need not accept Plato's original notion of an objective transcendental truth; nor do I accept that rationality and irrationality are diametrically opposed categories.

[41] 5 U.S. (1 Cranch) 137 (1803).

[42] *Id*. at 173-78 (1803); s*ee generally* PAUL KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA (1997) (teasing apart the structure of the judicial imagination); Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095 (2005) (examining legal catechisms that have descended from *Marbury*).

[43] Who else would appreciate the delicious irony of the Court thumping its chest about the importance of legally vested rights even as it afforded William Marbury no remedy, or of John Marshall's interest in vindicating his personal failure to deliver the commission while not appearing cowed by a new administration bent on reversing the gains of the last Federalist administration? *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 8 (2005) (arguing that *Marbury* was a "large strategic retreat" rather than a vindication of judicial power).

[44] This has been true with every major constitutional event, from the recalibration of legal commitments in the 1930s to facilitate the New Deal agenda, to the revival of rights-based jurisprudence during America's post-war transformation into an exemplar of democratic constitutionalism. For a thoughtful take on the rise of democratic constitutionalism, see Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 28-30 (2003) (proclaiming an "Age of Democracy," in which the constitutionalism of democratic politics features prominently).

behalf.

Take Justice Scalia's *kulturkampf* metaphor, which is today etched in the minds of lawyer and layman alike. In *Romer v. Evans*,[45] he argued in dissent:

> I think it no business of the courts (as opposed to the political branches) to take sides in this culture war. . . .
>
> . . . .
>
> When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins – and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.[46]

Those who have taken Justice Scalia to task for the bitterness of his prose usually miss the more significant point.[47] His terminology is effective and eminently quotable precisely because it cuts to the quick. As a dialogic tool, it accomplishes things that mere denotative speech or doctrinal argumentation cannot. According to the vision of self-governance encapsulated in his martial imagery, the people are better off (or at least have no cause to complain) when left to their own devices. In such situations, courts are more likely to supplant collective moral preferences with poor shadows of their own. This, Scalia suggests, is not only improper, but also deeply undemocratic.

Now, it is one thing to say that courts should stay out of cultural conflicts; it is quite another to be able to distinguish such phenomena from other highly fraught matters. The binary image of social strife between two armies reinforces the impression that any involvement by the courts inevitably and unfairly sways the outcome. This image not only (over)simplifies the complex political dynamics in play by suggesting that such battles are fair fights,[48] it

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[45] 517 U.S. 620 (1996).

[46] *Id*. at 652. Justice Scalia recycles this metaphor in *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."). Scalia's reference to "Templars" refers to the Knight Templars, a monastic order formed at the end of the Crusades to assist pilgrims to the Holy Lands. ANDRÉ MAUROIS, A HISTORY OF FRANCE 60-61 (Henry L. Binsse & Gerard Hopkins trans., First Evergreen ed., Grove Press Inc. 1960). Within two centuries, the Knight Templars had grown powerful and rich, answering only to the Papal Throne. *Id.* In 1307, King Phillip crushed the order brutally through a series of arrests, rounds of torture, public trials, and executions. *Id.*

[47] *See, e.g.*, Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 228 (1996) (characterizing Scalia's *Romer* dissent as "derisive"); *Taking the Initiative*, NEW REPUBLIC, June 10, 1996, at 8 (describing Scalia's dissent as "indulg[ing] in his own fit of spite").

[48] *See* Bernard E. Harcourt, *Foreword: "You are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions About* Lawrence*, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. &

also denies that democratic values might call for the taking of sides.[49]

Nevertheless, as a "messenger of meaning,"[50] a tidy metaphor such as this one moves briskly between social domains, carrying democratic bricolage back and forth to different constitutional actors. Justice Scalia's militaristic rendering of a doctrine of non-interventionism has become a rallying cry for process conservatives and social conservatives alike;[51] it has even left a lasting mark on fellow jurists.[52]

To be sure, the statements of jurists and officials are presumptively authoritative in ways that everyday speech is not. Bureaucratic forces are different in each arena of linguistic development. Yet it is no less political in the institution-fortifying sense I have described when a judge employs metaphor than when a spokesperson for an interest group does. Aristotle called man a natural "political animal."[53] Metaphor is a natural way of inscribing and publicizing humankind's commitments.

II. DEMOCRACY'S METAPHORS

Because democrats and rhetoricians so often talk past one another, they routinely fail to notice metaphor's salient qualities in the production of constitutional norms. I will now strive to tease them out.

As a preliminary matter, let us distinguish between basic-level metaphor and

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CRIMINOLOGY 503, 507-08 (2004) (arguing that Scalia incorrectly characterizes the culture wars as a "two-sided military conflict"). The metaphor also occludes the fact that the social contest over the citizenship rights of sexual minorities involves many different coalitions and agendas. *Id.* at 516-24.

[49] Jack Balkin has provided an excellent discussion of the flaws in Scalia's perspective, namely that every fight over social status is a cultural conflict, and that the principle of equality requires courts to take sides in such contests. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2317-20 (1997); *cf.* Post, *supra* note 10, at 10 (arguing that "[u]nless the Court were to cease protecting constitutional values altogether, it cannot avoid entanglement in the 'culture wars' that sometimes sweep the country").

[50] SABINE MAASEN & PETER WEINGART, METAPHORS AND THE DYNAMICS OF KNOWLEDGE 20 (2000).

[51] No media account of the ruling could bypass the phrase "culture war." *See, e.g.*, Linda Greenhouse, *Gay Rights Laws Can't Be Banned, High Court Rules*, N.Y. TIMES, May 21, 1996, at 1 (highlighting Scalia's use of the phrase "culture war").

[52] Neither "culture war" nor "kulturkampf" appears in the writings of federal judges before Justice Scalia's vivid exposition. Afterward, the image experienced a sudden surge in popularity. *See* Newdow v. U.S. Congress, 292 F.3d 597, 614 n.4 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part) (insisting that government usage of the phrase "In God We Trust" or "under God" "have not led us down the long path to kulturkampf or worse."); Am. Family Ass'n v. City & County of San Francisco, 277 F.3d 1114, 1126 (9th Cir. 2001) (Noonan, J., dissenting) ("This case is a skirmish in the culture wars of the last century."); ACLU Neb. Found. v. City of Plattsmouth, 186 F. Supp. 2d 1024, 1035 (D. Neb. 2002) ("[F]ederal courts are a poor place to fight the culture wars.").

[53] ARISTOTLE, THE POLITICS Book I ii, 1253a1, at 59 (T.A. Sinclair trans., 1992).

its specialized variety. Basic or first-order metaphors are fundamental to language itself. When George Lakoff and Mark Johnson explicate the container metaphor and the travel metaphor in everyday discourse,[54] they describe two linguistic structures that are to the formation of ideas what air and water are to basic survival. Consider these statements:

- John's argument *contains* flaws.
- Jane's speech *proceeded* logically from point A to point B; her words *moved* the audience.

Every metaphor combines information from two conceptual domains. Meaning is generated through the mapping of entailments from the *source domain* (made up of experiential data about an idea or an event) upon the *target domain* (a second and often more abstract idea).[55] As the above statements reveal, certain metaphors are imbedded in our very system of communication. We organize ideas "in" mental containers of all shapes and sizes – indeed, we tend to speak as if meaning is inherent in the words themselves rather than dependent upon context. We then send ideas "in motion" to persuade others, employing the argument-as-travel metaphor.[56] We cannot do without these basic-level metaphors in our daily affairs, just as we cannot do without them in the law.

The same cannot be said of specialized metaphors, though this difference does not diminish their importance to the political order. Metaphors contained in such famous sayings as the "bulwark of liberty"[57] or the "revolutionary spark"[58] are not indispensable in the sense that legal utterances would be

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[54] *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 115-19 (2003); GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 284-85 (1987); *see also* Michael J. Reddy, *The Conduit Metaphor: A Case of Frame Conflict in Our Language About Language*, *in* METAPHOR AND THOUGHT 286-292 (Andrew Ortony ed., 1979) (discussing the centrality of the "conduit metaphor" in the transference of thoughts through language).

[55] LAKOFF, *supra* note 54, at 276-78.

[56] *See* LAKOFF & JOHNSON, *supra* note 54, at 115-119.

[57] Many things have been characterized as "grand bulwarks of liberty," from the right to trial by jury, *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *349); to the notion of the free press, *McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 335 (J. Elliot ed., 2d ed. 1859)) [hereinafter "DEBATES IN THE SEVERAL STATES"]; to the Great Writ, *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting). Even the whole of the Bill of Rights has been described in this way. United States v. Havens, 446 U.S. 620, 634 (1980) (Brennan, J., dissenting) ("Yet the efficacy of the Bill of Rights as the bulwark of our national liberty depends precisely upon public appreciation of the special character of constitutional prescriptions.").

[58] Gitlow v. New York, 268 U.S. 652, 669 (1925) ("A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive

incomprehensible without them. Rather, they are valuable in that they elucidate and dramatize a set of foundational commitments and political relationships. In so doing, they assist in the construction of democracy as a social practice that is lived, valued, and contested.

Call these *second-order metaphors*. In employing this term, I intend to signify qualitative differences in category and function, as well as in priority of importance to the dynamics of political self-understanding. These compositions are at once more focused and more performative than their first-order brethren. Second-order metaphors gain prominence where the bulk of first-order metaphors remain imbedded and unnoticed. Many arise in one doctrinal setting and become closely associated with a particular area of law; a few are later borrowed for other contexts because of their allure. They engage the intellect in a more extended fashion than first-order metaphors – they are particularly *tacky* in our political imagination – and therefore legitimate constitutional regimes precisely because of their gestalt properties.

Constitutional metaphor, a species of second-order metaphor, is a multifunctional composition in a democratic society.[59] The very ideal of democracy – *demos* ("by the people") and *kratia* ("rule") – presupposes understanding of the basic rules of participatory government and, more precisely, proficiency with the patois of self-rule.

In this light, we can say that metaphor serves four principal functions in the ongoing project of democracy. Metaphor:

- *conquers time* by building interpretive fellowship and legitimating political arrangements;
- *levels the law* by making commitments accessible to the average member of the republic;
- *enhances democratic accountability* through popular mobilization and litigation; and
- *repairs rifts* in the fabric of legal community posed by changed social norms and political realignments.

Each characteristic addresses a particular core facet of democratic myth-making. I employ the term "myth" in a non-pejorative sense to describe the patchwork of beliefs, outlooks, terminology, and discursive tactics that together characterize a political community's *raison d'être* and its members' relationships with one another.

I take each function of metaphor in turn, drawing on examples from actual constitutional practice.

conflagration."); *see also* Frohwerk v. United States, 249 U.S. 204, 209 (1919) ("[T]he circulation of the paper was in quarters where a little breath would be enough to kindle a flame").

[59] It is certainly true that non-foundational metaphors exhibit some of these traits. I confine my analysis to constitutional metaphors, which arguably face a different set of institutional and cultural forces both within and without the Judiciary.

A. *Conquering Time*

The challenge for statesmen of every age has always been this: how to build a lasting and more just society. Time is their principal enemy. The threats of time are manifold. A founding generation ages, and its members will one day die out. Before they do, they might pursue policies that devastate the youth (say, an aggressive war agenda) or the conditions for governance (say, a risky economic policy). Even when the rates of birth and immigration outpace death and exit, there is always the danger that the next generation neglects the commitments made by elders. How, then, can a people cheat death and forgetfulness?

1. Participation and Memory

Since the days of the ancient Greeks, plans for stability over time were rooted in organizational structures that maximized mankind's virtues. In *The Politics*, Aristotle observed:

> It is useless to have the most beneficial laws, fully agreed upon by all who are members of the constitution, if they are not going to be trained and have their habits formed in the spirit of that constitution – in a democratic spirit, that is, if the laws are democratic.[60]

Aristotle's solution was the "middle" constitution, which he believed represented a "well-made combination of oligarchy and democracy."[61] An educational system worthy of a wise ruling class would serve as a crucial backstop against internal decay.[62]

On occasion, one caught glimpses of a deeper truth: something beyond well-formulated policies might be required to cultivate a truly rich democratic way of life. Plato foresaw the need to engage in political story-telling in order to forge the "courage of a citizen"[63] within a well-ordered society. Consider this exchange between the figure of Socrates and his companions in *The Republic*:

> "[H]ear the rest of the myth: 'All of you in the city are brothers,' we'll tell them, 'but the most precious are the ones fit to rule, because when the god formed you at birth he mixed gold into them, silver into the auxiliaries, and iron and bronze into the farmers and craftsmen. . . . And we'll pretend there's an oracle that predicts the downfall of the city when she's guarded by the guardian of iron or bronze. Can you think of a scheme to make them believe this tale, Glaucon?"
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> "Not them," he replied, "but their sons and descendents and all later

[60] ARISTOTLE, *supra* note 53, Book V ix, 1310a12, at 331.

[61] *Id*. Book IV ix, 1294b14, at 262-63.

[62] *Id*. Book VIII I, 1337a11, at 452 (concluding that where the youth receive inadequate education, "the quality of the constitution suffers"); *see also* PLATO, THE REPUBLIC, Book 2, 376c-d, at 48 (Raymond Larson ed. & trans., AHM Publ'g Corp. 1979).

[63] *See* PLATO, *supra* note 62, Book 4, 430b-d, at 97.

peoples."[64]

For Plato, the myth of the ideal city's origins maintains intergenerational community and mediates the tension between two foundational principles: *civic equality* and *temperate governance*.[65] The myth itself is enabled by an extended metaphor of a society populated by persons born of different metals, as well as the metonymic identification of each citizen-type with a particular social function. Elsewhere, Plato selects a new metaphor to describe the process of political acculturation as "a scheme to persuade [the guardians-to-be] to take our laws like a beautiful dye."[66] If one can put aside the hierarchical and insular tendencies of classical republican thought, this insight is well worth recovering: symbolic formulations of the citizenry and ruling institutions have, since the very beginning, advanced the loftiest goals of self-rule.

The importance of a political mythology has never been more important. Everywhere the prospects for self-governance in the United States seem cloudy: the country is too large, its demographics ever-changing; the people are too divided by regional priorities and idiosyncratic tastes. Our daily lives are propelled by personal concerns rather than collective aspirations. Against this backdrop, the formation of political community requires a suspension of disbelief in one form of reality, and the adoption – on blind faith – of another.

It turns out that metaphor is not the repository of a "faded mythology,"[67] but a utensil for the care and feeding of the political imagination in the here and now. Taken literally, a metaphor is an untrue statement: people are not, in fact, born color-coded; one searches in vain for a physical barrier between the people whose liberties are at stake and those who might trample them. But notice how metaphor's jarring, even confounding, quality reproduces democracy's baseline values of engagement, skepticism, and critique.

A second-order metaphor stages a clash of meanings that invites a listener to participate in political fellowship. The act of affiliation calls upon the citizen first to reconcile the incongruities inherent in each distinctive metaphor; then, having resolved the incompatibility (or at least made peace with it), to internalize and repeat it. Here I elaborate upon Ted Cohen's insight that metaphor has the power to "cultivate intimacy."[68] By reworking such

[64] PLATO, *supra* note 62, Book 3, 415-d, at 84-85.

[65] *Id.* Book 4, 423, at 90. For an extended discussion of Plato's understanding of social roles and specialization in the ideal state, see *id*. Book 2, 370-c, at 41-42.

[66] *Id*. Book 4, 430, at 97. Speaking non-literally about political myth-making, Socrates says, "[Y]ou know that when dyers want to dye wool purple they select from all the possible colors wool that is naturally white, give it a long preliminary treatment to make the color take, and only then dye it. Things dyed like that are permanent, and even detergent won't wash out the dye." *Id*. Book 4, 429d-e, at 96-97.

[67] ERNST CASSIRER, LANGUAGE AND MYTH 85 (Susanne K. Langer trans., 1953) (quoting German philosopher Friedrich Wilhelm Joseph von Schelling).

[68] Ted Cohen, *Metaphor and the Cultivation of Intimacy*, *in* ON METAPHOR 1, 6 (Sheldon

bricolage, members of the polity establish, maintain, and transform themselves and their democratic society. In the process, individuals sharpen the very skills necessary to keep the project going.

Metaphor's inherent plasticity, derided by those who would demand an impossible clarity of word and deed, actually serves the goals of political fellowship. No community can exist by requiring perfect agreement of aims and means. A certain degree of ambiguity in meaning allows different constitutional actors to accept the validity of an idea or general framework and defer further conflicts over meaning. As Louis Seidman has ingeniously argued, the Constitution prevents the crystallization of law, which would ensure perpetual political losers.[69] My approach aligns with Seidman's but makes a cross-cutting claim: the very structure of our constitutional language promotes the unsettled nature of the law.

A popular construction of law not only possesses the capacity to draw a democratic audience within its mystery and hold its attention, but also acts upon adversaries locked in debate by incentivizing the development and refinement of accessible terms. A detractor is always free to try an alternative language tactic, but one's first instinct is always to co-opt a metaphor in play, and to take advantage of the material used by a political opponent. Whereas resort to specialized terms breeds disengagement and distrust, innovative usage of everyday terms fosters civic engagement and faith in deliberative processes.

2. "The Body of the People in Every State"

For Plato, a sudden shift to figurative language drew the story's participants (as well as the reader) into the very ideal state he was in the process of sketching. In this way, Plato himself modeled what every democratic citizen is expected to do: envision political fellowship, experiment with existing models, and invite critique.

For modern democrats, too, metaphorical discourse involves a constitutive act. When the revolutionary generation claimed the sacred prerogative of the people to break loose from the suffocating confines of the Articles of Confederation, they undertook a project of epic proportions. Playing to widespread discontent with the government was easy enough, but harnessing political energy for the centralization of real-time authority was a far more

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Sacks ed., 1978). As Cohen puts it:

> There is a unique way in which the maker and the appreciator of a metaphor are drawn closer to one another. Three aspects are involved: (1) the speaker issues a kind of concealed invitation; (2) the hearer expends a special effort to accept the invitation; and (3) this transaction constitutes the acknowledgment of a community.

Id. at 6.

[69] LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 86 (2001) (arguing that "the primary virtue of liberal constitutionalism is its incoherence, which can be put to good use if our aim is to build an unsettled constitution").

challenging task. Let us not forget that the Framers were not only battling the forces of the status quo, they were also parrying the arguments of those who favored outright dissolution of political community. Excessive localism and anarchy had to be avoided at all costs. Having shouldered such a daunting agenda, they made inventive usage of familiar cultural forms.

From the start, metaphor played an important role in this high-stakes affair. Those who sought to undermine the legitimacy of the enterprise accused the drafters of offering nothing but "gilded chains . . . forg[ed] in the secret conclave."[70] Secrecy, these critics suggested, was the antithesis of political equality; the "rivet[ing] [of] the shackles of slavery on you and your unborn posterity" would surely follow.[71] To this, proponents of the new order pointed to transparency in the ratification process and claimed the momentum; it was the other side, the opponents of self-rule, who "whispered in . . . private circles."[72]

One of the most prominent and active elements of the eighteenth century lexicon was the body politic.[73] In the Framers' hands, the metaphor of the body was molded to keep citizens engaged in the ongoing project of constitutionalism while persuading them to consider alternative political configurations. In a chorus, reformers declaimed against the "extent and malignity of the disease" now afflicting the political order.[74]

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[70] *Dissent of the Minority of the Pennsylvania Convention*, PENNSYLVANIA PACKET (Phila.), Dec. 18, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 1, at 526, 528.

[71] *Id.* at 535.

[72] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 7.

[73] This usage of the term "body" is not only figurative, but also organic and specialized, and should therefore be distinguished from use of the word "body" merely to refer to a particular institution (e.g., "this august body"). Its longevity is due, in no small part, to the influence of classical political thinkers. Plato writes: "When one of us smashes his thumb, for instance, the entire partnership of body to soul, organized into a single community under its ruler, instantly feels it and suffers together as one with the hurt part, and we say 'the man feels pain in his thumb'" and that "the best-governed city is arranged most like such an organism." PLATO, *supra* note 62, Book 5, 462d, at 127. Plato also compared the "true and healthy" city-state to one with "indigestion." *Id.* Book 2, 372e, at 44. And in a move from the metaphorical to the literal and back again, he further ventured: "When a city gets bloated with self-indulgence and disease, courtrooms and doctor's offices burst open; and litigation and medicine take on airs when free men take them seriously." *Id.* Book 3, 405, at 74. *See generally* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY (1957) (analyzing the union and separation of the king's physical and figurative bodies).

[74] THE FEDERALIST NO. 21 (Alexander Hamilton), *supra* note 4, at 125. The Constitution was presented as a "cure" and "remedy" for the "malady" and "diseases" of faction. THE FEDERALIST NO. 10 (James Madison), *supra* note 4, at 53, 62; *see also* THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 4, at 170 (describing the need for an army to deal with "seditions and insurrections, [which] are, unhappily, maladies as inseparable from the body

So compelling was this line of argument, so ingrained was the network of related concepts in American thought, that Anti-federalists were moved to confront it directly through open mockery:

> Whereas it hath been represented unto us that a most dreadful disease hath for these five years last past infected, preyed upon, and almost ruined the government and people of this our country; and of this malady we ourselves have had perfect demonstration, not mentally, but bodily, through every one of the five senses . . . . And whereas a number of skilful [sic] physicians having met together at Philadelphia last summer, for the purpose of exploring, and if possible removing the cause of this direful disease, have . . . found out and discovered, that nothing but a new government . . . will infallibly heal every distemper in the confederation, and finally terminate in the salvation of America.[75]

Accepting this frame of understanding merely played into the Federalists' hands. Here is the lively response by Madison, who exhibited neither fear nor doubt about his project, but spun the metaphor still further, until its tendrils touched the proposal's every surface:

> A patient who finds his disorder daily growing worse, and that an efficacious remedy can no longer be delayed without extreme danger, after coolly revolving his situation, and the characters of different physicians, selects and calls in such of them as he judges most capable of administering relief, and best entitled to his confidence. The physicians attend; the case of the patient is carefully examined; a consultation is held; they are unanimously agreed that the symptoms are critical, but that the case, with proper and timely relief, so far from being desperate, that it may be made to issue in an improvement of his constitution. They are equally unanimous in prescribing the remedy, by which this happy effect is to be produced. The prescription is no sooner made known, however, than a number of persons interpose, and, without denying the reality or danger of the disorder, assure the patient that the prescription will be poison to his constitution, and forbid him, under pain of certain death, to make use of it. Might not the patient reasonably demand, before he ventured to follow this advice, that the authors of it should at least agree among themselves on some other remedy to be substituted? And if he found them differing as much from one another as from his first counsellors, would he not act prudently in trying the experiment unanimously recommended by the latter, rather than be hearkening to those who could neither deny the necessity of a speedy remedy, nor agree in proposing one?

politic as tumors and eruptions from the natural body").

[75] John Humble, *To Lick the Feet of Our Well Born Masters*, INDEPENDENT GAZETTEER (Phila.), Oct. 29, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 1, at 224.

Such a patient and in such a situation is America at this moment.[76]

Under this metaphorical framework, virtuous statesmen "prescribed" an experimental remedy, but it was a cure that only the people themselves-as-patients could choose to ingest. Alarmists and naysayers cried "Poison!" yet offered no alternative courses of treatment. In politics, credibility is everything, and here the Federalists couched the body metaphor to respect the autonomy of the citizenry while burnishing the Federalists' stature as well-intentioned experts.

At the same time that the drafters painted a word-picture of a political system in failing health, these leading men argued vociferously against the "dismemberment" of the Union.[77] Alexander Hamilton, in particular, ridiculed those who might fail to heed the lessons of history, arguing that "[n]otwithstanding the concurring testimony of experience, . . . there are still to be found visionary or designing men, who stand ready to advocate the paradox of perpetual peace between the States, though *dismembered and alienated from each other*."[78]

To the Federalists and their allies, the shrillness of the opposition offered proof that "the noble enthusiasm of liberty is too apt to be *infected* with a spirit of narrow and illiberal distrust."[79] In the cauldron of constitutional crisis, metaphor wove existing political-legal templates together with contemporary ethics to form a continuous whole. The speech-tactic maintained political community even as it recast the most visible representations of that community: its language and its institutions. It treated citizens as essential to the task, and encouraged them to think of democracy as an exercise in bodily self-preservation.

As exquisitely as a ritual execution, the horrifying image of severed body parts strewn about a battlefield warned the people that preserving the status quo or weakening the central government would be as catastrophic as it would be humiliating.[80] Such an act of political self-mutilation, Hamilton cautioned in no uncertain terms, would spell the end of the American experiment in self-rule. He had, of course, a wealth of concrete examples to go along with his vibrant image-making: dissolving the Articles without a substitute framework for governance would revive long-simmering territorial disputes and ultimately leave everyone worse off by exposing the country to intrigue and invasion by foreign powers.[81] The primary effect of the body metaphor was to viscerally

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[76] THE FEDERALIST NO. 38 (James Madison), *supra* note 4, at 236.

[77] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 7.

[78] THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 4, at 29 (emphasis added).

[79] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 5 (emphasis added).

[80] THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 4, at 29-33.

[81] "America," Hamilton wrote,

> if not connected at all, or only by the feeble tie of a simple league, . . . would, by the operation of such jarring alliances, be gradually entangled in all the pernicious labyrinths of European politics and wars . . . . *Divide et impera* [divide and command]

reinforce the notion that there was something for which it was worth banding together and fighting. Recent experiences of revolutionary sacrifice joined with the abstractions of democratic ideals to form a calculated message in favor of reform rather than a return to idyllic but disaggregated forms of self-governance.

Once these statesmen decoupled the notion of sovereignty from existing institutions, they then deftly relocated authority in "the great body of the people in every State," rather than in the state itself or any other then-existing institution.[82] "In Democracy," they argued, "the supreme power is possessed by, or derived from the aggregate body of the people."[83] This technique decoupled the body politic from the actual institutions that give voice to the citizenry's present desires.[84] Several salutary effects flowed from this speech tactic. First, it preserved – even sacralized – the first principle of popular sovereignty: the right to re-imagine political community. The people were not shackled by the debate, *but made free in the very act of rhetorical reconstitution*.

Second, the rousing notion of the body politic regained its dynamism and utility – a commonplace phrase became a powerful way to capture and promote the Federalists' agenda. Joyously mixing their metaphors, they insisted that only the "spirit of the people" themselves could "keep alive the sacred flame of liberty," rather than any particular institution.[85] Constitutional ideals being inseparable from the language used to give them life, new political

must be the motto of every nation that either hates or fears us.

THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 4, at 40. There is a delicious irony in Hamilton's choice of words. "Dismemberment" of Americans' relationships with each other would cause the states to become "entangled" in European wars. *See id.* at 35, 40.

[82] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 7; *see also* THE FEDERALIST NO. 46 (James Madison), *supra* note 4, at 304 (referencing "the great body of the citizens of the United States"). Antifederalists attacked the Constitution for "consider[ing] the people of the several states as one body corporate." "Brutus" V, *On the "Necessary and Proper" and the "General Welfare" Clauses, and on Congress's Power to Tax: The States Will Be Destroyed*, N.Y. JOURNAL, Dec. 13, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 1, at 499, 500.

[83] "Americanus" [John Stevens, Jr.] V, *On Montesquieu, A System Monger Without Philosophic Precision, and More on the Errors of "Cato"*, DAILY ADVERTISER (N.Y.), Dec. 12, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 1, at 487, 489.

[84] The move allowed the Framers to legitimate the use of imperfect assemblies or meetings out-of-doors to ratify the Constitution, for so many Americans were accustomed to thinking of legislatures as the entity in which "'the members of a commonwealth are united and combined together into one coherent, living body.'" WOOD, *supra* note 7, at 162 (quoting PROVIDENCE GAZETTE, Apr. 3, 1779).

[85] "The Republican" to the People, *"The Principal Circumstances Which Render Liberty Secure"*, CONN. COURANT (Hartford), Jan. 7, 1788, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 1, at 710, 714. They were quick to add, however, that "the constitution breathes the spirit of liberty." *Id.* at 715.

configurations demanded the refurbishing of older rhetorical forms.

Third, the discursive tactic generated a set of terms to be utilized in the taverns, workplaces, and homes. Separating the spirit from the word was critical to the rejuvenation of the political imagination. The people could comfortably cast aside the Articles' framework and overlook compliance with its strict terms without doing untold violence to their own interests, for the body politic would survive this constitutional reformation.[86] Transcendence of the literal realm allowed the people to break the law without breaking with their principles.[87]

Although it would be folly to expect perfect congruence, the Framers' constitutive metaphors maintained a high degree of consistency and coherence as the nation's attention became captivated by the event. For as Gordon Wood recounts, the talk of "disease" running rampant drew on the popular culture of the time.[88] Many social commentators lamented the "Venality, Servility, and Prostitution [that were] eat[ing] and spread[ing] like a Cancer."[89] Other tropes reinforced the sacred right of the people to repair democratic deficits by reconstituting themselves through popular language: the people themselves were the "fountain of government;"[90] while elected officials merely "agents"[91] and "trustees" of the law.

This ingenious move had to invigorate even the greatest skeptic of the proposed Constitution. Consider just how effectively the metaphor blunted critics' strongest arguments. Anti-federalists themselves clung to the belief that the states best embodied the spirit and will of the people. Right from the start of the Virginia Convention, Patrick Henry argued that "[s]tates are the characteristics and *the soul* of a confederation."[92] William Grayson of Virginia, who campaigned against ratification, accused the drafters of wishing "to *prostrate* all the state legislatures, and form a general system out of the

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[86] For accounts of the Framers' non-compliance with the terms of the Articles of Confederation as well as debate over its significance, see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 478-87 (1995); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 464-69 (1994).

[87] 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 14 (2000).

[88] WOOD, *supra* note 7, at 110 ("On the eve of the Revolution, America was displaying all the symptoms (in the lexicon of eighteenth-century political science) of a state attacked by disease.").

[89] *Id.* (quoting Letter from John Adams to Catherine Macauley (Dec. 31, 1772), *in* 2 JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 75 (L.H. Butterfield ed., 1961)).

[90] *Id.* at 530 (quoting James Wilson, Address at the Pennsylvania Ratifying Convention (Dec. 4, 1787), *in* JOHN BACH MCMASTER, PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 316 (John Bach McMaster & Frederick D. Stone eds., 1888)).

[91] THE FEDERALIST NO. 46 (James Madison), *supra* note 4, at 305.

[92] WOOD, *supra* note 7, at 526 (emphasis added) (quoting Patrick Henry, Address at the Virginia Ratifying Convention (June 4, 1788), *in* 3 DEBATES IN THE SEVERAL STATES, *supra* note 57, at 22).

whole."[93] Even Samuel Adams, who eventually favored ratification after the Bill of Rights was added, openly feared that "[t]he Body of the People tamely consent & submit to be . . . Slaves."[94]

Matched against the Federalists' claim of returning to first principles, these arguments came off as paternalistic, even obstructionist. If the people themselves desired fundamental change, then formality would have to give way to substance; ideological purity would have to take a backseat to the politics of the possible. The people's discursive practices, in turn, would preserve and refract these compromises in the reformation of political community.

B. *Leveling the Law*

Robert Wiebe once described the pamphleteering of the founding generation as, at bottom, an elitist exercise: "the gentry addressed their speeches and pamphlets, rich with learned allusions and first principles, to one another, not to the people."[95] Wiebe was only half-right. The Framers' primary audience certainly consisted of the sophisticated intellectuals and opinion-makers of the day. Given the subtlety and comprehensiveness of the ideas in play, however, it is easy for contemporary readers to overlook the accessibility and centrality of more basic concepts and terms. The biblical references, images of slavery and liberation, and plain-talk that appeared in founding-era pamphlets were all aimed at bringing the public at large over to the orators' side.

Anyone can assemble or disassemble a metaphor – no special training is necessary. In fact, a lasting insight of empiricists who study language acquisition is that all of these skills are second nature, part of our hard-wiring and cultural know-how.[96] From this scientific observation one may draw a number of secondary inferences as to the salutary qualities of such descriptive grammar in American democracy. These interlocking features can be summed up in three words: access, portability, and pluralism.

1. Access

John Locke's expertise was not limited to political philosophy, but extended

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[93] *Id.* at 525 (emphasis added) (quoting Letter from William Grayson to James Monroe (May 29, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 30 (Max Farrand ed., 1966)).

[94] Letter from Samuel Adams to Richard Henry Lee, *The Sovereignty and Diversity of the States Will Be Lost* (Dec. 3, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 1, at 446, 447.

[95] ROBERT H. WIEBE, THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION 40 (1984).

[96] *See* LAKOFF & JOHNSON, *supra* note 54, at 115-19 (theorizing that metaphor is a product of people's natural experiences); Albert N. Katz, *Figurative Language and Thought: A Review*, *in* FIGURATIVE LANGUAGE AND THOUGHT 7-13 (Albert N. Katz et al., eds. 1998) (discussing the biological hard-wiring of language).

to language theory. Yet he was mistaken when he claimed that "the artificial and figurative application of words . . . [is] for nothing else but to insinuate wrong ideas, move the passions, and thereby mislead the judgment."[97] Far from exemplifying a mistake of reason or a deliberately false statement, such compositions facilitate collective self-understanding.

Metaphor's unification of common experience and official doctrine in sing-song renders political commitments accessible to the people. That is to say, metaphor *levels* the law by promoting widespread understanding of foundational ideals among various sub-communities.

Comprehension and habitual usage of democratic materials, in turn, breed fidelity. When an individual shouts from the rooftops that freedom of expression is "the constitutional cornerstone of our democracy," he is both claiming the birthright that citizenship affords and demonstrating obedience to the polity.[98] On a systemic scale, even vociferous and vituperative attacks on a constitutional regime implicate this self-governing function of language, so long as they build upon accepted modalities.

The doctrinal aspects of constitutional language are obscure and technical, tempting some to believe – mistakenly – that law's legitimacy is rooted in its strangeness and insularity. If we were to take this proposition seriously, however, we would expect the law to be more widely respected and obeyed the less ordinary citizens understood its basic cadence. And we would then have to conclude that the law is most legitimate when there are but a handful in a given society who can navigate its complexities. Or, alternatively, that democracy is best served when the people themselves are reduced to passive receptors of the law.

But the former notion defies common sense and flirts with instability; the latter veers into vanguardist theories of political rule. A free people should never leave the law to professionals. More to the point, metaphor exemplifies the uniqueness of American constitutional discourse: it is simultaneously the speech of those who govern and those who are governed. America's rich history of popular rule justifies and encourages resort to figurative language: "the people," James Iredell declared, "are avowedly the fountain of all power."[99] If law is to secure the support of not merely lawyers but the people

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[97] 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 146 (Alexander Campbell Fraser ed., 1959). Because such figurative usages of language were "perfect cheats" to Locke, he insisted that "they are in all discourses that pretend to inform or instruct, wholly to be avoided." *Id.* Summing up his view, Locke wrote: "language, which was given us for the improvement of knowledge and bond of society, should not be employed to darken truth and unsettle people's rights." *Id.* at 131.

[98] *See, e.g.*, *Vermont House Votes Down Call for Flag-Burning Amendment*, N.Y. TIMES, Feb. 14, 1995, at 11 (quoting Jeffrey Amestoy, Vermont Attorney General, who opposed a resolution that urged Congress to pass a flag-burning amendment).

[99] James Iredell, Address at the North Carolina Ratifying Convention (July 24, 1788), *in* 4 DEBATES IN THE SEVERAL STATES, *supra* note 57, at 11.

themselves, a theory of constitutional language must take the citizenry's claims upon governing discourse seriously.

Metaphor stimulates the political imagination. A well-made composition pries open the historical memory, putting significant events, folk narratives, and other foundational tropes at the disposal of the virtuous citizen. The mapping of abstract ideas onto everyday phenomena allows individuals to appreciate and internalize democratic principles.

Although every metaphor dramatizes some features of communal life and occludes others, its artificiality – its *constructedness* – remains front and center. Metaphor's dual nature (its naturalness and artificiality) thus reminds citizens that all societies are socially constructed: they live, age, and pass away. Even as it invites acceptance of the model of governance basking in the light, its existence stands as proof that there is always an alternative democratic formulation in the shadows, a vision of law yet to be imagined. This has a reassuring effect on the people. Far from disabling the imagination of the citizenry, figurative discourse instead stimulates creative reuse of political knowledge to build counter-metaphors and symbols.

2. Portability

One of metaphor's greatest strengths (and greatest sources of concern) is its nomadic quality – that is, its ability to travel efficiently among social settings and institutions.[100] Figural rhetoric facilitates participatory democracy through its permeability to large scale cultural shifts and its attractiveness to activists and lawyers. It allows ordinary people and organizers to quickly summarize and publicize complicated political-legal stakes.

Indeed, it is often a pithy metaphor that encapsulates a constitutional position and becomes the basis for public debate as to its merits. School board members and parents, no less than trained legal advocates, can and do debate whether to shore up the "wall of separation between church and state."[101] A single encounter can ripple outward beyond county lines, from one subject matter to another, frequently with cumulative effects. Once enacted, it becomes a legal-rhetorical strategy to be emulated or avoided, lauded or disparaged.

Metaphor's leveling functions have taken on even greater importance in the information age, as technology eases its diffusion. Its vivid, compact amalgamations are able to rise above the din of modern life without being torn apart by its forces or deflected into oblivion. Metaphor enlists popular culture in the service of democracy. Beware of the skewing effect of big money on

[100] MAASEN & WEINGART, *supra* note 50, at 3-4 ("The single most important feature of a term or phrase being a metaphor is that they are [sic] 'nomadic', that is, taken up by and interacting with various discourses over time, thereby showing their malleability both actively and passively").

[101] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.").

"the marketplace of ideas" during campaign season, an activist warns (and the media dutifully reports it in the next news cycle).[102] Congress must act to stop the "wildfire" of gay marriage from spreading, Senate Majority Leader Bill Frist declares,[103] and his compatriots – local and state officials, ordinary Americans opposed to real or symbolic alterations to the institution of traditional marriage – respond to the clarion call.[104] The Internet is "both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services," the Supreme Court announces,[105] and this rapidly enters the information stream, a digitized capsule of constitutional principle to be repeated in endless permutations.

It is true, of course, that every metaphor limits the language-sphere and excludes information not pertinent to the conceptual network. Great evil can be accomplished and the culprits' tracks covered by beautiful language. Evocative language of God-given property rights masked ideologies of manifest destiny and policies aimed at subjugating native peoples.[106] The fiction of separate spheres of social and political life was enlisted in maintenance of racial apartheid.[107] A potential for abuse, however, is inherent in any communicative tool. In any society that aspires to be self-governing, each citizen shoulders a burden to enlighten her neighbor. If ordinary language is being used to perpetuate democratic injustice or to confuse or frustrate debate, it is incumbent upon virtuous individuals to deconstruct governing discourse and offer more incisive modalities of their own.

3. Pluralism

Finally, subpropositional devices aid the modern project of pluralism. Due in part to the homogeneity of their own polity, classical theorists undervalued the importance of democratic patois.[108] The Framers, too, made this mistake, believing that they would always be blessed by "a people descended from the

[102] Derek Cressman, *Free Speech vs. Paid Speech*, CHRISTIAN SCI. MONITOR, Aug. 26, 2004, at 9.

[103] Editorial, *The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, § 4, at 12.

[104] Lolita C. Baldor, *Massachusetts Governor Supports Gay Unions Ban: Governor of State that Recognizes Gay Marriage Backs Passing Amendment Banning Same Sex Marriage*, WIS. STATE J., June 23, 2004, at A3 (acknowledging 'wildfire' metaphor, and describing Massachusetts Governor Mitt Romney's vow to fight the recognition of gay marriage).

[105] Reno v. ACLU, 521 U.S. 844, 853 (1997).

[106] Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 441 (1998) (discussing the concept of "manifest destiny" and the appropriation of Native American lands by the U.S. government).

[107] *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (establishing the "separate but equal" doctrine).

[108] *See supra* notes 61-66 and accompanying text.

same ancestors, . . . [and] professing the same religion."[109] Because the world is so different today, democrats must re-think the nature of the ties that bind.

The usual answer is to promote diversity of the population[110] or alternative political arrangements.[111] Amy Gutmann has argued that group identity must be respected in order to protect and promote the "ethical agency" of individuals.[112] Similarly, Heather Gerken has recently discussed the importance of multiplying variety *among* institutional types as opposed to merely diversity of membership *within* them.[113] As Gerken astutely recognizes, horizontal differentiation, no less than vertical diversity, facilitates pluralism, and expands opportunities for dissent.[114]

Yet there is a darker side to this account. Institutional variety alone does not ensure that either pluralism or dissent serves the ultimate order. In the absence of a common tongue and ethic, efforts to secure lasting constitutional achievements – even if they are borne of public spiritedness – are likely to prove ineffective. Contrarian positions may be misperceived as threatening rather than invigorating, the ideas alien rather than indigenous. In such an event, multiplying organizational or demographic diversity may well generate frustration and dissipate reformist energies. This is what haunts every pluralist project like Banquo's Ghost: the omnipresent threat of political atomization and social isolation.

Democratic myth-making offers the missing ingredient. In the service of pluralism, figurative rhetoric provides a crucial linkage between institution and individual, and between the bustling subcommunities that together form American society. Each foundational metaphor represents an amalgamation of

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[109] THE FEDERALIST NO. 2 (John Jay), *supra* note 4, at 9.

[110] *See* AMY GUTMANN, IDENTITY IN DEMOCRACY 26-29 (2003); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 6, 9 (1995); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 507 (2001) (advocating a model of cultural dissent, by which appeals to law to silence intra-group contrarians bear the burden of justifying claims of cultural distinctiveness and homogeneity).

[111] *See* David Barron, *Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 494-96 (1999) (offering doctrinal improvements to enhance the constitutional status of cities); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 150-53 (forthcoming Dec. 2005) (positing localist account of marriage).

[112] *See* GUTMANN, *supra* note 110, at 26-29 (explaining "ethical agency" as including "the capacity to live one's own life as one sees fit consistent with respecting equal freedom for others, and the capacity to contribute to the justice of one's society and one's world").

[113] Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1108 (2005) ("Second-order diversity seeks variation *among* decisionmaking bodies, not *within* them. It favors *inter*organizational diversity, not *intra*organizational diversity."); *see also* Heather K. Gerken, *Dissenting By Deciding*, 57 STAN. L. REV. 1745, 1754 (2005) (arguing that dissenting by deciding "fus[es] an act of contestation with an act of affiliation").

[114] *See* Gerken, *supra* note 113, at 1103 (positing that "[second-order diversity] fosters diversity without mandating uniformity").

elite and popular conceptions of constitutional life; it is a place where the deep structures of law and politics converge. Popular features of legal language represent traces of self-rule.

The rich and the poor, the formally educated and the self-taught, all have an authorial role in American democracy. But it begins with the basic nature of governing language. It is this realization that turns the multiplicity of voices and background experiences from a potential threat to order and unity into a reservoir of strength.

What others have derided as lowbrow features of our law[115] are, in fact, nothing of the sort. Just as Hamilton and his compatriots engaged the citizenry in their day by mixing common ways with high-minded abstractions, so metaphor today invigorates political participation according to an equivalent formula.

C. *Enhancing Accountability*

So far, it has been my goal to unveil metaphor's harmonic force and its open texture. If metaphor is uniquely accessible to average citizens, it then follows that the device is not only understood by the people, but can also be acted upon by them. It is in this sense that constitutional vernacular's participatory dimension reveals its greatest strength: its capacity to enhance political accountability in the law. Because a judge's every statement is buoyed by politics, constitutional language is constantly enmeshed in and inevitably enriched by what occurs beyond law's borders. In fulfilling this authorship-enhancing function, governing discourse necessarily reveals its disharmonic properties.

The hallmarks of democracies are receptivity to self-critique and belief in the perfectability of the polity. Figurative language creates bite-sized units of constitutional knowledge for these tasks. These units, in turn, facilitate the efficient exchange and sharpening of political ideas. As citizens make use of common rhetorical-political forms, they develop basic skills necessary to the day-to-day practice of self-government.

Recalibration of legal language transpires not only during litigation, as parties press competing constructions of law upon the courts, but also through popular mobilization, which alters the very field from which judges cull their raw material. Consider two prominent historical examples of democratic self-

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[115] *See, e.g.*, LON FULLER, LEGAL FICTIONS 4-5 (1967) (calling the concept of legal fiction a "skeleton in the family of the law [that should] be taken from its closet and examined thoroughly"); 5 THE WORKS OF JEREMY BENTHAM 92 (John Bowring ed., London, Simpkin, Marshall, & Co. 1843) ("[L]ying and nonsense compose the groundwork of English judicature . . . in English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness."); Thomas Morawetz, *Metaphor and Method: How Not to Think About Constitutional Interpretation*, 27 CONN. L. REV. 227, 230 (1994) ("Clear thinking about the roles of social goals, evolving history, and originalist admonitions in decision-making require that we resist the lure of metaphor.").

critique: the first by social liberals, the second by social conservatives. Each illustrates the layered nature of democratic dialogue and the generative power of constitutional vernacular.

1. Civil Rights Revivalism

One can discern metaphor's permeable structure most vividly in the crafting and extension of the "meeting" or "assembly" metaphor which spurred innovations in democratic culture in the 1960s. Building on the gains of progressivism, union organizers in this country built a mighty grass-roots movement on the model of the "army" and the "town meeting."[116] Alternative models of participatory democracy (e.g., anti-war, feminist, and black civil rights) then flourished to tackle a widening circle of social ills. As one Students for a Democratic Society ("SDS") member exclaimed in 1965 at the height of the civil rights movement, "freedom is an endless meeting."[117] Churches served as the sites of democratic renewal, and when those institutions were not open or available, the people conducted "mass meetings in pool rooms, taverns and wherever else [they could] get an audience."[118]

Alternative assemblies were conducted openly and notoriously in order to highlight a contrast-community existing alongside the exclusionary legal order, but also to underscore the values of equality, mutual sacrifice, and reason, which they believed were not presently reflected in the law. A new mythology of equality was being built from the ground up – through incidents, anecdotes, songs, and sayings. Call this the formation of a *democratic sub-culture*.

To many inspired to take the streets or to commandeer segregated diners and buses, the entire civil rights experience had the air of an extended revival meeting.[119] This image became fixed squarely in the political imagination. The Montgomery bus boycott of March 1956 was managed in a series of "mass meetings" – nearly four thousand people were present to reject an early end to the boycott, signaling a collective intent to press on.[120] On August 28, 1963,

[116] FRANCESCA POLLETTA, DEMOCRACY IS AN ENDLESS MEETING 30 (2002).

[117] *Id.* at 1 (quoting an unidentified SDS member).

[118] *Id.* at 67-68 (quoting a Student Nonviolent Coordinating Committee organizer in Batesville, Mississippi). As Polletta explains, organizations like SDS self-consciously organized as a participatory democracy, and many members felt renewed faith in self-government through their efforts at home and in the streets. *Id.* at 69-71.

[119] David Chappell's study recovers the prophetic ideas that made the black civil rights experience soar. At some meetings, people would give speeches, speak in tongues, heal the sick, and invite the spirit of the Lord. The encounters between the protesters and the police were often seen as miracles that they did not produce more violence. *See* DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 92-96 (2004).

[120] L.D. Reddick, *The Bus Boycott in Montgomery*, *reprinted in* 1 REPORTING CIVIL RIGHTS 252, 264 (2003) (relating how the boycotters "manifested their collective will" by voting to continue the boycott); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE

the rhetorical strategy reached its crescendo: Martin Luther King, Jr.'s riveting oration on the steps of the Lincoln Memorial now recapitulated the meeting metaphor as the Eucharistic banquet. In so doing, he not only broadened the civic gathering to encompass the Nation as a whole, but also claimed the values of kinship, difference, and forgiveness as democratic virtues:

> I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident, that all men are created equal." I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.[121]

Seizing the moment, democratic vernacular now shifted in tone from opposition to reconciliation,[122] from promises unfulfilled to opportunities regained. In this way, mobilization rhetoric invited cooptation by governing discourse.[123]

Saturation of popular culture with images of people assembling out of doors eventually redirected the path of constitutional language. Through popular idiom, the people rendered law first relevant, then accountable. If law is a political-cultural system, then metaphor acts as a *chokepoint* – an entry point to that order, a place where pressure and influence may be most effectively applied. The reform-oriented rhetoric of discontent would become absorbed by the law, thereby reinvigorating it. The voices of rage, deprived of an audience, would be increasingly marginalized.

In a series of path-breaking cases, protests in the streets and lunch counter sit-ins forced a collision of political rhetoric and indifferent, even hostile, legal

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KING YEARS 1954-63, 136, 139-43 (1988) (recounting mass meetings in Montgomery). "The mass meeting pattern [was] relatively simple: songs, prayer, latest news and plans, a 'pep talk,' collection." Reddick, *supra*, at 257.

[121] Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *available at* http://www.americanrhetoric.com/speeches/Ihaveadream.htm.

[122] *Id.* The theme of a unified and determined march toward legal justice runs throughout the speech. In addition to the ancient image of table fellowship, King urged listeners not to "satisfy our thirst for freedom by drinking from the cup of bitterness and hatred; to not allow the "marvelous new militancy . . . [to] lead us to a distrust of all white people;" and to instead use their faith in the law to "transform the jangling discords of our nation into a beautiful symphony of brotherhood." *Id.*

[123] King's speech unleashed a flurry of vibrant political and religious metaphors. Making clear the goals of the movement, King accused America of "giv[ing] the Negro people a bad check" and stated that "we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice." *Id.* Portraying justice as an inevitable product of the struggle, he contrasted "the sweltering summer of the Negro's legitimate discontent" with "an invigorating autumn of freedom and equality." *Id.* Then, quoting the Book of Amos, he urged his listeners to work until "'justice rolls down like waters, and righteousness like a mighty stream.'" *Id.* (quoting *Amos* 5:24 (American Standard Version)).

infrastructure.[124] Litigants brought cases to prompt not only reconsideration of legal rules, but also the very recalibration of constitutional language. The effect was to revolutionize not only the High Court's conception of free expression, but also the very notion of political community.[125] Each time, direct action and trial strategies – some coordinated, at other occasions overlapping in timing and objectives[126] – prompted a further institutional elaboration of these metaphors in First Amendment law, as jurists described these activities as evincing elements of "deliberation," "order," and "exchange."[127] As I have argued elsewhere, the incongruity between the populist, deliberative imagery spun in each of these controversies and the actual facts demonstrates both that small-scale art has tremendous staying power and that judicial discourse is subject to popular control.[128]

Concomitantly, the political branches acted to transform purely private sites nurturing discrimination into institutions re-dedicated to the principle of equal citizenship. Here, too, the civil rights laws can be seen as a codification of mobilized rhetoric: "public accommodations" would now stand forever as living symbols of constitutional justice, where citizens can freely congregate, go about their business, and even exchange ideas.

Indeed, the civil rights experience reveals that the importance of foundational language to the life of a social movement can be mapped along a

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[124] Taking to the streets and rhetorical strategy have traditionally gone hand in hand. *See* Gary Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 410 (2005).

[125] *See id.*

[126] For a thoughtful discussion of the sometimes divergent goals of lawyers and activists, see Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1443 (2005) (exploring "the tension between litigation and social movement tactics"). On the conflicts between public interest lawyers and the communities they purport to serve, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1627-43 (1997).

[127] *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 564 (1965) (upholding the constitutionality of Louisiana's statute that prohibited picketing near a courthouse, but reversing defendant's conviction for picketing during a civil rights rally because he had received permission from police chief); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (reversing breach of the peace convictions of black students who had participated in a peaceable civil rights protest at the statehouse on free speech and assembly grounds); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 297 (1961) (invalidating statute that required each local organization affiliated with an out-of-state association to file an affidavit that none of its members belonged to "subversive organizations").

[128] Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, *supra* note 8, at 212-15 (arguing that these rulings "captured the legal principle that thinking people will not be presumed to rush to violence or illegal activity at the drop of an inflammatory word," and also that the rulings "introduced inventive images, counter-scripts, and categories of meaning to a new generation of constitutional actors"); *see also, e.g.*, NAACP v. Button, 371 U.S. 415, 428-29 (1963); *Gremillion*, 366 U.S. at 297.

timeline:

- In the first stage, rhetoric facilitates a group's self-organization, recruitment, identity, and solidarity. Discursive practices are focused on internal rather than external goals.[129]
- Spontaneous efforts at direct action begin. As a group reaches a critical mass, it splits and multiplies into other groups, each with its own identity, membership, and agenda. Metaphors proliferate in the second stage. Conceptual and linguistic competition commences.
- Only through common purpose and shared language can factions unite. Thematic coherence increases. A movement arises when such a coalition formulates a new message to engage with political institutions and an external target audience.[130] At this third stage, figurative discourse facilitates a democratic counter-culture, gaining in popularity yet opposed to aspects of civic life and not yet enjoying recognition or decisive sway over public policy.
- In the fourth stage, the movement's symbolic acts achieve validation through institutional cooptation. Freedom is now recognized as everybody's cause or everybody's failure.[131] Words, phrases, and ideas embraced by elected officials and courts of last resort reflect the universality of the heretofore contested principle –

[129] Herbert Simons explains that a social movement must accomplish three tasks: (1) attract, maintain, and mold workers into an efficiently organized unit; (2) secure adoption of their product by the larger social structure; and (3) react to resistance generated by the larger structure. Herbert W. Simons, *Requirements, Problems, and Strategies: A Theory of Persuasion for Social Movements*, *in* READINGS ON THE RHETORIC OF SOCIAL PROTEST 34, 35-36 (Charles E. Morris III & Stephen H. Browne eds., 2001); *see also* DAVID SNOWBALL, CONTINUITY AND CHANGE IN THE RHETORIC OF THE MORAL MAJORITY 66-71 (1991) (observing that mobilization rhetoric initially makes claims that political action is effective, legitimate, and necessary).

[130] Shifting toward externally-directed functions, Charles Stewart has stressed the importance of transforming perceptions of history, transforming perceptions of society, prescribing courses of action, mobilizing the discontented, pressuring the opposition, and maintaining the visibility of a movement. Charles J. Stewart, *A Functional Approach to the Rhetoric of Social Movements*, *in* READINGS ON THE RHETORIC OF SOCIAL PROTEST, *supra* note 129, at 167-68.

[131] For example, see President John F. Kennedy's June 11, 1963, civil rights address, in which he argued that discrimination "is not a sectional issue . . . [nor] even a legal or legislative issue alone." President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), *available at* http://www.jfklibrary.org/j061163.htm. He then reasserted the importance of the rule of law: "It is better to settle these matters in the courts than on the streets, and new laws are needed at every level." *Id.* Finally, he wove law, religion, and morality into a new whole: "We are confronted primarily with a moral issue. It is as old as the scriptures and is as clear as the American Constitution." *Id.*

these speech-acts are incorporated into official or ruling discourse, becoming indistinguishable from the legal norms with which they have been associated. The language of mobilization and change becomes the mechanism of norms-enforcement.

- The fifth stage is transitional. Every successful project in constitutional lexicon-building inspires mimics and detractors.[132] The cycle of constitutional politics begins anew.

Consider another example. In opposition to the older patriarchal order and in building upon the gains of the New Deal-New Frontier coalition, second-wave feminism sought greater control over the decisions that affected women's daily lives (stages 1 through 3).[133] *Roe v. Wade* represents not only a culmination of doctrinal developments since *Griswold v. Connecticut*, but also a harmonization of discursive trends in the political and legal domains (stage 4). This period of settlement is marked by bureaucratic efforts to impose rhetorical and physical order on social practice.

But governing language can remain stable only for so long. The fragile congruence between public attention, ruling idiom, and popular ethos begins to dissipate. New popular movements inevitably claim to speak on behalf of the people, aiming to either extend existing gains or to curb perceived excesses. These informal organizations will nourish their own discourses, along with

[132] As Stuart Scheingold puts it, legal enactments "can lay the basis for a collective political identity, since the entitlements provide a joint stake and the deprivations a mutual cause. In sum, litigation can politicize individual discontents and in so doing activate a constituency, thus lending initial impetus to a movement for change." STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 136-37 (1974); *see also* JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS 20-21 (1996) (discussing the forms of law in politics – rights, institutional realism, ideology of remedy, and radical consciousness – that are "so distinctive that they define a movement's conventions").

[133] By contrast, first-wave feminism organized around the right to suffrage. Second-wave feminism's legacy, like that of the black civil rights movement, can be traced in civil rights laws from the Equal Pay Act of 1963 to the Pregnancy Discrimination Act of 1973. As Reva Siegel argues, "[c]laims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution." Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312-13 (2001). *See generally* JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986) (detailing the failed efforts to ratify a constitutional amendment banning government sex discrimination); SARA EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT (1979) (recounting the efforts to redefine cultural views restricting women to the twin roles of mother and homemaker); JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS (1975) (analyzing how the women's liberation movement has shaped public policy toward women); JUDITH HOLE & ELLEN LEVINE, REBIRTH OF FEMINISM (1971) (discussing the revival of feminist movements in the 1960s and their efforts to achieve private and public equality for women).

related frames of understanding through which to visualize and appreciate the stakes of democratic conflict. Official characterization of abortion in the language of privacy spurred the formation of new social groups bent on toppling the legal-linguistic regime (stage 5), which they believe fostered a "culture of death"; in its stead, the religious revival promises a "culture of life."[134]

Planned Parenthood of Southeastern Pennsylvania v. Casey represents an important weigh station along this journey, as the rhetoric of second-wave feminism recombined with the right-to-life movement's emphasis on the sanctity of every human life. In language cognizable only against the backdrop of political struggle, the Court acknowledges that pregnancy requires unique "sacrifices" and is inextricably bound with the "destiny of the woman."[135] At the same time, the state has a "profound interest in potential life," which is now said to extend throughout pregnancy.[136] "These principles do not contradict one another," the Court insists.[137]

The election of George W. Bush, along with the appointment of ideologically-compatible jurists across three Republican administrations does not ensure the ultimate success of the conservative movement.[138] It does, however, dramatically alter the fields within which constitutional language is fiercely contested and produced.

2. The Anti-Separationist Movement

Over the last thirty years, the country has been roiled by an intense debate over the proper role of religion in public life. This has played out on a number of fronts simultaneously. A particularly potent metaphor – the "wall of separation between church and state"[139] – has galvanized opposition to the Warren Court's legacy while sparking a popular sense of moral renewal. A "high and impregnable" wall was essential, Justice Hugo Black famously wrote in *Everson v. Board of Education*,[140] to avoid the "turmoil, civil strife,

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[134] *E.g.* Robin Toner, *Pope May Color Debate in U.S. Over "Life" Issues*, N.Y. TIMES, Apr. 21, 2005, at A1 (reporting a conservative appeal to U.S. Catholics on "culture of life" issues – abortion, euthanasia, and stem cell research).

[135] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

[136] *Id.* at 878.

[137] *Id.* at 846.

[138] The expectations of those committed to a strategy of ideological shift through personnel changes can be very high. As one senator exclaimed during the confirmation hearings of Judge John G. Roberts, Jr., the day Roberts's nomination was sent to the floor: "This may be, I hope, a turning point in our legal system." Sheryl Gay Stolberg, *Panel Approves Roberts, 13-5, as 3 of 8 Democrats Back Him*, N.Y. TIMES, Sept. 23, 2005, at A1.

[139] Reynolds v. United States, 98 U.S. 145, 164 (1879) (quoting a letter from Thomas Jefferson to the Danbury Baptist Association); *see infra* notes 148-149 and accompanying text.

[140] 330 U.S. 1, 18 (1947).

and persecutions" that plagued the colonists' forebears.[141] Accordingly, "[w]e could not approve the slightest breach."[142]

At first, enraged conservatives tried to dismantle the wall itself. Predictably, their opening gambit was to insist that the wall was purely a judicial fabrication without basis in the Nation's political tradition.[143] In recent years, as the frontal assault on the iconic wall proved ineffective, their strategy has shifted toward seeking a more porous membrane between government and the private realm.[144] Increasingly, conservatives have accepted that the wall – in one form or another – will persist. Rather than challenge the wall directly, they have argued that the "wall of separation" has been transformed by unelected magistrates into a "wall of religious oppression."[145]

So argued then-Senator John Ashcroft in 1988 before a gathering of the Christian Coalition. Later, as Attorney General, he would take the symbolic step of holding regular prayer breakfasts for Justice Department staff.[146] In September 2004, Jim Towey, Director of the White House Office of Faith-Based and Community Initiatives, made a similar argument: "The separation of church and state is very important but we also recognize that that wall

[141] *Id.* at 8. Although the Court first called the wall metaphor an "authoritative declaration of the scope and effect of the [First] [A]mendment" in *Reynolds v. United States*, 98 U.S. 145, 164 (1879), there was no further mention of it in the Court's opinions until *Everson*, more than a generation later.

[142] *Id.* at 18; s*ee also* Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (stating that an earlier case in which the state had used tax-supported property for religious purposes "breach[ed] the 'wall of separation'"); Bd. of Educ. v. Allen, 392 U.S. 236, 251 (1968) (Black, J., dissenting) (invoking wall metaphor); Engel v. Vitale, 370 U.S. 421, 425 (1962) (concluding that public school sponsored prayer "breaches the constitutional wall of separation"); Torcaso v. Watkins, 367 U.S. 488, 493 (1961) (invoking wall metaphor in striking down religious oath requirement to become notary public); Braunfeld v. Brown, 366 U.S. 599, 604 (1961) (citing wall metaphor as proper encapsulation of law); McGowan v. Maryland, 366 U.S. 420, 443 (1961) (same); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948) ("[T]he First Amendment's language, properly interpreted, had erected a wall of separation between Church and State.").

[143] *See, e.g.*, ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 49-82 (1982) (arguing that "the First Amendment did not, nor was it intended to, create a 'high' and 'impregnable' wall between Church and State.").

[144] Stephen Carter, for example, has argued that "in order to make the Founders' vision compatible with the structure and needs of modern society, the wall has to have a few doors in it." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 109 (1993).

[145] In 1988, then-Senator John Ashcroft reportedly told a meeting of the Christian Coalition that "a robed elite have taken the wall of separation designed to protect the church and they have made it a wall of religious oppression." Dan Eggen, *Ashcroft's Faith Plays Visible Role at Justice; Bible Sessions with Staffers Draw Questions and Criticism*, WASH. POST, May 14, 2001, at A1.

[146] *Id.*; *see supra* note 145.

separating the poor from effective programs had to come down."[147] The wall that once symbolized progress had hardened into a totem to suffering. Built to preserve and nurture liberty, it is now said to stifle human interaction and political innovation.

Social conservatives realized that there was always something jarring about this constitutive metaphor. Although the *Everson* opinion quoted the "wall of separation" language of Jefferson's 1802 letter to the Danbury Baptist Association,[148] it was Roger Williams who first wrote that in order "to restore [God's] Garden and Paradise" individuals should "be walled in unto [God] from the world."[149] Whereas Williams's metaphor painted a picture of the citizenry nurtured within the walls, Justice Black's rendering separated the instruments of political authority from the people themselves, who are metaphorically banished beyond the wall. This wall has always been vulnerable to charges of elitism; it seems to defy the spirit of civic republicanism.

A wall that keeps the righteous from their sacred inheritance has generative force in a country populated by the God-fearing.[150] This change in discursive practice is part of a broader agenda to transform public perception of an actual religious majority into a political minority. People of faith, this mobilized community insists, are excluded from the public square through the excesses of liberalism and secularism.[151] Conceived in law, the wall has become the

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[147] Adelle M. Banks, *Adviser: Bush "Mainstream" in His Faith; Politics: Pastor Says President Hasn't Received Divine Orders on War*, LONG BEACH PRESS-TELEGRAM (Cal.), Sept. 11, 2004, at A15.

[148] *Everson*, 330 U.S. 1 at 16.

[149] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 45 (2002). As Philip Hamburger recounts, the separationist drive emerged in earnest in the middle of the nineteenth century, as Protestants sought to prevent the Catholic Church from exercising political and religious clout. Advocates argued that affairs of the state must be kept "distinct" from and "unconnected" to religious life, with each sphere to retain its "purity." *Id.* at 221-23 (citations omitted). In particular, during a pitched battle over whether New York City sectarian schools should receive public funds, the American Republicans argued: "Our sole object is to form a barrier high and eternal as the Andes, which shall forever separate the Church from the State." *Id.* at 228.

[150] The connections between belief in religion and belief in the rule of law run deep. A recent Harris poll showed that over ninety percent of Americans believe in God, and a similarly overwhelming majority believe in miracles, the afterlife, and other expressions of divinity. *See* Humphrey Taylor, *The Religious and Other Beliefs of Americans 2003*, THE HARRIS POLL #11, Feb. 26, 2003, http://www.harrisinteractive.com/harris_poll/index.asp?PID=359. In the evocative story of Jericho, whose inhabitants "had shut and barricaded its gates (against the Israelites)," God instructs Joshua to march around the city seven times on seven successive days. At the completion of this cycle, and "[w]hen the ram's horn sounds . . . the entire people must utter a mighty war cry and the city wall will collapse then and there." *Joshua* 6:1-5 (New Jerusalem).

[151] Republican Senators have in recent months systematically decried Democratic

antithesis of law.

Ingeniously, by making the iconic wall seem impregnable, social conservatives have turned separationists' strength into a weakness. Because second-order metaphors are so *tacky*, so enmeshed with democratic principles, this political-rhetorical strategy has softened social support for not only the dominant liberty metaphor of the last constitutional regime, but also the legal machinery with which it has been associated. A byproduct of this process of delegitimation has been institutional indecisiveness, then doctrinal incoherence, and now implicit abandonment of the *Lemon* test.[152]

Civil libertarians have cheerfully if unwittingly enabled this strategy every time they have demanded that this symbolic wall be made "high and strong."[153] To be sure, the idea of rights as bulwark has a long pedigree in our constitutional tradition.[154] All this tells us, however, is that a legal concept or

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opposition to certain judicial candidates as emblematic of hostility to "people of faith." *See* David D. Kirkpatrick & Sheryl Gay Stolberg, *Frist is Drawing Criticism from Some Church Leaders*, N.Y. TIMES, Apr. 22, 2005, at A18 (describing a telecast on radio and television themed "The Filibuster Against People of Faith").

[152] *See, e.g.*, *Van Orden v. Perry*, 125 S. Ct. 2854, 2861 (2005), in which the Court explained: "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Id.*; *see* Lemon v. Kurtzman, 403 U.S. 602 (1971)). Further marginalizing the rule, the Court stated that although "we have sometimes pointed to *Lemon v. Kurtzman* as providing the governing test . . . . [m]any of our recent cases simply have not applied the *Lemon* test." *Id.* at 2860-61 (citation omitted). In *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2736 (2005), the Court appeared to relax the religious purpose prong by requiring that a state's motive be "predominantly" to advance religion before it may be enjoined. *Id.*

[153] Press Release, ACLU, Kansas County Official Abused Position By Mailing Bible Tracts, Attacking Citizens's [sic] Beliefs, ACLU Says (Aug. 30, 2000), *available at* http://www.aclu.org/religion/govtfunding/16302prs20000830.html; *accord* Press Release, Americans United for Separation of Church and State, Rep. Delay Calls Faith-Based Initiative an Opportunity to "Rebuke Church-State Separation" (July 11, 2001), *available at* http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=6045&security=1002&news_iv_ctrl=1381 (quoting Barry Lynn, Executive Director, to the effect that the administration's faith-based initiative is a "crusade to force government-sponsored religion onto the American people and demolish the wall of separation between church and state").

[154] For example, in *West Virginia State Board of Education v. Barnette*, Justice Jackson stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship and assembly . . . may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 503, 508 (calling courts of justice an "excellent barrier to the encroachments and oppressions of the representative body" and "bulwarks of a limited Constitution"). For a sharply pessimistic account of boundary metaphors, see Jennifer Nedelsky, *Law,*

turn of phrase is theoretically available; it cannot predict whether or when it will resonate with the populace or influence legal norms.

Given the coordinated strategies to make the wall a focus of social mobilization and public debate, it was only a matter of time before the law absorbed the heightened political sentiment against the symbolic boundary. Not only have a number of jurists expressed outright hostility toward the wall of separation,[155] the High Court has increasingly eschewed the trope in its authoritative resolutions.[156] This is especially telling in cases that actually favored the anti-establishment position.[157]

As late as 1982, Chief Justice Warren Burger confessed in *Larkin v. Grendel's Den*[158] that the "the concept of a 'wall' of separation is a useful signpost."[159] Reflecting the fact that the locus of governing discourse had begun to shift in response to society's rightward tilt, just two years later he wrote:

> The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact

Boundaries, and the Bounded Self, *in* LAW AND THE ORDER OF CULTURE 162 (Robert C. Post ed., 1991) (arguing that the boundary metaphor is "destructive" in the degree to which it obscures communal relationships).

[155] *E.g.* Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) ("The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.").

[156] Recently, proponents of the wall of separation have been able to invoke it only in separate opinions. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 873 (2000) (Souter, J., dissenting) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting) ("[T]he record in this case illustrates the importance of rebuilding the 'wall of separation between church and State' that Jefferson envisioned."); Lee v. Weisman, 505 U.S. 577, 600-01 (1992) (Blackmun, J., concurring) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947))); Marsh v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting) (same).

[157] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); *Weisman*, 505 U.S. at 598.

[158] 459 U.S. 116 (1982) (holding that a Massachusetts law giving schools and churches veto power over liquor licenses within a 500-foot radius violates the Establishment Clause).

[159] *Id.* at 123. In 1977, the Court wrote: "We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state 'is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' Nonetheless, the Court's numerous precedents 'have become firmly rooted.'" Wolman v. Walter, 433 U.S. 229, 236 (1977) (citations omitted).

> exists between church and state.[160]

Elevating the mobilized conservative critique into law, he explained that:

> No significant segment of our society and no institution within it can exist in a vacuum or *in total or absolute isolation from all the other parts*, much less from government. . . . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause."[161]

Here, the image of the unitary body politic was set in opposition to the boundary metaphor in order to undermine it.

Utilizing the same basic strategy, Justice Anthony Kennedy has observed that "enforced recognition of only the secular . . . would signal not neutrality but a pervasive intent to *insulate* government from all things religious."[162] For him, boundaries matter but only insofar as they serve to "guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[163] The message is unmistakable: a creation of the mind, the wall should serve the mind rather than effectuate the physical segregation of the religious community.

For religious conservatives, as it had been with civil rights activists, metaphor served as the chief site of constitutional in-fighting. A social movement was organized in response to perceptions of diminished social worth and political clout; sympathetic officials were elected and appointed; and the rhetoric of governing elites was significantly recast. In both situations, figurative discourse motivated and enabled popular control of foundational principles.

The peculiarly porous character of American constitutional language presents distinct tradeoffs. One risk is that a highly determined segment of the populace can set the terms of debate, and with a little luck, shift the locus of governing rhetoric. Political elites (including judges) can mistake the calibrated voices of lawyers and high-pitched pleas of activists for that of an

[160] Lynch v. Donnelly, 465 U.S. 668, 673 (1984); *see also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970). The *Walz* court stated, "No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts – one that seeks to mark boundaries to avoid excessive entanglement." *Id.* at 670. "[The exemption] restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other. Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact . . . ." *Id.* at 676.

[161] *Lynch*, 465 U.S. at 673 (emphasis added).

[162] County of Allegheny v. ACLU, 492 U.S. 573, 657, 663-64 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added) ("A categorical approach would install federal courts as jealous guardians of an absolute 'wall of separation,' sending a clear message of disapproval."). Chief Justice Rehnquist and Justices White and Scalia joined Justice Kennedy's opinion. *Id.* at 655.

[163] Lee v. Weisman, 505 U.S. 577, 592 (1992).

aroused citizenry in instances when they merely produce echo chamber effects.

What is more, conceptual creep –a low grade, almost imperceptible shift in legal meaning – is not only a fact of life, but presents a perennial problem of institutional management. The very forces seeking to tame the law from without can distort, destabilize, and displace accepted understandings.

D. *Repairing Rifts*

Law's sense of stability is in perpetual danger of being breached. War and revolution are the most cataclysmic events that destroy the necessary conditions for law to exist. The appearance of law can be disrupted in other, less seismic ways. Migration, economic swings, birth patterns, and popular culture all have a hand in destabilizing the social understandings that cement law's hold on us.

Political realities, too, are always, at some level, in flux: coalitions break down and new alliances must be made, public officials exhaust or squander their mandates, policy agendas are re-ordered with each election season. These cultural and electoral developments constantly put pressure on dominant constitutional understandings. For legal language to continue to ring true in the face of these challenges, it must alter its pitch or vary its tone.

Principled judgment on the part of law's stewards, including adherence to stare decisis, plays a crucial role in projecting law's equilibrium.[164] But it can only do so much – the appearance of principle is only one pillar of our belief in the law. Much of the constitutional text is contestable. For the average citizen, fidelity to existing doctrine is a hopelessly abstract morass. Everyone claims to keep faith with the Framers, but who is right?

Constitutional vernacular here serves as an additional mediating and stabilizing device. Legal change is simultaneously facilitated and masked by familiar metaphors and idioms. In this way, even the most significant changes to the polity are made familiar, sensible, and ultimately palatable among various constitutional constituencies. I call metaphor's capacity to render law seamless and timeless its *reparative quality*.

If there is something counterintuitive for the modern citizen, exacerbated by moments when law appears out of touch with human concerns, it is the idea that one must be governed by another's promises rather than one's own. Resort to the figurative eases this anxiety. It fosters citizens' acceptance of

[164] *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 588 (2001) (stating that stare decisis "promotes stability, protects settled expectations, and conserves judicial resources"); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (making the case for the explicit consideration of the "appearance" of fairness in deciding whether stare decisis should compel continued adherence to a past legal rule); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749-53 (1988) (justifying stare decisis as a means to promote stability and to legitimate judicial review).

being ruled by past commitments, engendering intergenerational trust. The very structure of governing discourse reminds the people that while there is no escape from the past, liberty comes from engagement and political renewal.

By way of illustration, consider the tectonic, cross-doctrinal shift that can be traced from *Bowers v. Hardwick*[165] to *Romer v. Evans*[166] and finally to *Lawrence v. Texas*.[167] For the legal technician, *Bowers* was puzzling, if not irrational.[168] The definitional analysis should have come down to a choice between a holistic notion of privacy (e.g., autonomy over life-altering choices) and a more limited, act-based account of privacy (e.g., consensual sexual acts). Instead, the Court drew finer-grained distinctions that lent earlier cases a heterosexual gloss (not even *Griswold*, in its emphasis of the importance of marriage, dares to limit the logic of privacy to that institution alone).[169]

As dehumanizing a decision as *Bowers* was, however, from a cultural perspective the outcome could not have been entirely unexpected in the mid-1980s. There was certainly no authoritative language of gay equality – the words "gay" and "sexual orientation" themselves barely appeared in the legal lexicon.[170] *Griswold* notwithstanding, from the standpoint of existing

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[165] 478 U.S. 186 (1986).

[166] 517 U.S. 620 (1996).

[167] 539 U.S. 558 (2003).

[168] Reaction to *Bowers* was swift and hostile. *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 215-16 (1987) (asserting that *Bowers* "deviat[ed] sharply from the Court's own precedents"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 747-48 (1989) (observing that after "briefly waving the standard of judicial objectivity," the analysis quickly devolved into judgment that homosexual sex "is either less fundamental or more unsavory than the activities protected in prior cases"); Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 649 (1987) ("[T]he Court's opinion . . . rests upon nothing more substantial than the collective distaste of the five justices in the majority for the conduct under scrutiny."); *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1523 (1989) ("Had the majority examined the regulated conduct in Hardwick at the same level of generality employed in previous privacy decisions, it would have found constitutional protection for private, consensual, same-sex sodomy.").

[169] Only three Justices – Goldberg, Warren, and Brennan – would have rooted the right in the concept of "marital relation" alone. *See* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring).

[170] "Sexual orientation" as a phrase referring to an individual's sexual preference or status appears only once in the U.S. Reports before *Bowers*, in a lonely dissent from a denial of certiorari. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1017 (1985) (Brennan, J., dissenting from denial of certiorari) (taking colleagues to task for not considering whether dismissal of high school guidance counselor for acknowledging her bisexuality violated the First Amendment). Usage of the word "gay" as a reference to homosexuality was equally scarce. *But see, e.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 *passim* (1987) (upholding law that prevented use of the word "Olympics" in corporation's "Gay Olympics" competition); Ratchford v. Gay Lib, 434 U.S. 1080, 1083 (1978) (Rehnquist, J., dissenting from denial of

rhetorical materials, there was little with which to work.

Gays and lesbians became increasingly visible and politically mobilized in American life during the last twenty years, thereby threatening a serious disjunction. The *Romer* Court itself recognized these whirlwind changes, noting the rapid enactment of anti-discrimination laws in many localities.[171] By the late 1990s, a monolithic moral-legal framework excluding sexual minorities from the polity could not be blindly asserted as rational, any more than racial discrimination could be asserted as rational by the 1960s.[172] The position now had to be articulated and defended. That vision – at least in its most virulent form – was finally rejected in *Lawrence*.

Now consider more carefully metaphor's role in this progression. In *Bowers*, the Supreme Court repeatedly deployed the famed law-as-tree metaphor[173] in rejecting Michael Hardwick's claim that the right to privacy shielded him from prosecution. The Justices asserted both that there was no "deeply rooted" right to engage in same-sex sodomy and that "[p]roscriptions against that conduct have ancient roots."[174] The Court thus raised the image of the law as a towering oak, imbuing Georgia's sovereign act to mark and isolate Hardwick with historical heft. It simultaneously characterized the individual's claim as rootless and as an illegitimate attempt to engraft a new right, rather than as a seamless extension of existing doctrine.[175]

Chief Justice Burger's concurrence went further, offering an alternative, more terrifying metaphor. Harkening to Blackstone, he described same-sex sodomy as a "deeper malignity" than rape.[176] Rape strikes at the very center of civilization and its specter has long been used to inflame the populace. The image-schema of the body did double duty here. First, blurring the difference between sodomy and rape infused the act with a misleading sense of invasiveness, coercion, and searing emotional harm, for the statute under review forbade consensual sex as well as involuntary sexual acts.

Second, Burger's metaphor cast homosexuals as a moral contagion – direct threats to the state necessitating an aggressive course of treatment.

certiorari) (describing university's reaction to student group advancing "gay liberation").

[171] *Romer*, 517 U.S. at 623-24 (chronicling local anti-discrimination ordinances that prohibit discrimination on the basis of sexual orientation).

[172] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (finding "no legitimate overriding purpose independent of invidious racial discrimination" that would justify the racial classifications created by Virginia's anti-miscegenation statute).

[173] 478 U.S. 186, 194 (1986).

[174] *Id.* at 192; *see id.* at 194 (suggesting that the claimed right to privacy has "little or no cognizable roots in the language or design of the Constitution").

[175] *See id.* at 194 ("[T]o claim that a right to engage in [homosexual sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

[176] *Id.* at 197 (Burger, C.J., concurring) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *215).

Collectively, the metaphors of the body and the tree in *Bowers* legitimated intrusive, "ancient" criminal laws aimed at subordinating, isolating, and disciplining sexual minorities.[177]

In excluding these individuals from the polity so completely, the ruling demanded a sharp division of the self into the personal (unprotected) and the political (protected). The highest law of the land now endorsed an unforgiving policy: in order to enjoy civic equality, one had to deny oneself.[178] This proved inconsistent with principles of self-determination to many, and for this reason *Bowers* provoked collective reflection, and then incited a counter-movement.[179]

A decade later, in *Romer*, the iconographic battleground had shifted: now, the most important second-order metaphors worked to the benefit of sexual minorities. The metaphor of the body made its reappearance, but unlike Justice Burger's version in *Bowers*, the threat to the integrity of the body politic came not from the individual, but from the state.

According to Justice Kennedy, Colorado's "Amendment 2" imposed a "special disability," a "broad and undifferentiated disability," on homosexuals alone.[180] In a move reminiscent of the Framers' own, the Court disentangled the image-schema of the body from the state itself, and re-imagined it as short-hand for the people of the state themselves. Re-mapping the conceptual target and source domains in this way conveyed the sense that the injury to gay citizens caused by the state constitutional provision was so grave that it was tantamount to losing a limb or otherwise suffering the impairment of a major life function. The metaphor stressed continuity in the law while simultaneously humanizing the plaintiffs as artificially "disabled" by the law.

Whereas Justice Burger's use of the body excluded sexual minorities from the public sphere, the *Romer* Court's use of the identical metaphor initiated their re-integration into "ordinary civic life in a free society."[181] All of this was accomplished without directly mentioning *Bowers* at all.

Nor was the harm posed by "Amendment 2"-style laws limited to the individuals themselves. The measure was antithetical to the very ideal of self-rule, captured in "the principle that government and each of its *parts* remain

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[177] *See Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

[178] For a thoughtful discussion of *Bowers* and the dynamics of the closet, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002).

[179] *See* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 323 (1993) ("*Bowers* is to the growing gay rights movement what *Plessy v. Ferguson* was to the civil rights movement, and what *Dred Scott v. Sandford* was to the abolitionists.").

[180] Romer v. Evans, 517 U.S. 620, 631-32 (1996) (explaining that the constitutional amendment forbidding safeguards to homosexuals alone is so broad that it is "inexplicable by anything but animus toward the class it affects").

[181] *Id.* at 631.

open on impartial terms to all who seek its assistance."[182] As the figural language suggested, the damage extended to the very institutions through which the people operationalize democracy. Nullifying existing non-discrimination laws and preemptively foreclosing the possibility of reform was no different from cutting off law from the lifeblood of democracy. What the Court accomplished was nothing short of a transformation; its instrument of choice was an indigenous rhetorical form with tremendous staying power.

Once the High Court signaled its desire to re-evaluate the privacy doctrine in *Lawrence*, the stakes for the law's continued legitimacy could not be higher. Not only had social changes further weakened *Bowers*' view of citizenship,[183] but the *Romer* decision – which never mentioned *Bowers* – opened deeper fissures between the social domains demarcated by the law of privacy and equal protection. Technically, the rulings came in different doctrinal areas, but now the civic imagery of *Romer* was powerful and inspiring; it demanded a measure of reconciliation with past formulations of democratic community. The earlier decision cast gays and lesbians as secondary citizens; the decision of more recent vintage painted a picture of full citizenship. Which vision would prevail?

Two time-honored legal metaphors do the heavy lifting in *Lawrence*: the law-as-house and rights-as-bulwark. While Justice Kennedy called *Bowers* wrong the day it was decided,[184] his metaphors suggested otherwise. First, casting *Bowers* as a ramshackle house, he stated that the precedent's "foundations . . . have sustained serious erosion from our recent decisions in *Casey* and *Romer*."[185] Second, recalling law's promise of well ordered liberty, he revived the barrier metaphor on the individuals' behalf, reminding readers that "'[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'"[186] The move not only resuscitated society's abiding belief in constitutional limits, but also cast the sexuality police as the outsiders. Suddenly the police became interlopers on the outside looking in rather than guardians, beating futilely upon that formidable constitutional structure.

A number of lessons can be drawn from this episode. *First*, metaphor can be used effectively to de-legitimate a prior legal-political regime and hasten its

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[182] *Id.* at 633 (emphasis added).

[183] Darren Leonard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 36-43 (2005) (discussing the social context of *Lawrence v. Texas*, 539 U.S. 578 (2003), and arguing that public opinion supports the decriminalization of sodomy).

[184] *Lawrence*, 539 U.S. at 578.

[185] *Id.* at 576. Justice Kennedy's description of the right to privacy in transcendental and universalistic terms was somewhat more distracting, though it, too, reinforced the transformative quality of the ruling.

[186] *Id.* at 578 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

end. After all, who could object to the razing of a decrepit house sitting on a rotting base when a little push was all it needed? On this score, recall Madison's own rendition of the constitution as a capacious house. Urging fellow citizens not to succumb to the entreaties of naysayers, he exclaimed:

> No man would refuse to quit a shattered and tottering habitation for a firm and commodious building, because the latter had not a porch to it, or because some of the rooms might be a little larger or smaller, or the ceiling a little higher or lower than his fancy would have planned them.[187]

Madison's metaphor of the Constitution-as-house played upon sympathetic accounts of the drafters as "skilful architects" who recommended a new roof for "a certain mansion house [which] was observed to be in a very bad condition."[188] Justice Kennedy's version in *Lawrence* not only facilitated the quiet demolition of the older legal infrastructure, but also paved the way for the erection of a new wing devoted to the protection of sexual autonomy.

Second, metaphoric tactics facilitated a seamless shift from a disfigured, heterosexualized right to privacy toward a thinly-conceived equal protection right,[189] and then toward a resuscitated conception of substantive liberty.[190] In the process, figurative language initially propelled the ritual exclusion of sexual minorities, and then facilitated their eventual reintegration into communal life.

For the sake of *communitas* and the continuation of the republic, the law makes others' sacrifices its own. In order to preserve momentous, context-smashing events, the law domesticates them. Even as the people seek to reshape the law – to humanize it in each generation and turn it to their most pressing needs – the law first resists, then relents, and finally acts as if the outcome was pre-ordained all along.

III. IMPLICATIONS FOR THEORIES OF LEGAL CHANGE

A sounder appreciation for metaphor's role in statecraft refines our portrait

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[187] THE FEDERALIST NO. 38 (James Madison), *supra* note 4, at 239-40.

[188] [Francis Hopkinson], *"The New Roof"*, PENNSYLVANIA PACKET (Phila.), Dec. 29, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 1, at 662, 662. In the parable recounted here, the architects are "servants of the family" who owned the house, while an old woman – Margery – was a tenant who "had long kept the house in confusion, and sown discord and discontent amongst the servants." *Id.* at 663. *See* discussion *supra* Part III.E (revisiting role of the judge against these political understandings).

[189] *See* H. Jefferson Powell, *The Lawfulness of* Romer v. Evans, 77 N.C. L. REV. 241, 256-57 (1998) (defending *Romer*'s "relatively limited scope," which "does not ensure gays and lesbians (or any other group) success in seeking the protection of the laws").

[190] I would not go as far as Randy Barnett, who sees in *Lawrence* a budding "libertarian revolution," but I do quite agree with his insight that there is a self-conscious effort to escape the rhetorical confines of the then-existing privacy debate. Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 21 (arguing that the "majority did not protect a 'right of privacy'" but "protected liberty").

of legal change. The study of constitutive language illuminates the strengths and flaws of the dominant accounts of constitutional law. It then points the way toward a richer account of transformative language.

A. *Matters of Text and History*

Textualists have the most in common with the monument builders of old, who hoped that their awe-inspiring creations could remain unsullied and "cut into the rock forever."[191] With the passing of Justice Hugo Black, strict textualists have trended toward extinction. Those who remain have become reconstructed as modest originalists.

Originalism posits that the substance of our foundational commitments is, or must be, fixed according to the wishes of their initial makers. Because they were first in time, it is said, their outlook should be given priority over the preferences of the present generation. Although originalist models proliferate in their details,[192] they all share the belief that (a) something like a collective intention can be discerned from the historical tea leaves, and (b) if employed rigorously, this methodology can be said to constrain judicial decision-making in predictable ways.

Beyond differences in the source of constraint (words as opposed to drafters' beliefs), textualism and originalism can actually be said to share four characteristics: (1) subordination of present context and subtext to past text; (2) denial of a legitimate role for courts in facilitating democratic change; (3) preference for orderly process of legal change; and, hence, (4) skepticism of popular idioms.

H. Jefferson Powell laments the "devaluations of the Constitution-as-historical-document," which provides "a common set of terms and expressions, almost a vocabulary and grammar, for political debate."[193] Yet after recognizing the generative force of language to make new forms out of old, Powell shifts back to classical textualist terrain: he argues that legitimate change happens through formal processes explicitly provided for in Article V, and "creative judicial explication of the existing text is no substitute."[194]

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[191] *Job* 19:24 (New Jerusalem). Larry Sager aptly describes originalism as a pure form of the agency model of constitutionalism, appealing in its simplicity of protocol, but ignoring important differences between ordinary legislation and foundational text. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 16, 30-31 (2004).

[192] To take the sting out of originalism, some have searched for a more objective, more generalized, or more flexible originalist formulation. *See generally, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); William Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

[193] H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1428-29 (1986).

[194] *Id.* at 143.

It is certainly true that every constitutional struggle can be said to be *about* the text; in this sense, parchment surely does matter. Still, no debate has been waged – much less won – through mere recitation and counter-recitation of the words actually contained in the founding document. Far more important have been the extra-textual grammar, political iconography, and the moves and feints perfected during the course of such struggles. As Powell's later work suggests, writings have presented the occasions for and the starting point of dialogue, but cannot be said to determine or constrain constitutional debate.[195]

Even so, it is not at all clear that Powell's second claim – that of textual superiority – is descriptively accurate. Once we put aside the obvious glosses on text that are facially ludicrous, we must confront the fact that judicially-produced text is no substitute for text *if and only if* the cultural support for constitutional norms can be said to be measurably different depending on their initial source. From the standpoint of democratic theory, if a well-mobilized present day majority succeeds in securing faithful institutional reinterpretation of foundational commitments, such a development might very well represent a confirmation of self-determination, not a denial of it.

There is, in fact, no decisive evidence that the initial source of constitutional language makes a significant difference in its cultural durability, at least in the long run. The mantra, "separate is inherently unequal," is a rallying cry of gay marriage advocates, and by all accounts the power of its logic remains undiminished by the fact that its source is *Brown v. Board of Education*[196] rather than the Equal Protection Clause itself.

Cases such as *Casey*, *Dickerson v. United States*,[197] or *Grutter v. Bollinger*[198] are as much recognitions of the inscription of court-initiated sub-constitutional modalities in the popular imagination as they are affirmations of the principle of stare decisis. Any misgivings about the wisdom or legitimacy of their predecessor rulings among lawyers gave way to the reality that "the right to choose,"[199] "the right to remain silent,"[200] and demographic "diversity"[201] have gained, rather than lost, institutional and social support

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[195] H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 950 (1993) (contending that the founding era's greatest achievement was "the creation of a shared political and legal language that made reasoned debated possible"). As Powell rightly points out, these habits do not produce determinate outcomes, and one must go "beyond the grammar of constitutional debate" to identify the depth and nature of our political commitments. *Id.* at 1008-09.

[196] 347 U.S. 483 (1954).

[197] 530 U.S. 428 (2000).

[198] 539 U.S. 306 (2003).

[199] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992) (upholding the right to abortion recognized in *Roe v. Wade*, 410 U.S. 959 (1973)).

[200] *Dickerson*, 530 U.S. at 442 (upholding *Miranda v. Arizona*, 396 U.S. 868 (1969)).

[201] *Grutter*, 539 U.S. at 325 (upholding the affirmative action program of the University of Michigan Law School).

since their creation by jurists' hands.

Rhetorical inquiry reveals that incredible resources must be devoted to the originalist vision. Proponents' outright and frequent rejection of gradualism's favorite metaphor betrays the suppressive quality of the enterprise. Justice Scalia, for example, scoffs at the notion of a "[l]iving Constitution" at every opportunity.[202] He denies *even the possibility* of legal change through the courts; for him, the Constitution is, and shall forever be, "rock solid, [and] unchanging."[203] He maintains this picture of the Constitution-as-given, though only by obscuring the authorship of the current generation and that of the judge. For the originalist, the present is, and must continually be, consumed by the past; the subjugation of the living to the dead made complete. Even to acknowledge, for a moment, the discretion to reconsider and elaborate is to tolerate "revisionis[m]."[204]

What the originalist actually means is that jurists are to act as seers, translating the wishes of those who were first in time. In "new fields," Scalia argues, "the Court must follow the *trajectory* of the [law],"[205] implying not only doctrinal movement of its own volition rather than law created by human hands, but also the complete erasure of juridic autonomy. When judges are doing their jobs, they are truly voiceless.

But the originalist is the myth-maker who cannot appreciate the web he spins; he becomes hopelessly entangled in it. As time passes, the elaborate fictions of a unitary original set of intentions dictating outcomes and the absence of juridic voice become more difficult to maintain. Whatever more might be said about its normative appeal as a starting point, with the passage of time originalism loses credibility as an explanatory account of legal change. Context and subtext gain importance over time, while text – at least original text – becomes only one aspect of constitutional discourse. It is one thing to call law a "rock"; it is quite another to believe it.

B. *The Limits of Gradualism*

If originalism effaces the authorship of the living, there is always the evolutionary alternative. Benjamin Cardozo's works *The Nature of the Judicial Process* and *The Growth of the Law* bear all the hallmarks of the standard gradualist account.

To Cardozo, interpreting the Constitution is merely an exercise in common law jurisprudence on a grander scale. The judge is an interstitial lawmaker who "supplements the declaration [of lawmakers], and fills the vacant spaces, by the same processes and methods that have built up the customary law."[206]

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[202] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 41-47 (1997).
[203] *See id*. at 47.
[204] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 17 (1990).
[205] SCALIA, *supra* note 202, at 45 (emphasis added).
[206] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921).

The trouble is that most evolutionary models suffer from one of two general defects: they either over-represent judicial control of legal language or are too vague to be of much use. Cardozo's account admits of both flaws. From the perspective of the gradualist: "Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.'"[207] The law is seen as not merely porous, but as radically open-textured. Yet, ironically, gradualism clings to the belief that the jurist alone can preserve the locus of the law and direct its ultimate path – to "bring certainty and order out of the wilderness of precedent."[208] Where the originalist sees relative order, the gradualist sees general disorder. Situated at the center of this dynamic of "perpetual flux" in the law, the judge is to extract – but not find – governing principles and apply them.[209] Utterly alone, the wise judge understands that "[t]here is nothing that can relieve us of 'the pain of choosing at every step.'"[210] All he can do is create workable legal doctrine as best he can. Faced with crossroads at every turn, "[h]e must gather his wits, pluck up his courage, go forward one way or the other, and pray that he may be walking, not into ambush, morass, and darkness, but into safety, the open spaces, and the light."[211]

Path dependence theories of law modify this image of relatively unbounded judicial lawmaking, positing that one's doctrinal starting point sharply reduces the range of interpretive possibilities.[212] Yet while path dependence slows the pace of legal change, the model shares its predecessor's inward orientation. It privileges factors endogenous to the system of justice (e.g., consistency, notice, sunk costs); any exogenous forces acting upon legal language remain at the periphery.

In sum, the gradualist account is one of ceaseless motion coupled with an abiding faith in the jurist's capacity to make periodic corrections to the trajectory of the law (which is taken to be the sum total of her responsibilities). What a cultural account reveals instead is a system of democratic parlance containing predictable structure accompanied by moments of fluidity. In recycling democratic idioms, judges respond to external perceptions of legitimacy as much as concerns of doctrinal integrity and efficiency.

C. *Representation Reinforcement Redux*

Dissatisfaction with originalism's monumental denial of legal change and gradualism's open-endedness prompts us to circle back to Ely's theory of

[207] *Id*. at 28.

[208] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 1 (1924).

[209] CARDOZO, *supra* note 206, at 28.

[210] CARDOZO, *supra* note 208, at 67.

[211] *Id.* at 59.

[212] *See, e.g.*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001) (defining path dependence as the process by which "an outcome or decision is shaped in specific and systematic ways by the historical path leading to it").

constitutionalism.[213] If he is not shy about venturing beyond the text, Ely nevertheless chooses to operate within the paradigm of the countermajoritarian difficulty. The tightrope he walks is treacherous: if he slips toward judicial lawmaking, he risks being savaged by those who hold dear the values of tradition and restraint; if he wavers in the direction of simple solutions, he may be mocked by interpretivists and historians. His solution is to identify a single principle for judicial intervention, but otherwise leave it to political actors to effectuate change.

Ely's vision of democratic governance, in this sense, is rooted in a strategy of institutional specialization. If foundational change is taking place, it is occurring in the political sphere, and the judge's job is merely to get out of the way. If and only if political majorities have entrenched themselves or warped the electoral process should courts intervene in daily affairs. Ely's model thus operates according to the conception of politics as a game, with the judge as a "referee" who steps in only to reset the rules of play "when one team is gaining unfair advantage."[214] Although the first notion is better articulated than the second, here Ely's theory and Justice Scalia's "culture war" imagery take on analogous form.

Both visions share a basic vulnerability. Fidelity to the Bickelian baseline (that is, solicitude for the actions of presently-constituted majorities) renders their conceptions of change formalistic and somewhat simplistic. Taking and deciding a constitutional question is fraught with peril for democracy, we are told; on the other hand, refusing a case almost always does no damage to the bonds of political community.

If, however, we understand democracy not as a one-day sporting event but as the cultivation of a contested set of discursive practices over time, then three propositions must follow. First, courts contribute to constitutional culture whether they act or refrain from acting. It is unavoidable. Extended non-action can deprive a democratic counter-culture of the oxygen it needs to sustain a reformist drive or to resist an authoritarian impulse. Because the refusal to write law does not occur on a blank canvas, ceding the stage has the effect of privileging existing rhetorical forms. To the extent that such forms are used to perpetuate constitutional injustice, juridic silence may allow anti-democratic discourse to dominate the field of action.

Second, for the health of deliberative democracy, it is not enough simply to

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[213] *See supra* text accompanying notes 18-21.

[214] ELY, *supra* note 18, at 103. Ely also deploys an antitrust analogy, according to which judicial involvement in politics is legitimate when the "political market[] is systematically malfunctioning." *Id.*; *see also* Jonathan Riley, *Constitutional Democracy as a Two-Stage Game*, *in* CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 147, 147 (John Ferejohn, Jack N. Rakove & Jonathan Riley eds., 2001) (positing a theory of constitution building in which the first stage "is a cooperative game in which moral . . . players jointly agree to promote their common good" and the second stage "is a noncooperative game in which the veil of ignorance is lifted and each moral player freely pursues his particularistic interests").

clear the formal channels for political decision-making. Open government is a necessary condition for democratic constitutionalism, but it is far from sufficient. In addition to political access, a robust constitutional culture requires: (a) overlapping claims of authority, from edicts to practices; (b) a complex system of political beliefs; and (c) multiple stores of vernacular by which to express and nourish such beliefs. These fonts of self-rule then act in mutually reinforcing ways.

Third, and in closely related fashion, judges are not merely applying ageless rules but are also making them; they are not voiceless, but constantly screening, modulating, privileging, or supplementing the constructs of other members of the democratic community.

Contrary to Ely's portrait of self-determination in which politicians do all the talking, courts play a central role in the creation of a public ethos. Judges play their part not merely by constraining other actors, but also by cultivating the very rhetorical and conceptual tools upon which deliberative democracy depends. It turns out that the judiciary does, indeed it must, reinforce the democratic process – just not in the way that Ely himself envisioned.

D. *Dualism's Blindspot*

Now consider Bruce Ackerman's sophisticated theory of dualist democracy, which not only envisions a two-track understanding of American law, but also endorses unconventional procedures for constitutional change through the use of "transformative" statutes, judicial appointments, and rulings.[215] For the dualist, any legitimate change must be sanctified by a political-legal process consisting of (1) signaling; (2) proposal; (3) deliberation; and (4) codification.[216]

The explanatory account is a considerable improvement upon the textual-originalist model because it better captures historical practice. Resisting the impulse to reify text (particularly Article V) to the exclusion of actual practice, Ackerman acknowledges the people's reservation of the ultimate power to rewrite their political destiny. At the same time, however, the creativity in the dualist model is somewhat deceiving. Because dualism's focus is on the truly momentous "constitutional moments," a number of events are poorly accounted for by the model. More crucially, it denies a judge the rhetorical discretion that comes with being a full partner in constitutional lawmaking. Ackerman's self-styled "three-moment theory of constitutional creation"[217] fails to explain changes in political community that may be broad and profound, but are neither flashy nor the subject of the four-stage process he

[215] *See* 1 ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 11, at 52-54.

[216] *See id.* at 266-67.

[217] *Id*. at 63-66; *see id.* at ch. 3 (proposing a "three-solution narrative," which recognizes the role of the Founding, Reconstruction, and the New Deal in "creating new higher lawmaking processes and substantive solutions in the name of" the people).

outlines.[218] A good many of the reshapings of the legal imagination cannot be traced directly to electoral approval.

Particularly confounding is the fact that "the marketplace of ideas" has revolutionized – some might even say, distorted – the law of the First Amendment during the post-war period. But it is difficult to trace the re-emergence of laissez-faire jurisprudence to any decisive constitutional moment. The closest is the Reagan-Bush presidencies from 1980 until 1992, but Ackerman himself sees the Reagan era as a failed constitutional revolution.[219] To him, the appointment of Anthony Kennedy and Clarence Thomas to the High Court are signs that the country has returned to a period of normal politics.[220] All of this puts the dualist in a predicament. Either this importation of market ideology into free speech jurisprudence is a vestige of a failed revolutionary return to the *Lochner* era,[221] or it represents a successful but illegitimate one.[222]

There remains, of course, another possibility: that dualism does not sufficiently encompass the dynamics of constitutional change. Dualism does not recognize transformations in the legal imagination that may be the product of paradigm-breaking events, such as civil war or hostilities abroad. To the dualist, these are not singular moments of collective deliberation. More importantly, they cannot properly satisfy the four-fold criteria.[223] Dualism offers an institutionalist account of legal change that leaves out many constitutional actors' most important contributions to legal context, as well as the micro-tools necessary to maintain the people's hard-won gains.

Although dualism pencils back in the people's role in constitutional politics, its sketch of the judge's actual contribution to democratic culture – and her relationship to the people – remains parsimonious. Collectively, the Supreme Court Justices serve as a *preservationist* barometer testing whether a political movement has gained broad and deep support. At most, jurists *synthesize* established principles during previous regimes; nothing more. *Brown* is not innovative for its reasoning or inspiring in its attempt to provoke a wider societal conversation about the depth of the nation's commitment to racial equality; it is a straightforward synthesis of regimes two (Reconstruction's equality principle) and three (New Deal's activist state) over regime one

[218] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1079-83 (2001) (arguing that the dualism theory works best by looking at constitutional history in hindsight, and positing instead a "theory of partisan entrenchment" that dispenses with specific "criteria and procedural conditions for constitutional change to be legitimate"); *see* text accompanying note 216.

[219] *See* 2 ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS, *supra* note 87, at 389-97.

[220] *Id.*

[221] Lochner v. New York, 198 U.S. 45 (1905).

[222] *Cf. id.* at 390-96.

[223] *See* Balkin & Levinson, *supra* note 218, at 1079-83.

(limited government).[224] Likewise, *Griswold* is not an opening bid to reconsider the very preconditions for deliberative democracy, but an instance of one-three synthesis.[225]

We have certainly come a long way from merely denying that judges have any part in legal change. Still, the idealized model of the bound judiciary remains potent even in dualist democracy.[226] According to dualism, judges never initiate conversations, but they do conclude them.

What have we learned? The people do make their voices heard, but it is not always in a single, brilliant moment. Constitutional regimes do exist, but they are not monolithic and they inspire far more than single principles. Governing paradigms can die dramatic deaths, but most of the time they are eroded and supplanted by legal language in bits and pieces over time.

E. *Toward a Decentralized Discursive Model*

To the originalist, the judge is a medium for voices from the past; to the dualist, she is a synthesizer of disparate generational interests; to the Elyist, the judge is a referee in a high-stakes contest; and to the gradualist, she is a nervous innovator. Each of these accounts of judging – in one way or another – minimizes or distorts the jurist's contributions to democratic vernacular.

By comparison, the constructivist judge is an experienced "craftsman with verbal skill."[227] Her trade is the reinforcement of democratic design; her implements are legal principles and ageless tropes. The judge builds upon earlier models of governance and community, and modifies those vehicles in response to changed circumstances.

A song popularized during the ratification period confirms this understanding of the jurist's role in democratic governance. According to the tune, the Framers and their virtuous compatriots were described as "[l]ads" who built a grand new roof for their government.[228] Working with local materials, each with his own tool and "Plenty of Pins of American Pine," workers first put up the plates, which, "Like the People at large, [were] the Ground-work of all."[229] Next to be built was the judiciary: "Our *King-Posts* are Judges – how upright they stand, Supporting the *Braces*, the Laws of the

[224] 1 ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 11, at 133, 142-50; *see* Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[225] *Id.* at 150-58.

[226] *See* Robert L. Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83, 101-03 (2004) (discussing the prevalence of the model of the bound judiciary in theories of constitutional interpretation).

[227] Paul Ricoeur, *The Metaphorical Process as Cognition, Imagination, and Feeling*, *in* ON METAPHOR, *supra* note 68, at 141, 144 (calling the creator of metaphors a "craftsman with verbal skill"); *see generally* PAUL RICOEUR, THE RULE OF METAPHOR (2003).

[228] Hopkinson, *supra* note 1, at 169-70.

[229] *Id.* at 169.

Land."[230]

Although she necessarily sees only part of the landscape of any constitutional dispute,[231] the judge cultivates the conditions under which other actors contest foundational principles and adds to the rhetorical arsenal (i.e., the allusions, analogies, and abbreviations useful for constitutional debate). It is in this way that the judge "strengthen[s] the Weak, by weak'ning the Strong."[232]

The classical schema of constitutional politics looks like this:

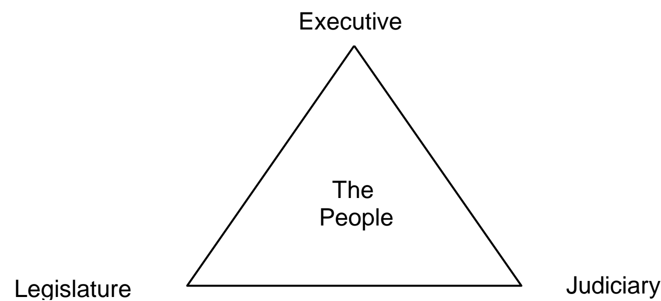

Fig. 1. Classical Model

Instead, a decentralized model of constitutional vernacular reveals a more complicated set of dialogic relationships:

[230] *Id.* at 170. In architectural terminology, a king post is an essential component of a well-built roof. Standing vertically, it connects a crossbeam to the apex of a triangular truss.

[231] *See, e.g.*, Frederick Schauer, *Do Cases Make Bad Law?* 3 (Harvard Univ., Kennedy School of Government Faculty Working Paper Series, Paper No. RWP05-013, 2005), *available at* http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP05-013/$File/rwp_05_013_schauer.pdf (explaining that cases before judges may not represent "the full array of events that the ensuing rule or principle will encompass").

[232] Hopkinson, *supra* note 1, at 170 (describing how judges support "the Laws of the Land," which "strengthen the Weak").

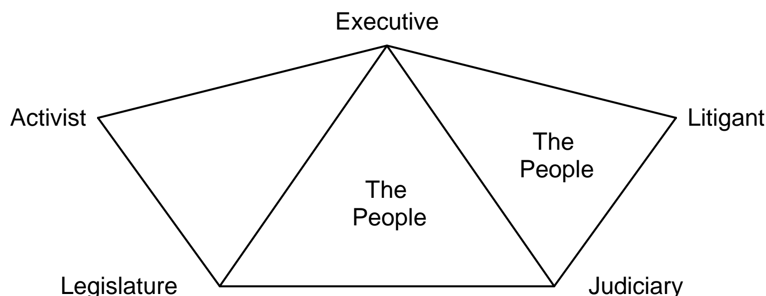

Fig. 2. Decentralized Model

In contrast with the classical model, the judge-as-"king-post" of the democratic order is neither reified nor banished to the margins of American constitutional practice. Wielding her explanatory power, the jurist is accorded equal footing with other political actors in advancing visions of the democratic order. Similarly, the litigant and activist are not subordinated to the formal branches of government, as they are in the classical account. Rather, they are treated as creators of constitutional culture in their own right. Importantly, as an "agent[] and trustee[] of the people" each actor claims to speak on behalf of their enduring interests.[233]

IV. ANTICIPATING THE NORMATIVE CRITIQUE

A skeptic might raise two particular criticisms of the model I have sketched.[234] First, one might ask: what licenses unelected officials to speak in figurative terms? Let us call this the *authorization objection*. In its boldest form, it denies the historical legitimacy of poetic devices in judicial discourse. Second, one could argue that judicial language and political discourse are in fundamental opposition. On this view, Locke was on to something after all, and we ought to limit free-flowing discourse to public officials and forbid unelected magistrates from such excursions. This is the claim of *linguistic specialization*, and it too deserves a reply.

A complete answer lies beyond the scope of this article. What I offer here are the basic elements of a response, focusing on the judicial function. The emphasis on judges is not an effort to privilege juristic constructions; it is

[233] THE FEDERALIST NO. 46 (James Madison), *supra* note 4, at 305.

[234] I have elsewhere considered and rejected concerns surrounding intelligibility and therefore waste little time rehashing those arguments here. To summarize, metaphor tends to reinforce claims of principle; open networks of meaning as well as close them; and stimulate linguistic development. *See* Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, *supra* note 8, at 186-90 (challenging critics of legal metaphor and explaining the central role of metaphor in "the cultivation of constitutional culture").

simply an acknowledgment that the judge's role requires justification given the current state of democratic theory.

A. *Courts as Mediating Institutions*

One could respond to the challenge to judicial innovation by asking what the world would look like if judges could only resort to propositional argumentation and the matching of cases to facts like so many swatches. Would anyone truly wish to scrub the law reporters of all that is fanciful and majestic? Would legal utterances be as memorable? Energizing? Outrageous?

A stronger defense of rhetorical creativity can yet be mounted: the same processes that legitimate juridic elaboration of hard principles similarly authorize the inscription of poetic conventions. Basic changes to the very conception of the judicial function were underway as the eighteenth century drew to a close.[235] Distrust of magistrates began giving way to a collective desire for a stronger juristic presence to counterbalance the excesses of popular government.[236] Gordon Wood explains this intellectual shift: "Redefining judges as agents of the sovereign people somehow equal in authority with the legislators and executives fundamentally altered the character of the judiciary in America."[237] This is reflected in the Federalists' own ratification strategy, which appealed to the people's own rising interest in a judiciary justified by and beholden to no other institution but the people themselves.

Though motivated by a desire to unravel the plan, Brutus's description of the Judiciary's complex dialogic role was absolutely spot on – he recognized that Article III "give[s] a certain degree of latitude of explanation."[238] Courts are authorized to "give such meaning to the constitution as comports best with the common, and generally received accepta[nce] of the words in which it is expressed, regarding their ordinary and popular use, rather than their

[235] Gordon S. Wood, *Comment*, in SCALIA, A MATTER OF INTERPRETATION, *supra* note 202, at 49, 51-53 (describing the shift of public view of judges from skepticism to acceptance of judges' role in democratic governance).

[236] *Id.* at 52 (explaining that as Americans' "trust in their democratically elected assemblies" eroded during the 1780s, they began to desire a stronger judicial role).

[237] *Id*. at 54.

[238] "Brutus" XI, *The Supreme Court: They Will Mould the Government into Almost any Shape They Please*, N.Y. JOURNAL, Jan. 31, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 1, at 129, 131. Jack Rakove offers a sympathetic account. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 187 (1996) (concluding that Brutus's essay "grasped the central thrust of Article III as clearly as any Federalist commentator, and his dark musings were no less plausible than Madison's bland assertion of the 'impartiality' of federal judges"). Indeed, the Federalists' defense of judicial review on the grounds of impartiality, superior learning, and respect for tradition implicitly acknowledges this very zone of rhetorical freedom. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4.

grammatical propriety."[239] This zone of rhetorical discretion – which Brutus sees more clearly than many contemporary theorists – includes being "empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."[240] Brutus's comments might not have been circulated widely enough to have an impact beyond New York's ratification debate.[241] Yet surely it is important that he and others attacked Article III precisely because of the judge's rhetorical freedom, and that they failed to convince the citizenry to reject the discretion that is part and parcel of the judicial function.

Brutus could not be more wrong, however, about one thing: magistrates do not have the power to "mould the government, into almost any shape they please."[242] The fact that legal language is permeable and adaptive does not mean one should expect complete pass-through between culture and law. Entrenched social traditions, electoral realities, and bureaucratic intransigence serve as brakes on the pace and degree of reconstitution. Publius foresaw that courts would act as "mediating" institutions.[243] This is true not only in the sense that judges must sift through conflicting claims of right advanced in their courtrooms. It is also true in the sense that the democratic voices pressed upon the courts in legal briefs and swirling just beyond the courthouse doors are modulated and, in many instances, deflected by the Judiciary. Constitutional debate is neither orderly nor linear; rather, it is cacophonous and never-ending. Like the Senate, the Judiciary cools the passions of the people by absorbing some, but not all, of their mobilized rhetoric.

For now, I wish to bracket the important question of the degree to which jurists should consciously take account of cultural shifts.[244] The answer in any particular situation will depend upon a host of circumstances, ranging from the level of generality of a textual commitment to the degree of social and political consensus regarding a particular norm. This question is different in kind, however, from the antecedent matter of whether figurative discourse can be normatively justified in the first place. Still, two preliminary observations are in order.

First, there is little reason to fear that metaphors of juristic origin are any more elitist than the substantive principles with which they are paired.

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[239] "Brutus" XI, *supra* note 238, at 131.

[240] *Id.* Barry Friedman similarly treats judges both as "speaker[s]" and "facilitator[s]" of debate. Friedman, *supra* note 12, at 668.

[241] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 81 (2004).

[242] "Brutus" XI, *supra* note 238, at 135.

[243] *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 506 ("[C]ourts were designed to be an intermediate body between the people and the legislature.").

[244] *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293-1317 (2005) (advocating a pluralism-facilitating model of judicial review).

Constitutional language is always an amalgamation of aristocratic and popular elements, technical and common modalities. To the extent that jurists comprise primarily a conservatizing force in American politics – drawn from, educated alongside, and living among the political elite – we should expect their constructions to err on the side of consensus.[245]

Second, on those occasions when judicial constructions of the democratic order conflict sharply with prevailing social norms, subsequent electoral dynamics and litigation almost always soften judicial rhetoric. The *Casey* ruling offers a poignant illustration of this phenomenon, as the most libertarian and clinical rhetoric of *Roe* was modulated, replaced by pointed discussions of the value of "potential life" and the "unborn child" counterbalancing a woman's right to self-determination.[246]

Contrary to the most jurist-phobic accounts, judges do not have the last word. Rather, they participate in constitutional dialogue with the other branches, where they rarely enjoy the most influential voice. This insight can be made from within the judiciary or from without. Flights of fancy tend not to secure assent within the institution itself; they become the stuff of concurrences and dissents. Thus marginalized, such flourishes are less likely to generate support critical to self-regeneration. Tropes that are too out of touch with the times do not become the focal point of constitutional debate, but are eschewed by other political actors.

B. *Democracy for All Seasons*

If the claim of rhetorical specialization were to be accepted, one solution would be to restrict each constitutional actor to a particular modality. As the argument goes, not only will this strategy permit the proliferation of distinctive institutional voices, it will also incentivize orderly dialogue. While there is nothing wrong – and much that is right – with the objective of respecting unique discursive practices, the move to quarantine rhetorical creativity in the political branches can be neither justified nor accomplished. The specialization strategy rests on two mistaken assumptions. First, it presumes that judicial discourse is fundamentally different from political discourse. Yet while judges speak the language of principle, their dialogic role extends

[245] As my earlier study of First Amendment metaphors revealed, the structure of judicial language tended to track popular sentiment rather than lead it. *See* Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, *supra* note 8, at 204-05. For others who see greater continuity between judicial decision-making and political ethos, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."); Neal Devins, *The Majoritarian Rehnquist Court*, 67 LAW & CONTEMP. PROBS. 63, 63 (2004) (concluding that "majoritarian forces help explain why the Rehnquist Court seemed so willing to strike down federal laws").

[246] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871, 974 (1992).

beyond doctrinal tinkering. The same principles that favor overlapping powers and responsibilities similarly favor mutually nourishing pockets of political and legal discourse.

Second, the specialization model wrongly assumes that rules of constitutional grammar can be successfully policed. The thoughtful student of language should be highly skeptical of any model of public discourse that depends upon strict propriety of usage or a community of the literal-minded.[247] Such accounts tend to privilege official sources – and therefore elite notions of order – while discounting the possibility of popular control of legal discourse.

I do not intend, of course, to deny that legal argumentation takes on certain predictable forms. The subtleties in each type of engagement account for some differences in goals and audiences. Nor do I mean that judges should throw caution to the wind and permit artistry to overwhelm statecraft. Prudence and humility remain virtues in doctrinal craftsmanship. What I hope to underline, however, is that constitutional actors – whatever their official title – simply cannot help but hear what others say. These actors naturally engage in borrowing and mimicry; linguistic competition between the branches of government is therefore the norm rather than the exception. The forces of constitutional politics – the search for credibility and stature, a desire to rekindle belief in the rule of law – all impel the Judiciary to behave, at some level and in many instances, like other political institutions. These are the deep structural constraints on constitutional language, not the interpretive strategies and doctrinal rules used to determine legal outcomes.

It may be fruitful to juxtapose my conception of foundational meaning-making from that of another proponent of constitutional construction. Keith Whittington identifies five different levels of constitutional debate: (1) policymaking; (2) interpretation; (3) construction; (4) creation; and (5) revolution.[248] Each of these methods can be distinguished from the others along several axes: the relationship to founding text, degree of settlement of debate, role of constitutional actor, and consequences of the function.[249]

At the heart of Whittington's theory lies a strict dichotomy between *interpretation* (how judges alone may speak) and *construction* (how political actors articulate visions of self-rule).[250] Whittington profitably expands the tableau of non-juristic forms of constitutional meaning-making, yet he does so by unnecessarily impoverishing the judicial function. To create sufficient space for what he calls political constructions, he reduces the range of judicial

[247] Jack Balkin and Sanford Levinson make this point more ably than I. Jack Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1771-1774 (1994) (acknowledging that "language is [constantly] undergoing change," and thus adoption of a "strategy of pure description" of language is problematic).

[248] KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 3-9 (1999).

[249] *See id.* at 4.

[250] *See id.* at 5-6 (contrasting interpretation, a "jurisprudential model," with construction, "a political task").

action to determinate, evolutionary readings of precedent based on legal norms.[251] Whittington therefore denies judges the authority to construct a vision of political community and the imaginative resources to fight for it.

Yet rhetorical analysis reveals that the difference between interpretation and construction is not so great, that they share many structural similarities, and that neither modality of debate can be so easily cabined within institutions. The vision of political community created by the Court in *Lawrence*[252] is no less bracing than the one enunciated by John Jay.[253] The constitutive synecdoches of judicial handiwork – like those fashioned by political actors – remain subject to the test of time. Each may have its distinctive advantages, but the ultimate audience in both situations is the same. In the court of public opinion, each must struggle for survival and primacy.

None of this is to say that the dialogic roles of judge and elected official are identical. Rather, it is only to recognize that both the jurist and the statesman engage in a measure of interpretation and political construction simultaneously. Each act involves a degree of poetic license, appeals to enduring political values, and, as even Whittington acknowledges,[254] reinforces the constitutional order.

C. *In Praise of Dicta*

It might be appropriate to conclude by exploring (albeit briefly) one final implication of a more nuanced account of constitutional dialogue. The thought is this: once we have cleared away the debris that denies firm grounding for the commonplace and abbreviated, we have arrived at a very different theoretical basis for what is often considered to be non-essential legal language.

The conventional account treats a judicial opinion as a self-contained unit, the product of a particular set of claims and dispute. Dicta, as the term is commonly understood, refers to language that is not essential to the "holding" of a decision that ends the controversy.[255] Within this paradigm, the accepted view is that such details are less deserving of deference by later decision-makers because these features of the law are less likely to be well reasoned or

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[251] "Unlike jurisprudential interpretation," Whittington writes, "construction provides for an element of creativity in construing constitutional meaning." *Id.* at 5. Accordingly, Whittington adheres to the classical view that law is the space for reflection, while politics is the place for creative action. *Id.* at 8.

[252] *See supra* text accompanying notes 184-189; *see also* Lawrence v. Texas, 539 U.S. 558 (2003).

[253] *See* THE FEDERALIST NO. 2 (John Jay), *supra* note 4.

[254] *See supra* notes 248-251 and accompanying text.

[255] EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949). Levi argues that the common law judge

> is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important.

the product of robust discussion.

Because every ruling is necessarily incomplete and fashioned through compromise,[256] however, it is better to think of dicta as accordion-like in scope. Dicta therefore consists of a range of obviously irrelevant details as well as many that are ripe for contest in successive conflicts.[257] For the gray areas, I have in mind not only Justice Powell's famous disquisition on the importance of diversity adopted by the *Grutter* majority,[258] but also the trimester framework later excised by the *Casey* Court as "not . . . part of the essential holding of *Roe*."[259] We tolerate dicta even if we disfavor it because doing so is thought to enhance the reasoning function in the long run by rendering the majority's rationale more transparent.

But even an understanding of dicta broadened along this trajectory – driven as it is by a search for rules of decision – does not fully come to grips with the subpropositional aspects of constitutional discourse. For it is in the so-called "dicta" of every opinion that judicial vernacular principally lies. The gripping catchphrase, the singular prototype that other actors use to fight over family resemblances, and the galvanizing metaphor all range freely in this domain.

These devices are not so easily relegated to the dustbin of the forgotten and the useless; nor do the well-taken assumptions about ordinary dicta ring true. These allusions and catchphrases can serve as the basis for vocal disagreements about principles; the very fact that dissenters contest the majority's tropes and offer counter-tropes suggest that they are the product of deliberate construction. At the same time, under the traditional dicta model these common aspects of constitutional discourse cannot be said to be compelled. The usual dichotomy between essential and non-essential language has reached the limit of its utility.

A judge has at least three possible reasons for pursuing dicta-based tactics:

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[256] While it is certainly true that the trial judge seemingly enjoys broad rhetorical freedom, the hydraulic pressures of compromise from above exert their sway on even a single judge's product. Through stare decisis and the desire to avoid being overruled, even the trial judge's rulings will incorporate statements borne of compromise.

[257] *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065-67 (2005) (developing a definition of dicta that recognizes that "judges . . . often retain substantial choice in the means of using cases to make law"); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1998 (1994) (defending "a view of the holding/dictum distinction that attributes special significance to the *rationales* of prior cases, rather than just their *facts and outcomes*").

[258] Grutter v. Bollinger, 539 U.S. 306, 323-325 (2003):

> [C]ourts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent . . . . [T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

(referencing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

[259] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 873 (1992) (citing Roe v. Wade, 410 U.S. 133, 163-66 (1973)).

(1) curbing a momentary majority's gains (ordinarily by penning a decisive concurring opinion); (2) educating future decision-makers; or (3) inspiring other political actors to undermine the prevailing juridic vision of democratic governance. If we put aside the obvious desire to influence future members of a jurist's own institution, the rest of these goals are directed at external audiences: lower court judges, elected officials, activists, and lawyers. The abundance of regime-building (or regime-undermining) dicta demonstrates that every judicial utterance is undeniably a construction of political community.

Tying these points to our earlier insights, each of these motivations can be restated in democracy-promoting terms: (a) slowing or preventing political hegemony by a single party or mobilized segment of society; (b) inviting institutional interaction; and (c) encouraging future claims on behalf of the people. Thus, we can say that dicta serves deliberative democracy by reinforcing the contestability of the law across time. Dicta represents bits and pieces of democratic thought, available for future bouts of political hand-to-hand and lawyerly issue-framing. To embrace dicta is to accept that the law, like the broader experiment of self-rule, remains a work-in-progress.

A caveat: my account is not an argument for the unnecessary proliferation of judicial opinions any more than it is a license for incoherence within a particular ruling. There is more than a stone's throw of a difference between a theoretical justification for non-doctrinal rhetoric (which I offer) and an argument for dicta-based strategies in specific situations (which I do not).

On the poetic function of the law, Justice Cardozo explains that the jurist searches

> [F]or the just word, the happy phrase, that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found. There is emancipation in our very bonds. The restraints of rhyme or metre, the exigencies of period or balance, liberate at times the thought which they confine, and in imprisoning release.[260]

If we forgive his gradualist impulses, what Cardozo describes as the judge's province can equally be claimed by other actors within our order – at least when it comes to the everyday and the figurative. What all of this underscores, in the end, is the reciprocal nature of sovereignty's relationship with popular language. A complex system of beliefs and rhetorical practices ties us closer together in the very act of liberating us; it also frees us by illuminating our commonalities. Perhaps we can bring ourselves to praise dicta accordingly.

CONCLUSION

A credible theory of constitutional vernacular straddles law and politics, accounting for sharing between the two fields of action. It treats poetic devices neither as glittering accoutrements to be brushed aside nor as illegitimate incursions upon reason's empire. Instead, the approach treats them as indices

[260] CARDOZO, *supra* note 208, at 89.

of popular sovereignty. The model envisions a rich, layered process of dialogue in which multiple actors claim to act on behalf of the people. It holds no illusions that some voices will be drowned out, but acknowledges that fighting faiths will occasionally become incorporated as features of official anthem, doctrine, or law. Some of these populist features of a living language are so infused that they appear to the naked eye to generate action and thought of their own volition; others appear to be no more than vestiges of a forgotten era.

Important questions remain. First, to say that the path of constitutional language is legitimately recalibrated through direct action and public litigation does not tell us the extent to which law should mirror popular culture or should instead manage and reform dominant ways of life. Direct defiance of valid orders can never be countenanced, but short of this drastic situation there is much gray area for principle and practice to collide. The civil rights experience is an obvious exemplar of maximum absorption, but the ultimate challenge for any comprehensive account is to delineate between impermissible cultural domination of law and permissible resistance and recalibration of governing norms.

Second, significant territory remains for exploration of the precise combination of rules, bureaucratic superstructure, and linguistic infrastructure necessary to renew democratic self-governance. There is a need today for American law to be made more responsive to intractable social ills, not less so. This instrumental goal is not the primary reason for revisiting dominant understandings of foundational dialogue; nor can it be allowed to distort our evaluation. Yet this urgency should make further inquiries into the rich interactions between self-rule and ordinary language both timely and relevant.

Omissions of this nature do not make this account wrong; they merely demonstrate that the work of theory remains necessarily unfinished.