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4-16-2009

### April 16, 2009: What Can the Courts Do About Gay Marriage?

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#### Repository Citation

Ledewitz, B. (2009). April 16, 2009: What Can the Courts Do About Gay Marriage?. Retrieved from <https://dsc.duq.edu/ledewitz-hallowedsecularism/275>

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Title: What Can the Courts Do About Gay Marriage?

Date: 2009-04-16T08:10:00.001-04:00

4/16/2009--I wrote an entry on The Huffington Post yesterday concerning the routes taken by Vermont and Iowa to legalize gay marriage. I praised the legislature in Vermont and criticized the State Supreme Court in Iowa, although they got to similar results. I suggested that the result in Iowa might bring conservative politicians and the Republican Party back into power. This criticism is part of my general view that courts should not attempt to resolve social issues until something of a consensus begins to emerge among the public. The comments in Huffington suggested that I am willing to sacrifice the interests of gay people to other progressive causes. I can see how people might get that impression. So, I want to say here what I may have left out there: it is not just that courts should not impose views contrary to that of settled majorities in the nation, but that they cannot. Such judicial efforts will fail. We see this in America already in that some 30 states have now placed barriers to legislative pro-gay reforms in either the State Constitution or the statute book. Many of these efforts pointed to legalization by court decision as a reason to remove gay marriage from ordinary politics, where it belongs. In Iowa itself, the court decision may be reversed by a constitutional convention, which is an effort the Democratic legislature cannot block. Such conventions are very unpredictable. I'm not sure anybody will be happy with that result should it occur. I am not the first to cast doubt on the heroic thesis that the courts can change fundamental political outcomes. The political scientist Robert Dahl made the same argument in the 1950's. The courts are not all-powerful in a democracy, nor should they be. Courts can only lead. This means in regard to gay marriage, like other controversial decisions, that such decisions will be lasting if they are ultimately persuasive. I see little evidence that judges even appreciate that aspect of their roles. Courts are a part of political change, not something apart from it.