

DEFINING MARRIAGE IN CALIFORNIA: AN ANALYSIS OF PUBLIC AND TECHNICAL ARGUMENT

Edward Schiappa

This study compares and contrasts arguments advanced in the technical sphere of legal and constitutional debate with those in the public sphere leading up to the 2008 vote in California over Proposition 8, defining marriage as “only . . . between a man and a woman.” Of particular interest is how the norms and practices of constitutional argument filter out specific arguments, particularly fear appeals and claims based on religious beliefs, which are prevalent in the public argument. The essay concludes with a discussion of the dilemmas facing a society in which the public and technical spheres of argument produce dramatically different performances of rhetorical reasoning.

Key Words: technical sphere, public sphere, definition, constitution, gay marriage

Whether the term and legal status of *marriage* should include same-sex couples is the most prominent civil rights question in the United States in the early 21st century. Like all significant definitional controversies, competing values, interests, and questions of power are at stake in how the institution of marriage and the legal right to marry are defined. In the state of California, two competing definitions emerged from two distinct argumentative spheres. On May 15, 2008, the Supreme Court of California ruled in *In re Marriage Cases* that *marriage* could not be limited to male/female couples, thereby redefining marriage to include same-sex couples. On November 4, 2008, the people of California voted to approve what is known as Proposition 8, which states: “Only marriage between a man and a woman is valid or recognized in California” (California Voter Guide, 2008).

Drawing on G. Thomas Goodnight’s (1982, 1987) influential work on argument spheres, this essay compares and contrasts the arguments advanced in the technical sphere of legal and constitutional debate with those in the public sphere leading up to the November 4, 2008, vote with a particular emphasis on *definitional* arguments, that is, arguments over how marriage ought to be defined. Of particular interest is how the norms and practices of constitutional argument in the technical sphere filter out specific arguments—particularly fear appeals and claims based on religious beliefs and values—that are prevalent in the public sphere over Proposition 8. The essay concludes with a discussion of the dilemmas facing a society in which the public and technical spheres of argument produce dramatically different performances of rhetorical reasoning, and how scholars of argument might respond. Specifically, I contend that the gap between technical and public sphere argumentation can be enormous, even concerning an explicitly political topic, highlighting the question of audience competence when it comes to the performance of reasonability on technical matters. To a surprising degree, the outcome of the public debate illustrates the concerns expressed by James Madison and Alexander Hamilton about the public sphere more than two centuries ago. From a theoretical standpoint, we can accept Goodnight’s description of the three spheres of argument while refining the normative notion that the public sphere is preferable

Edward Schiappa is a Visiting Professor in the Comparative Media Studies Program at the Massachusetts Institute of Technology. Anthony D. Toderò, Emily Berg Paup, Justin Killian, and Jon B. Hoffman provided valuable research assistance to this project; without their help, this essay could not have been written. The author is grateful for the useful feedback of audiences at Northwestern University and the University of Cincinnati to earlier versions of this essay and to Jeremy Engels for his timely assistance. Correspondence concerning this article should be addressed to the author at Schiappa@mit.edu.

for all political argument. To that end, the dispute over same-sex marriage affords argumentation scholars an important pedagogical opportunity to try to enhance audience competence in the public sphere.

LEGAL ARGUMENT AS TECHNICAL SPHERE ARGUMENT

Goodnight's familiar typology of public, technical, and personal argument spheres (1982, 1987) provides a useful framework for thinking through just how different the arguments were in California that yielded contrary definitions of marriage. Goodnight (1982) defined "sphere" as "branches of activities—the grounds upon which arguments are built and the authorities to which arguers appeal" (p. 216). Argument in the *personal sphere* is relatively private, informal, ephemeral, and guided by the arguers' own sense of appropriate norms. Argument in the *technical sphere*, by contrast, is typically regulated by a particular community of arguers who determine who may speak or publish and requires "a considerable degree of expertise with the formal expectations" of argument (p. 219). In contrast to the personal sphere, technical argument is typically archived in some manner, the content constrained because "more limited rules of evidence, presentation, and judgment are stipulated in order to identify arguers of the field and facilitate the pursuit of their interests" (p. 220). Argument in the *public sphere* occurs when matters become of interest to a broader audience of citizenry. Public sphere argument is characterized, in part, by its accessibility to elected or self-selected representatives of particular positions. This combination of broader participation and audience results in "forms of reason" that are "more common than the specialized demands of a particular professional community" (p. 219).

There is no question that legal arguments concerned with constitutional matters that occur in appellate courts are technical. *Who* is authorized and allowed to argue, *what* sorts of claims, inferences, and evidence are considered appropriate, and *how* legal arguments are presented and archived, are all circumscribed by a specialized set of social practices.

In 2000, over 61% of California voters approved Proposition 22, described as the California Defense of Marriage Act (Bajko, 2008). California law already defined *marriage* as between a man and a woman (California Family Code, § 300). Proposition 22 closed what some argued to be a loophole that would require the state to recognize marriages performed out of state and, hence, added the phrase: "Only marriage between a man and a woman is valid or recognized in California." Subsequently, the California legislature approved legislation that recognized same-sex civil unions and granted them virtually all the same rights as male/female marriages.

The most significant legislation was the Domestic Partnership Act (DPA), which went into effect in 2005:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses. (§ 297.5)

From the standpoint of state law, at least, the only difference between same-sex civil unions and male/female marriages was the name *marriage*. The California Supreme Court ruled 4-3 in *In re Marriage Cases* (2008) that denial of the name *marriage* to same-sex civil unions was unconstitutional.

Analysis of the legal arguments involved in this case was based on the following sources: the initial briefs filed by Plaintiffs and Defendants, the many amici curiae (or "friends of the

court”) briefs filed by interested individuals and organizations, the oral argument that took place before the California Supreme Court, the Court’s majority ruling that rationalized the decision, and the Court’s dissenting opinions that critiqued the decision (*In re Marriage Cases*, 2008).

Three rulings were central to the majority decision. First, because marriage is a fundamental substantive right, the legal difference between civil unions and marriage required strict scrutiny, which means that the law must be justified by a compelling state interest that can be met *only* by enforcing such a difference. Second, no such compelling state interest has been demonstrated. Third, using different labels for “similarly situated” couples violates California’s Equal Protection Clause and therefore is unconstitutional. To treat same-sex couples equally under the law, the term *marriage* must be available to them as well as to male/female couples.

To understand the decision as a performance of reasonableness, the argumentative context must be understood. The U.S. Supreme Court’s ruling in *Romer v. Evans* (1996) struck down Colorado’s effort to deny equal protection to homosexual citizens. When the U.S. Supreme Court reversed *Bowers v. Hardwick* (1986) in *Texas v. Lawrence* (2003), laws criminalizing consensual homosexual conduct were ruled unconstitutional. The combined weight of these rulings meant that laws treating homosexual and heterosexual citizens differentially became presumptively suspect. California Chief Justice Ronald M. George noted that with the passage of the DPA, the California legislature made explicit statements of intent finding that homosexual Californians formed lasting committed relationships, and that expanding rights and duties would promote family relationships and reduce discrimination. Without the DPA, in response to the same constitutional challenge, the Court might have directed the plaintiffs to find a remedy in the Legislature.

The Chief Justice argued that denying same-sex couples the venerated label *marriage* would impose harm on same-sex couples and their children because it would “cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples” (*In re Marriage Cases*, 2008, p. 401). Historically, homosexual persons have faced discrimination; excluding them from the *marriage* label would seem like an official endorsement of such disparagement.

The Court listed several functions of civil marriage: facilitating stable family settings for child welfare, perpetuating social and political culture via the education of children, and relieving society of the burden to care for individuals who are or become incapacitated. In addition to societal benefits, the Court argued that the emotional and economic support provided by marriage might be crucial to personal development and achievement. Marriage facilitated entry into a partner’s family providing a broader and often necessary “network of economic and emotional security” (*In re Marriage Cases*, 2008, p. 424). Expressing commitment via the establishment of a family was an important component of self-expression, giving life meaning. Sharing the happiness and frustrations of childrearing with a loved one was “without doubt a most valuable component of one’s liberty” (p. 425).

Given the importance of marriage as a social institution, and the legal presumption that laws discriminating against homosexual citizens are suspect, the onus was on the State to provide a compelling reason to deny the label *marriage* to same-sex couples. Though the close 4-3 vote suggests reasonable people could disagree, the Court ruled that no such compelling state interest was demonstrated. Defendants and supporting amici briefs most often identified two interests: (a) society’s interest in encouraging procreation, and (b) the traditional value of heterosexual marriage. Chief Justice George noted that not all marriages

result in procreation and that the heterosexual right to marry does not depend on procreation; furthermore, the State's interest in supporting stable families could be advanced by providing families headed by same-sex couples the same dignity and protection families headed by male/female couples. The Chief Justice also noted that *tradition* is not a compelling state interest. The Court noted that entrenched social practices and traditions often masked inequality; examples include bans on interracial marriage, routine exclusions of women from many occupations, and the relegation of blacks to separate but supposedly equal public facilities. Furthermore, many sections of the California Civil Code prohibit discrimination based on sexual orientation, and state law permits same-sex couples to adopt just as it does male/female couples.

Part of what distinguishes the public sphere of argument from the technical sphere is that certain arguments are acceptable in the former but not the latter. As Goodnight (1987) notes, "Technical discourse is not open-ended but requires formally coded and stipulated, field-grounded reasoning" (p. 429). Most conspicuous in the case of the same-sex marriage debate are arguments based purely on religious beliefs. To be sure, one can imagine intricate theological arguments among scholars potentially qualifying as technical argument. However, in the technical sphere of argument involving U.S. courts deciding matters of constitutional law, the advancement of religious beliefs cannot represent a compelling state interest. As will be argued shortly, a good deal of the opposition to same-sex marriage in public argument is driven by religious beliefs that homosexuality is wrong, unnatural, and/or immoral. The flip side of this argument is that heterosexual marriage is a traditional, important, and highly desirable institution that deserves support and defense. In the legal arena, only the second side of the coin was salient. With the DPA, and the *Romer* and *Lawrence* Supreme Court decisions, the argument that homosexuality is wrong, unnatural, and/or immoral was wholly preempted. This allowed the plaintiffs to seize most of the arguments that marriage is a traditional, important, and highly desirable institution because the *more* important the institution is, the more fundamental the *right* to marriage is for *all* citizens. If marriage creates a more stable environment for childrearing, for example, then it is a small step to move from the fact that California allows same-sex couples to adopt to allowing same-sex couples to wed. In short, *once explicitly anti-homosexual claims are excluded from the technical sphere of legal argument, the case for same-sex marriage is much easier to make*. Such a move was illustrated in the oral arguments.

In the oral arguments that took place before the Supreme Court on March 4, 2008, defenders of Proposition 22 made no attempt at all to condemn homosexuality in general nor to offer a moral or religious argument against same-sex marriage. The four topics receiving the most attention were: (a) the relevance of constitutional equal protection, (b) marriage as a fundamental interest, (c) the role of judicial review and separation of powers, and (d) competing definitions of *marriage* (California Courts, 2008). Equal protection got the bulk of the time, 67 minutes, and constituted almost all of the State of California's argument as presented by Christopher E. Krueger, the Supervising Deputy Attorney General, appearing on behalf of the State of California and Attorney General Edmund G. Brown Jr. Arguments about definitions came in second with 50 minutes. Arguments about who should be the agent of change or separation of powers arguments accounted for approximately 27 minutes. Finally, arguments about the fundamental interest in marriage, specifically the interracial marriage case of *Perez*, received approximately 22 minutes. A significant amount of time was spent on the differences between the respondent parties, the attorney general, the governor's attorney, and the private parties—about 14 minutes. The remaining time was spent on: policy

arguments, e.g. are heterosexual couples better at child rearing, about 10 minutes; whether Proposition 22 only applied to out of state marriages, about 6 minutes; polygamy/incest, about 3 minutes; religious freedom, less than one minute.

The more specific arguments that same-sex marriage would harm heterosexual marriage, or that same sex couples were worse at child rearing, were barely mentioned and were quickly dismissed by the Court. Mr. Levy on behalf of the Proposition 22 Legal Defense & Education Fund and Mr. Staver for the Campaign for California Families et al. were the only attorneys to advance such arguments. They spoke last and the least. When Levy argued that the State regulates marriage because marriage produces children, the Court interrupted to note that marriage is available to infertile couples. When Staver said the State has “a compelling interest” in having biological parents raise children, the Court interrupted to ask if Staver was suggesting that the “32% of lesbian couples” who have adopted are “unfit parents?” After Mr. Levy finished talking about how important marriage was, one judge pointed out that he was making the plaintiffs’ argument for them.

A similar pattern can be found in the 45 amici curiae briefs that were filed (Amici Curiae, 2007). At no point do *any* of the 14 briefs filed on behalf of the defendants make an explicit argument that homosexual unions are immoral, and only three discuss religious dimensions at any length. This is a noteworthy act of self-discipline given the fact that many briefs were filed by religious institutions that explicitly describe homosexuality as a sin. Nonetheless, definitional claims that rely on essentialism, such as arguments about what counts as a “real” or “true” marriage, advance values and interests that metaphysical language may obscure (Schiappa, 2003). For example, the brief filed on behalf of a group called African-American Pastors in California (2007) argued:

marriage [is] not a ‘socially constructed’ relationship rooted only in law or in the social or religious conventions of the society in which it is recognized. Nor is it simply a ‘committed relationship’ with a person of one’s choice. The union of a man and a woman in marriage *is, and always has been,* [emphasis added] the fundamental building block upon which families, communities, and entire societies are built. (p. 4).

Sometimes criticism of same-sex marriage is stated indirectly in order to avoid the perception that opposition is motivated by animus. An example is found in the brief filed for the California Ethnic Religious Organizations for Marriage (2007), which defends heterosexual marriage “not because it is a tool to promote invidious discrimination but rather because it is a *universal* social institution that provides the *matchless benefit* [emphasis added] of a husband and wife committed to one another and to the children they may create” (pp. 11–12). This statement is one of many examples of where heterosexual marriage is privileged as more desirable or essential than same-sex marriage. The Church of Jesus Christ of Latter-Day Saints’ (2007) brief claims that “male-female marriage is the life-blood of community, society, and the state” (p. 2). Obviously, one cannot survive without “life-blood”; same-sex marriage, by implication, is deemed inessential.

An interesting argumentative strategy that attempts to portray marriage as necessarily heterosexual was advanced by the National Legal Foundation (2007):

Just as the term “salt” is given to the specific molecular union NaCl, the term “marriage” is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that Na₂ or Cl₂ is not salt. (p. 6)

The Foundation might not be amused by philosopher and historian Thomas Kuhn’s (1990) observation that definitions such as H₂O are not as permanent as we may think, as they are

based on a historically contingent theory of chemical composition that very well could be revised.

The most common means of arguing for the essential nature of heterosexual marriage is the argument from tradition. Almost all briefs in opposition to the plaintiff's case deploy some sort of argument from historical precedent. A typical example is found in the brief by Douglas Kmiec et al. (2007): "Historically, despite wide variety in social traditions and customs, in both patriarchal and matriarchal societies, virtually every known society recognized marriage as a relationship between a man and a woman" (pp. 22–23).

Briefs filed in support of the plaintiff address the historical tradition argument in three ways. First, some advocates argue that there is greater historical precedent for same-sex marriage than opponents acknowledge. The Unitarian Universalists Association of Congregations et al. (2007), for example, note that "extensive evidence exists of socially-accepted marriages between individuals of the same sex both throughout history and throughout the world, including here in California, and historians are just beginning to reconstitute this rich and noble tradition" (p. 7). Second, some advocates contend that the absence of same-sex marriage historically is simply evidence of a prejudiced Western culture that "has not only been hostile to gays and lesbians, but has actually sought to legislate them out of existence. Forbidding gay and lesbian couples to marry was just one manifestation of that discriminatory effort" (City of Los Angeles et al., 2007, p. 14). Third, some advocates argue that historical traditions help to identify the *other* essential functions of marriage, such as its contractual status and its benefit to children, as an argument for why marriage should be available for same sex couples as well. In short, advocates of same-sex marriage certainly were aided in the case *In re Marriage Cases* by the ways in which arguments were constrained by national and state precedents.

I would also suggest that the *reasonability* of same-sex marriage is facilitated by that fact that legal definitions are explicitly lexical definitions; almost all statutes stipulate what the key terms of a law mean, and by doing so identify the *definitive attributes* associated with a particular phenomenon. Legal definitions answer the question: "What should count as X in Context C?" The California Family Code states: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary" (§ 300a). Note that the foregoing sentence identifies four attributes: (a) a personal relation, (b) arising out of a civil contract, (c) between a man and a woman, and (d) requiring consent. Same-sex marriage involves changing only one of the four attributes, the attribute of being a relation between a man and a woman. Lexical definitions are understood by those involved in the legal sphere as a matter of contingent social practice rather than reflecting metaphysical essence and hence are subject to periodic revision to meet changing needs and interests. Those trained and authorized to participate in the technical sphere of legal argument are enculturated as nominalists—that is, dubious of the existence of timeless, metaphysical essences. Thus, from a technical standpoint, it is possible to view changing the legal definition of marriage to include same-sex couples as a relatively minor refinement of a category that is consistent with other legal precedents.

POLITICAL ARGUMENT AS PUBLIC SPHERE ARGUMENT

The California Supreme Court's decision about Proposition 22 led to a ballot initiative, known as Proposition 8, to reverse the decision by changing the state constitution. Campaigns for and against Proposition 8 spent over \$83 million, making it the most expensive

campaign in U.S. history apart from presidential campaigns. The public debate over same-sex marriage took place in many contexts across various media; accordingly, what follows is not exhaustive. Nonetheless, by examining the content of California newspapers, television advertisements, and websites of the primary pro- and anti-Proposition 8 groups, I identify the crucial differences between the public and technical argument and gain some insights as to what can be anticipated in other states as the national debate over same-sex marriage proceeds.

The Case for Proposition 8

Though many organizations and individuals contributed to the Yes-on-8 public argument, the most significant voice on behalf of the proposition came from the ProtectMarriage campaign, officially a project of a group known as California Renewal. Through their colorful “Yes on 8” website (protectmarriage.com), Californians were able to read about the proposition, receive answers to frequently asked questions, order yard signs and t-shirts, and download material to distribute at church and other social functions. ProtectMarriage also provided sample letters for individuals who wanted to write their local newspaper editorial boards.

Maggie Gallagher represents the most prominent public figure to endorse the proposition. As president of the National Organization on Marriage, she traveled the state lecturing on the harms and potential societal downfalls that come from same-sex marriage. Other religious and conservative groups involved with the Yes-on-8 campaign include: the Church of Jesus Christ of Latter Saints’ First Presidency Council, the Roman Catholic Church, *What is Prop 8*, Rick Warren and the Saddleback Church, American Family Association, and Focus on the Family.

The content of Proposition 8 advocates can be boiled down to four points. First, advocates promote an essentialist definition of marriage solely as between a man and a woman. What makes the public arguments about heterosexual marriage being traditional and universal different from otherwise similar legal arguments is the frequent invocation of religious beliefs not only to oppose same-sex marriage but to condemn homosexuality as well. This sometimes happens directly, as in the case when a letter-writer says, “I consulted the Bible and it clearly states, sex between same sex person [*sic*] is wrong (Leviticus 18: 22, Romans 1: 24–27)” (Crooks, 2008, para. 2). More common is the claim that God wants marriage to be heterosexual. Quoting the book of Genesis, Reverend H. H. Lusk Sr. (2008) writes, “Proposition 8 is a real threat to the sanctity of marriage and we must vote yes to protect and defend traditional marriage, and do things God’s way” (para. 6). Another letter writer says, “I believe that marriage between a man and a woman only is not only best for our society but is how God intends it to be” (Porter, 2008, para. 5). Phil Goldsmith (2008) writes, “If you open that old family Bible and turn to Genesis chapter 2:22-25, we see that God created a man then woman, and together they were united as husband and wife. That was God’s design” (para. 1).

Second, advocates argued that the power to define *marriage* ought to reside with voters rather than the Court: “It’s wrong to let four San Francisco-based judges step on the will of the California voters” (Meyer, 2008, para. 1). Many advocates frame Proposition 8 as restoring democratic rule and contrast the 61% majority who voted for Proposition 22 with an act by four judges, usually identified as “activist” or as San Francisco judges.

Third, advocates argue that redefining marriage is unnecessary because the Domestic Partnership Act provided equal rights for same-sex couples. Logically, this is not a reason to vote *for* Proposition 8, but instead is an effort to take away an argument for voting *against* it. Such an argument became particularly important as an attempt to deflect the charge that Proposition 8 advocates are bigoted and discriminatory. As the ProtectMarriage.com website (2008) put it:

Vote YES on Proposition 8 to overturn the outrageous Supreme Court decision and restore the definition of marriage that was approved by over 61% of voters. Proposition 8 is NOT an attack on gay couples and does not take away the rights that same-sex couples already have under California's domestic partner law. California law already grants domestic partners all the rights that a state can grant to a married couple. Gays have a right to their private lives, but not to change the definition of marriage for everyone else. (The Solution section, para. 1)

Fourth, advocates offered a variety of arguments from consequence; that is, a redefinition of marriage to include same-sex couples is harmful to traditional marriage, families, and especially children. Sometimes this argument was made with subtlety, sometimes not. Pastor Phil Magnan (2008), president of the Bible Family Advocates, warns:

It is eternally reprehensible that the pro same sex marriage movement is working to codify their perversion of the marital union; which has an even broader agenda. This agenda will end up being forced into the religious institutions around us, as well as force children to accept immorality in every venue of education. . . . It is a cruel and unloving thing to use the institution of marriage to cause our little ones to stumble into this fallen way of life and lawlessness. (para. 4)

A somewhat more subtle and typical argument is offered by Sterling Quinn (2008), "Many Californians, including me, are concerned that if Proposition 8 fails our children will be taught in schools that same-sex marriage is equal to traditional marriage. . . . Please consider these questions before you vote on Proposition 8" (para. 2, 5).

This summary so far has been based on the written arguments my research encountered. It is difficult, however, to estimate their influence given the millions of dollars spent on television advertisements. Television advertisements are most effective not when they try to convey substance but when, in the words of Tony Schwartz (1973), they provide evocative "stimuli" that strike a "responsive chord" (pp. 26–27). The point of Schwartz's "resonance principle" is that to achieve a particular behavioral effect, one provides stimuli that will resonate with the viewers' current beliefs, values, and emotions (p. 1).

The available evidence on voters and campaigns suggests that campaigns do, in fact, matter. Hillygus and Shields (2008) in *The Persuadable Voter* document the correlation between campaign expense and increased issue salience and voting likelihood, especially with regard to hot-button wedge issues. Given the "epistemology of television" (Postman, 1985, p. 80), it is not unreasonable to infer that the millions of dollars spent in California on Proposition 8 advertising had a significant effect. Negative advertising that resonated with citizens' fears and anxieties about homosexuality combined with positive stimuli that link Proposition 8 with strongly held beliefs about one's children and family. Indeed, the most exhaustive analysis of the relationship between televised advertisements and public opinion polling pinpointed the release of advertisements specifically raising fears that grade school children would be taught about homosexual marriage as moving some 500,000 parents of children living at home from "No" to "Yes" votes on Proposition 8 (Fleischer, 2010). No comparable shift of opinion can be traced to arguments in print media.

Arguably the single most influential advertisement was known by proponents of Proposition 8 as “It’s Already Happening” and opponents as the “Princes” advertisement (VoteYesonProp8, 2008). In this advertisement, a young second-grade girl comes home from school and excitedly tells her mother that in school that day that “We learned about a prince who married another prince.” Handing her mother a copy of the book *King and King* (de Haan & Nijland, 2003), she adds, “And I can marry a princess.” The mother appears dumbfounded. Professor Richard Peterson of Pepperdine University School of Law then appears on the screen to say, “Think it can’t happen? It’s already happened.” An unseen announcer claims, “When Massachusetts legalized gay marriage, schools began teaching second graders that boys can marry boys” and that “Parents had no right to object.” The announcer continues, “Under California law, public schools instruct kids about marriage. Teaching children about gay marriage WILL happen here . . . *unless* we pass Proposition 8.” A superimposed text concludes: “Protect Our Children. Restore Marriage. Yes on Proposition 8.”

Another powerful advertisement was titled “It’s Simple” and has no voice-over at all (marriageitssimple, 2008). The advertisement features a pleasant instrumental tune and is shot against a plain purple backdrop. In the foreground, an adorably cute blonde girl about three years of age plays with two dolls, one male and one female, dressed as bride and groom. She makes the dolls kiss and dances with them, then at the end of the advertisement pushes the two dolls, now seated on a table, together. The words “Marriage. It’s Simple” appear on the screen over the two dolls, now with the girl absent from the screen. As the music ends, the words “Vote YES on Prop 8” appear before the advertisement dissolves to white. Not unlike Tony Schwartz’s famous “Daisy” advertisement, the advertisement’s argument is entirely enthymematic: No explicit claim is set forth. How same-sex marriage would change the idyllic scene of the little girl playing with her wedding-couple dolls is left to the viewer’s imagination. Presumably by increasing viewers’ affective investment in so-called traditional marriage, discomfort, fear, and opposition to same-sex marriage is increased.

The Case against Proposition 8

Advocates from a variety of backgrounds contributed to public arguments opposing Proposition 8. Celebrities, political leaders, Silicon Valley business owners, legal scholars, and the state’s major newspaper editorial boards all made public statements, as well as a great many other citizens. The organized opposition to Proposition 8 was headed by *NO on Prop 8*. The *NO on Prop 8* campaign was run by California-based LGBT rights advocates Equality for All, but the campaign was a collaboration of many LGBT rights organizations. *NO on Prop 8*’s executive committee included prominent members of Equality California, Human Rights Campaign, and the ACLU, among other local California advocacy groups.

Although widely varying in specific arguments, those who opposed Proposition 8 offered four main arguments: (a) the consequences of same-sex marriage cited by Proposition 8 supporters are false, (b) civil rights should not be subject to popular vote, (c) eliminating the right to marry is discrimination, and (d) marriage is about love.

The earliest public arguments against Proposition 8 were defensive, primarily reacting to and refuting Yes-on-8 arguments. The first supportive Proposition 8 advertisement aired on September 29, 2008 as part of an initial \$10 million advertising buy (Morain, 2008). The advertisement contained most of the arguments that no on Proposition 8 groups spent the

next month refuting: same-sex marriage will be taught in schools, churches will lose tax-exempt status, and a now-infamous statement from San Francisco Mayor Gavin Newsom declaring to a cheering audience: “It is going to happen now, whether you like it or not.” Both print-based and video arguments were created to describe these as false or misleading claims.

Of the many counter-arguments offered, I focus on two—one from print and one from video. The *Fresno Bee*'s editorial position is blunt, but not atypically so: “The notion that same-sex marriages somehow threaten the sanctity and strength of heterosexual marriages is simply absurd. Those who worry about the health of heterosexual marriages should focus their attention on divorce, which is the real threat to marriage” (Editorial Board, 2008, para. 6).

The first video, “Proponents of Prop 8 are Using Lies to Scare You,” was released on October 9 (NoOnProp8dotcom, 2008a). It begins with a close-up of two television sets playing pro-Proposition 8 advertisements and slowly pans back to reveal a total of 10 televisions. An ominously juxtaposed lullaby song plays in the background, presumably emphasizing the advertisements' impact on families and children. A male narrator with a stern voice begins, “Their attacks have come before, and they always use the same scare tactics. This time they want to eliminate rights and they're using lies to persuade you.” He then identifies the school and church arguments as lies. The commercial ends with text reading: “Keep government out of all of our lives.” The narrator says the same and appeals again to not eliminating rights for anyone. The advertisement stands out among *NO on Prop 8* material in its emphasis on a traditionally conservative value (“Keep government out of all of our lives”), but the main elements of the advertisement refuting claims of Proposition 8 affecting school and churches are similar to print arguments and other video appeals.

The second argument, that civil rights should not be subject to popular vote, functions both as a general argument against Proposition 8 (though once on the ballot, Proposition 8 makes the question moot) and as a specific response to the pro-Proposition 8 argument that the will of the people should decide the definition of marriage. Although there is a Madisonian theoretical argument that can be made that clearly is assumed in the majority opinions of *In re Marriage Cases*, the argument advanced by opponents of Proposition 8 relied on more accessible arguments by example. Daniel Murphy (2008) wrote in the *San Francisco Chronicle*:

When the bigots in baseball denied African American players the right to play in the majors, the sport and our pastime were cheapened. When the bigots at our finest universities refused to allow women to study there, the academy and our scholarship were cheapened. If the voters of California decide to take away the right of gays and lesbians to marry who they love, the institution and my marriage will be cheapened. Please don't let that happen. (p. B6)

Of the arguments citing the history of civil rights offences, racism against African Americans on the issue of interracial marriage played the most prominent role.

A related argument, but one that was offered frequently enough to deserve separate consideration, was what David Zarefsky (1998) describes as argument by definition—an argumentative move through which an advocate describes a particular phenomenon in a way that stipulates a positive or negative judgment without necessarily adducing evidence for that judgment. In the late 1990s, for example, describing the medical procedure of intact dilation and extraction as “partial-birth abortion” successfully reframed public debate about late-term abortions (Zarefsky, 1998, pp. 3-4). In the campaign leading up to the vote in November, opponents made a consistent effort to define Proposition 8 as an act of discrim-

ination. Passing Proposition 8 was frequently depicted in written and video arguments as turning back the clock to a more discriminatory society. An editorial in the *Los Angeles Times* says:

The very act of denying gay and lesbian couples the right to marry—traditionally the highest legal and societal recognition of a loving commitment—by definition relegates them and their relationships to second-class status, separate and not all that equal. (Editorial Board, 2008, p. A18)

This statement focuses on legal status and strongly emphasizes (“by definition”) that Proposition 8 is about discrimination with regard to the law; it treats people differently and unequally.

At the peak of public debate around Proposition 8, pro-LGBT organization *NO on Prop 8* released a final advertisement on television and the internet that summed up their basic argument: Proposition 8 is unfair and wrong. The November 2, 2008, commercial called “Parents” shows a series of parents making brief statements to the camera that emphasized the centrality of discrimination as a key term for opponents of Proposition 8 (NoOnProp8dotcom, 2008c). Typical claims include one mother stating, “I don’t want my kids to grow up with *discrimination*. Or thinking it’s okay to take away people’s rights,” while another says, “I want our kids to know that *discrimination is wrong. And that Prop 8 is wrong* [emphasis added].”

The previous two arguments—that civil rights should not be open to a vote and that Proposition 8 is discriminatory—probably led to two unintended consequences. First, in their strongest versions, such arguments paint all advocates of Proposition 8 with highly charged labels of intolerant, prejudiced, and bigots. However, sexual prejudice and policy attitudes are not identical: Attitudes about same-sex marriage are only moderately correlated with attitudes about homosexuality in general (Herek, 2009). One might have moderate or even positive attitudes toward homosexuals as a group, favor the option of civil unions, and yet still oppose same-sex marriage. Second, the analogy between same-sex marriage and interracial marriage, in particular, did not resonate well with an important target audience in California; namely, religious African-Americans. Egan, Persily, and Wallsten (2008) report: “African Americans are distinctly opposed to same-sex marriage, even after controlling for intervening variables such as attendance at religious services, moral traditionalism, and living in the South” (p. 247).

The fourth major argument also can be described as an argument by definition, but in this case is an argument that attempts to give meaning to same-sex marriage as about love. Advocates of Proposition 8 often emphasized that marriage is a *sexual* union and, when visually depicting same-sex marriage, almost always portrayed two men getting married. Such appeals function to evoke discomfort with gay male sex. Accordingly, both visually and intellectually it was important for opponents of Proposition 8 to stress the nonsexual dimensions of marriage, especially those dimensions that heterosexual couples could recognize and appreciate as similar to their own experience. A letter to the *San Francisco Chronicle* provides a nice example:

I see that they [same-sex couples] are just like me: They want to be happy, they want to be loved and they want to be protected and respected by the society we live in. Nothing more. I urge you to consider the humanity of all of us when you vote on Proposition 8 on Tuesday. (English, 2008, p. B6)

A number of television and video advertisements made a similar argument, including an advertisement produced by Ellen DeGeneres (NoOnProp8dotcom, 2008b). The advertise-

ment is simple in its staging, just one single shot. DeGeneres is standing with her palms together in front of her in a visual counterpart to her verbal plea for support. In the advertisement she states, "I got to do something this year that I thought I'd never be able to do: I got married. It was the happiest day of my life." Such a statement attempts to personalize the issue in a manner many married heterosexuals would recognize. She continues, "I believe in fairness, I believe in compassion, I believe in equality for all people. Proposition 8 does not. Please, please vote no on Prop 8."

CONCLUSION: ARGUMENT SPHERES AND THE ROLE OF THE CRITIC

Various opinion polls taken in California leading up to the vote on Proposition 8 suggested that the vote would be close, but most suggested the measure would fail. Although Barack Obama does not appear to have lost polling points due to the so-called Bradley Effect (where people answer what they believe is the more socially acceptable response to pollsters' questions, but then vote otherwise), it is possible that Proposition 8 did given, despite opinion polls predicting otherwise, it passed. Viewed in a larger context, the only surprising result was the closeness of the vote. As political scientist Barbara Gamble (1997) noted over a decade ago, "citizen initiatives that restrict civil rights experience extraordinary electoral success: voters have approved over three-quarters of these" (p. 245). Daniel C. Lewis recently updated and confirmed Gamble's findings (2011). Ballot initiatives involving homosexual rights have a particularly one-sided history. Between 1977 and 1997, voters approved 80% of measures that restricted homosexual rights. Exceptions are few and far between. Most LGBT rights victories at the polls have been at the city level, such as when voters in Saint Paul, Minnesota and Portland, Maine refused to repeal antidiscrimination ordinances.

Thirty-two ballot initiatives prohibiting same-sex marriage have been proposed; thirty-two have passed. The vote in California is actually the second closest on record with 52.24% approving, while in 2006, 51.7% of South Dakota voters approved a measure banning both same-sex marriage and civil unions. In 2004 Mississippi passed a constitutional amendment defining marriage as between a man and a woman by 86%. The average percentage voting in favor of such measures has been over 65% (Same-sex Marriage, 2011). What are argumentation scholars to make of such different performances of reasonability between the public and technical sphere?

From a theoretical/critical standpoint, this study contributes to the ongoing debate concerning the appropriate boundaries of public and technical argument spheres. Goodnight's (1982) concern initially in formulating the "spheres of argument" framework was that "the public sphere is being steadily eroded by the elevation of the personal and technical groundings of argument" (p. 223). To be sure, a commitment to democratic governance entails that it is important to resist rule by technocratic elites and to recognize that the deployment of certain framings, including "public" versus "technical," enacts specific power relationships (Schiappa, 2003, pp. 69–88). At the same time, as Robert C. Rowland (1986) pointed out with respect to the interplay of public and technical argument leading to the *Challenger* disaster, and as this analysis of the California debates over same-sex marriage suggests, the gap between technical and public sphere argument can be enormous.

It is reasonable to expand Goodnight's insights by emphasizing that spheres imply specific notions of *audience competence*. The performance of reasonability is one indicator of audience competence that may identify, on a case-by-case basis, certain controversies that are better

or worse suited for the argumentative practices of the public sphere. Even though the arguments found in the Federalist papers in favor of a strong judiciary in the United States may have been motivated more by the desire to protect property rights than civil rights (Engels, 2010), it is difficult not to recall the voices of Alexander Hamilton and James Madison on behalf of an independent check on the power of public opinion as it is expressed through the other branches of government (see *Federalist #47-49*). If I am correct about the role of fear appeals in the public sphere discussion of same-sex marriage leading up to the vote on Proposition 8, then it is a classic example of Madison's concern that "the passions," rather than "reason," sometimes rule the judgments of the public (*Federalist #49*).

Madison's well-known concern was that a direct democracy, "where a multitude of people exercise in person the legislative functions," was undesirable because the public demonstrates an "incapacity for regular deliberation" compared to a representative republic (*Federalist #48*). In a 21st century echo of Madison's concerns, the empirical research suggests that states with direct-democracy structures are significantly more likely to adopt bans on same-sex marriage than states without, leading Daniel C. Lewis (2011) to conclude, "Without the checks and balances of a representative, separated powers system that encourages deliberation and minority representation, minority rights are at increased risk under direct-democracy institutions" (p. 364). Thus have the courts evolved into a technical sphere argumentative check on decisions of the public sphere. One appropriate task of a scholar of argumentation, therefore, is to understand how *reasonableness* is performed in such different contexts as the technical legal argumentation culminating in *In re Marriage Cases* and the public vote on Proposition 8 in order to understand the status and future of the public sphere of argument.

This study also identifies a potential pedagogical agenda for argument scholars. If one concludes that the general public in California in November of 2008 did not demonstrate appropriate argumentative competence, then argumentation scholars have an opportunity to try to improve that competence. There is a history of public backlash to court decisions that differ from dominant public opinion; arguably, at least a portion of that backlash is due to a woefully poor public understanding of U.S. history and the basics of constitutional law. Many surveys have been done over the years to gauge public understanding of constitutional law. The findings typically suggest most U.S. citizens are distressingly ignorant of basic constitutional history and precepts (Bennack, 1987; Delli Carpini & Keeter, 1996). Though not normally included in surveys testing public knowledge of the constitution, it is reasonable to assume that too few adult U.S. citizens have even a rudimentary understanding of the judicial history of the First Amendment's establishment clause and, in particular, the so-called Lemon test, first announced in *Lemon v. Kurtzman* (1971). The Lemon test is the three-part formula used by the Supreme Court to decide whether or not a government action violates the establishment clause. The first part requires that the government action have a secular purpose; the second part demands that the action neither advance nor inhibit religion as its primary effect; and the final part dictates that the act not cause an excessive entanglement between church and state. While at times the Lemon test has been controversial, it nonetheless provides a necessary background to understanding *why* the sort of religious appeals made in the public debate over Proposition 8 found no purchase in the California Supreme Court's decision or even to a significant degree in any of the briefs filed by interested parties.

Charles Arthur Willard (1996) suggests that in an age of technical expertise there is a need for "translation" across different discourse domains (p. 303). He describes a continuum of

understanding, with one end marked by messages “meant to be understood by millions” and the other marked by esoteric expertise addressed and understood by a very small number of individuals (p. 303). Willard describes seven “latitudes of comprehension” (perhaps longitude would have been a better analogy), with the mid-point defined by college-educated “elite targets” who read nonfiction books and level 5 being Academia (1996, pp. 303, 305). It is crucial in an age where government policy is driven by the interplay of technical and public argument that more advocates become adept at speaking across these latitudes, and argumentation scholars are especially well positioned to educate both advocates and audiences to understand and evaluate such controversies.

To conclude: There were different performances of reasonableness in the technical versus public spheres in California over same-sex marriage in 2008. Given the inevitability of similar arguments occurring across the nation in the years to come, understanding those performances is nothing short of a civic duty.

REFERENCES

- African-American Pastors in California. (2007). *Amicus Curiae Brief*. In re Marriage Cases. Retrieved from <http://www.courts.ca.gov/6504.htm>.
- Bajko, M. (2008, November 13). Reactions to Prop 8 passage vary by state. *Bay Area Reporter*. Retrieved from www.ebar.com.
- Bennack, F. A. (1987). *The American public's knowledge of the U.S. Constitution: A national survey of public awareness and personal opinion*. New York, NY: Hearst Corporation.
- Bowers v. Hardwick 478 U.S. 186 (1986).
- California Ethnic Religious Organizations for Marriage. (2007). *Amicus Curiae Brief*. In re Marriage Cases. Retrieved from <http://www.courts.ca.gov/6504.htm>.
- California Family Code § 300 (1992).
- California Secretary of State (2008). Official Title and Summary of Proposition 8. In *California General Election Voter Information Guide*. Retrieved from <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm>.
- Church of Jesus Christ of Latter-Day Saints, California Catholic Conference, National Association of Evangelicals, & Union of Orthodox Jewish Congregations of America. (2007). *Amicus Curiae Brief*. In re Marriage Cases. Retrieved from <http://www.courts.ca.gov/6504.htm>.
- City of Los Angeles, et al. (2007). *Amicus Curiae Brief*. In re Marriage Cases. Retrieved from <http://www.courts.ca.gov/6504.htm>.
- Crooks, B. (2008, October 16). Yes on proposition 8 [Letter to the editor]. *Vallejo Times-Herald*, Retrieved from LexisNexis News.
- Delli Carpini, M. X., & Keeter, S. (1996). *What Americans know about politics and why it matters*. New Haven, CT: Yale University Press.
- Domestic Partnership Act, California Family Code § 297.5 (2003)
- Egan, P. J., Persily, N., & Wallsten, K. (2008). Gay rights. In N. Persily, J. Citrin, & P. J. Egan (Eds.), *Public opinion and constitutional controversy* (pp. 234-266). New York, NY: Oxford University Press.
- Editorial: Reneging on a right: Endorsements 2008: By banning same-sex marriages, Prop. 8 would create second-class citizens [Editorial]. (2008, August 8). *Los Angeles Times*, pp. A18.
- Editorial: No on prop. 8: Constitution shouldn't be used to restrict rights of same-sex couples [Editorial] (2008, October 21). *Fresno Bee*. Retrieved from <http://www.fresnobee.com/474/story/950392.html>.
- English, T. (2008, November 4). Just like me [Letter to the editor]. *San Francisco Chronicle*, B6.
- Fleischer, D. (2010). *The Prop 8 Report*. Retrieved from <http://prop8report.lgbtmentoring.org>.
- Gamble, B. S. (1997). Putting civil rights to a popular vote. *American Journal of Political Science*, 41, 245–269.
- Goldsmith, P. (2008, November 3). Prop 8 supports God's design [Letter to the editor]. *Monterey County Herald*. Retrieved from LexisNexis News.
- Goodnight, G. T. (1982). The personal, technical, and public spheres of argument: A speculative inquiry into the art of public deliberation. *The Journal of the American Forensic Association*, 18, 214–227.
- Goodnight, G. T. (1987). Public discourse. *Critical Studies in Mass Communication*, 4, 428–431.
- de Haan, L., & Nijland, S. (2003). *King and king*. Berkeley, CA: Tricycle Press.
- Herek, G. M. (1988). Heterosexuals' attitudes toward lesbians and gay men: Correlates and gender differences. *The Journal of Sex Research*, 25, 451–477.
- Herek, G. M. (2009). Sexual stigma and sexual prejudice in the United States: A conceptual framework. In D. A. Hope (Ed.), *Contemporary perspectives on lesbian, gay, and bisexual identities* (pp. 65–111). New York, NY: Springer Science+Business Media, LLC.
- Hillygus, D. S., & Shields, T. G. (2008). *The persuadable voter: Wedge issues in presidential campaigns*. Princeton, NJ: Princeton University Press.
- In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008). Complete documentation concerning *In re Marriage Cases*, including audio of the Oral Arguments, retrieved from <http://www.courts.ca.gov/2964.htm>.

- Kniec, D. W., Alvare, H. M., Dent, G. W., Calabresi, S. G., Presser, S. B., & Wardele, L. D. (2007). *Amicus Curiae Brief*. In re Marriage Cases. Retrieved from <http://www.courts.ca.gov/6504.htm>.
- Kuhn, T. S. (1990). Dubbing and redubbing: The vulnerability of rigid designation. *Minnesota Studies in the Philosophy of Science*, 14, 298–318.
- Lawrence v. Texas 539 U.S. 558 (2003).
- Lemon v. Kurtzman, 403 U.S. 602 (1971).
- Lewis, D. C. (2011). Direct democracy and minority rights: Same-sex marriage bans in the U.S. states. *Social Science Quarterly*, 92, 364–383.
- Lusk, Rev. H. H. (2008, November 1). God has a say on proposition 8 [Letter to the editor]. *Monterey County Herald*. Retrieved from LexisNexis News.
- Magnan, P. (2008, October 29). Vote against moral blasphemy, vote yes on Prop. 8 to protect marriage. *Christian Newswire*. Retrieved from LexisNexis News.
- Marriageitsimple. (Creator). (2008, October 5). Marriage: It's simple—Prop 8 [Video file]. Retrieved from <http://www.youtube.com/watch?v=KFFwBokHVfo>.
- Meyer, L. (2008, October 31). Voters, not judges, deserve final word [Letter to the editor]. *Chico Enterprise-Record*. Retrieved from LexisNexis News.
- Morain, D. (2008, September 30). Same-sex marriage foes roll out their first TV ads. *Los Angeles Times*, p. B4.
- Murphy, D. (2008, October 21). Cheapening marriage [Letter to the editor]. *San Francisco Chronicle*, p. B6.
- National Legal Foundation. (2007). *Amicus Curiae Brief*. In re Marriage Cases. Retrieved from <http://www.courts.ca.gov/6504.htm>.
- NoOnProp8dotcom. (Creator). (2008a, October 9). Proponents of Prop 8 are using lies to scare you [Video file]. Retrieved from <http://www.youtube.com/watch?v=vKAqbQJWQhc>.
- NoOnProp8dotcom. (Creator). (2008b). Ellen urges Californians to vote no on Prop. 8 [Video file]. Retrieved from http://www.youtube.com/watch?v=cd_ai2LrgJ0.
- NoOnProp8dotcom. (Creator). (2008c, November 3). Parents [Video file]. Retrieved from http://www.youtube.com/watch?v=J-IOh6Qni_g.
- Porter, T. (2008, November 2). Who is intolerant? [Letter to the editor] *Contra Costa Times*. Retrieved from LexisNexis News.
- Postman, N. (1985). *Amusing ourselves to death: Public discourse in the age of show business*. New York, NY: Penguin Books.
- ProtectMarriage. (2008). About. Retrieved from <http://www.ProtectMarriage.com>.
- Quinn, S. (2008, October 23). Classroom matters [Letter to the editor]. *San Bernardino County Sun*. Retrieved from LexisNexis News.
- Romer v. Evans, 517 U.S. 620 (1996).
- Rowland, R. C. (1986). The relationship between the public and the technical spheres of argument: A case study of the *Challenger Seven* disaster. *Central States Speech Journal*, 37, 136–146.
- Same-sex marriage legislation in the United States. (2011). *Wikipedia*. Retrieved October 27, 2011, from http://en.wikipedia.org/wiki/Same-sex_marriage_legislation_in_the_United_States#Efforts_to_prohibit_same-sex_unions.
- Schiappa, E. (1987). "Spheres of argument" as *topoi* for the critical study of power/knowledge. In B. E. Gronbeck, (Ed.), *Spheres of Argument: Proceedings of the Sixth SCA/AFA Conference on Argumentation* (pp. 47–56). Annandale, VA: Speech Communication Association.
- Schiappa, E. (2003). *Defining reality: Definition and the politics of meaning*. Carbondale: Southern Illinois University Press.
- Schwartz, T. (1973). *The responsive chord*. Garden City, NY: Anchor Press.
- Unitarian Universalist Association of Congregations, et al. (2007). *Amicus Curiae Brief*. In re Marriage Cases. Retrieved from <http://www.courts.ca.gov/6504.htm>.
- VoteYesonProp8. (Creator). (2008, October 7). Yes on 8 TV ad: It's already happened [Video file]. Retrieved from <http://www.youtube.com/watch?v=0PgjcgqFYP4>.
- Willard, C. A. (1996). *Liberalism and the problem of knowledge: A new rhetoric for modern times*. Chicago, IL: University of Chicago Press.
- Zarefsky, D. (1998). Definitions. In J. F. Klumpp (Ed.), *Tenth SCA/AFA Conference on Argumentation 1997: Argument in a time of change* (pp. 1–11). Annandale, VA: National Communication Association.