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

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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.

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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 for all political argument. To that end, the dispute over same-sex marriage affords argument-

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tation scholars an important pedagogical opportunity to try to enhance audience competence in the public sphere.

**LEGAL ARGUMENT AS TECHNICAL SPHERE ARGUMENT**

Goodnight's (1982, 1987) familiar typology of public, technical, and personal argument spheres 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 at 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