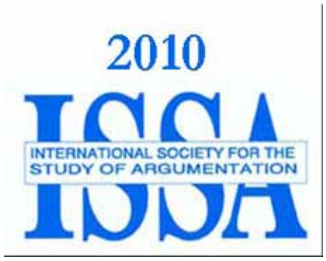
ISSA Proceedings 2010 – Everyday Argument Strategies In Appellate Court ArgumentA Same-Sex Marriage



1. Introduction

(1) *Exchange between Plaintiff Attorney (A-SM) and two Supreme Court Justices In re Marriage Cases, California, 03/04/08, Line 2653*

A-SM: Your honors, with regards to the question to of uh possible adverse consequences, you know with- with apologies to Shakespeare, same-sex couples have come here today to praise marriage, not to bury it. Petitioners deeply value the tradition of marriage and wish to participate in it with all of the joy and responsibility that that brings. There's absolutely no evidence uh in the record here or elsewhere that permitting same-sex couples to marry elsewhere has in [any-

CJ: [I thought when you invoked Shakespeare, you were gonna invoke the line, "what's in a name?"

((laughter))

A-SM: Also would have been very appropriate.

J-M: Also with apologies to Shakespeare, I thought you were gonna say, "a rose by any other name would smell just as sweet."

((laughter))

A-SM: Names are very important, your honor um-

In 2008 and 2009 California's Supreme Court issued two opinions regarding the legality of the state restricting marriage to opposite-sex couples. In the first case, *In Re Marriage*, the Court overturned the state's existing marriage laws, ruling that denying same-sex couples the right to participate in state-sanctioned ceremonies that labeled unions "marriage" was denying the couples a "fundamental interest in liberty and personal autonomy" (p. 7). In the second case, *Strauss v. Horton*, the Court upheld the legality of a constitutional amendment, Proposition 8, which was a ballot initiative that restricted marriage to one man and one woman that California voters approved in the months after

the Court ruling in the *Marriage Cases*. In justifying its opinion, the Court argued that giving a different name to the legally-recognized relationships of same-sex couples was not a significant enough change to count as a constitutional revision, and hence Proposition 8 was a legal amendment. In both cases – as the above moment of levity suggests – the constitutional issues revolved around the significance of a term.

Within argument studies, legal disputing is often treated as an exemplary model of how to argue (Perelman & Olbrechts-Tyteca, 1969; Toulmin, 1969), and, explicitly or implicitly, ordinary disputants are encouraged to use the kinds of practices common in legal discourse. My goal is not to challenge this positive assessment of legal discourse. Oral argument in appellate exchanges, the legal talk that is this paper's focus, is impressive. But oral argument is *talk* and as such, it is replete with ordinary talk's strategies of influence. Oral argument may be rich with institutionally distinctive vocabulary and reasoning moves, but appellate arguers also regularly use the evaluation-generating strategies of everyday discourse. Attorneys and judges strategically seek to advance their preferred outcomes through the names they select, the definitions they assume, and the descriptive details included. Simply put, participants load their expression so that one side of a dispute seems ever so reasonable, and the opposing side does not.

I begin by describing the discourse strategies of ordinary argument-making in informal conversations and public talk. Then, I provide background on oral argument and the two cases. The analysis describes three persuasive argument-building techniques used by attorneys and judges in these same-sex marriage cases: (1) assuming a definition of a key term, (2) employing evaluatively-tilted analogies, and (3) using stance-cuing non-focal terms. In concluding, I draw out implications for assessing judicial argument.

2. Argument-Building in Public and Personal Exchanges

Describing events one way rather than another is a key way ordinary arguers seek to build the reasonableness of what they are saying. In disputes, Edwards and Potter (1992) show, "reports being proffered . . . are typically contrasting versions. That is, they are typically organized to undermine or reject an alternative that may be either implicit or explicit" (p. 3).

A first way communicators seek to bolster their preferred position is by the way they define key terms. As Zarefsky (1998, p. 1) noted "to choose a definition is to

plead a cause." And while it is possible to argue why a key concept should be defined a certain way, what speakers do most often is to describe a situation using the meaning entailments of one definition of a disputed term. In other words rather than explicitly arguing as to what should be the definition of a key term, disputants simply speak as if their definition were accepted by all, the straightforward meaning of the word. This move to stipulate and treat their definition as the essence casts other meanings as unreasonable. Schiappi (2003) shows how this process worked in public disputes about "obscenity," "rape," and "wetlands." Similar moves will be seen in appellate speakers' uses of the term "marriage."

A second way everyday communicators seek to shape views toward an issue is by using vivid analogies. Comparing one kind of thing to another can lead a person to give attention to aspects of an issue that may have been overlooked. The danger, however, is that any analogy may be problematic, connecting two things that shouldn't be regarded as comparable. Texts on critical thinking (e.g., Browne & Keeley, 2006), in fact, regularly warn college students that they need to inspect any analogy for its appropriateness. What is not noted in these texts is that an assessor's judgment of appropriateness is likely to be shaped by his or her position in a dispute. Interpreters need to weigh the degree of similarity and difference in judging the fittedness of an analogy, but in scenes of dispute such a weighing often depends on an interpreter's other commitments.

A third way ordinary speakers build the reasonableness of their view (and the unreasonableness of those who are disputing them) is through their use of stance markers. In selecting words to express themselves, speakers tap into larger cultural scenes in which particular expressions, when in the neighborhood of other kinds of expressions, convey positive or negative stances toward what is being discussed. Stance, as it has been developed by discourse analysts (Englebretson, 2007; Jaffe, 2009), refers to the attitudinal position toward the topic of talk (or the other) that is conveyed by words, gestures and other semiotic forms (DuBois, 2007). As Amossy (2009, p. 315), comments, "the selection of a term is never innocent, and it is rarely devoid of argumentative purpose." Put crassly, ordinary arguers forward their preferred position by selecting words to surround a key claim that will tilt understanding toward their view and away from their opponent's.

To be sure, argument building in appellate exchanges uses discourse devices that

are distinctive to this site. These devices include (1) extensive use of argument meta-language, i.e., terms such as claim position, evidence, and argue (Craig & Tracy, 2010), (2) referencing of prior cases to justify claims, (3) hypothetical questions to explore complexities of issues (Tracy & Parks, 2010), and (4) a speaking style that uses few tokens of face-attention and face-attack (Tracy, 2011). But amidst these distinctively legal moves, appellate court exchanges, I will show, rest on the most ordinary of influence practices.

3. Oral Argument and the Two California Cases

Although US state supreme courts do not have identical formats for oral argument (Comparato 2003; Langer 2002), they do evidence a strong family resemblance. Across state courts oral argument involves a short presentation by the attorney(s) for a side, which ends when a first judge decides he or she has something to ask. Most of the time in oral argument is comprised of a string of rapidly fired questions in which justices, in no particular order, claim the floor to raise questions. At the end of the pre-allocated amount of time, or slightly longer if the Chief Justice approves, the first party sits down. The same sequence of activities occurs with the second party. In some courts, a party may include several attorneys, each of whom tackles one piece of that side's argument; in other courts, each side has only a single attorney. Typically the party who goes first, the one petitioning to overturn the lower court's opinion, can save a portion of his/her time for a rebuttal.

This study is part of a larger project (Tracy, 2009, in-press; Tracy & Delgadillo, in press) examining disputes about same-sex marriage in oral argument in eight state supreme courts and several state legislative hearings. Tapes of oral argument and legislative hearings were downloaded from state websites and simple transcripts were created. I also collected each court's judicial opinions. In the two California cases, which are this paper's focus, the same seven justices heard both cases. For the *In re Marriage Cases*, there were eight attorneys, with four on each side. In the *Strauss v. Horton* case there were six attorneys, five on the plaintiff side and one on the defense side. In each of the cases the oral argument lasted three to four hours, and averaged about 80 questions per hour. In the *In re Marriage Cases*, the focal issue identified in the judicial opinion was whether the California constitution "prohibits the state from establishing a statutory scheme . . . under which the union of an opposite-sex couple is officially designated a 'marriage' whereas the union of a same-sex couple is officially

designated a 'domestic partnership'" Important to note is that at the time of the case, except for the name, existing California law extended all "significant legal rights and obligations traditionally associated with the institution of marriage" (p. 4) In the *Strauss v. Horton* case, there were two issues: (1) Is Proposition 8's restriction on marriage to one man and one woman a permissible change to the California constitution? (2) And if so, are the 18,000 marriages that were performed between the time of the first and second case valid?

4. Everyday Evaluation-Tilting Strategies at Play during Oral Argument

4.1. A Contested Key Definition

A central difference between the proponents and opponents in these cases was their definition of the term marriage. Proponents used the word "marriage" to point to a committed, loving relationships between two parties that "consists of a core bundle of rights pertaining to privacy, autonomy, freedom of expression" which includes "freedom to choose one's spouse**[i]**." Marriage is a fundamental right constitutionally granted to almost all US citizens today, excluding only children, blood relatives, and multiple partners. Denying a person the right to marry his or her preferred partner the plaintiffs argued, is as discriminatory (and hence should be illegal) as denying two people of different races the right to marry. In contrast, attorneys for the defense defined marriage as a union between a man and a woman. Period. Consider one defense attorney's response to a question about what role he saw the Court to have in this dispute.

(2) *Line 2167, Attorney Lavy, defense of existing marriage law***[ii]**

Y- your honor, I don't believe that this r- court has a role in *redefining the term marriage*. E- since- I mean I- I understand that the petitioners are saying what we want is the right to marry, but the right to marry as defined in every decision by this court, every decision by the US Supreme Court, and almost every decision by any other state court, is the union of a man and a woman. That's what it was in Perez, that's what it was in Loving.

The attorney's comment is interesting in two regards. First, he describes what the plaintiffs are asking for as a *redefinition* of marriage. It is not extending marriage to a new set of people, but rather it is fundamentally changing its meaning. Marriage, in its essence, to use Sciappi's (2003) distinction is a union of a man and a woman. Anything else is not marriage. Second, Lavy bolsters this stipulative definition by citing precedent and treating it as supporting his view. In

mentioning Perez (a 1948 California Supreme Court case) and Loving (a 1967 US Supreme Court case) — two visible cases about interracial marriage which affirmed the rights of blacks and whites to marry each other — Lavy uses them to support his claim that the law has been consistent in its definition of marriage, since in both cases, one of the parties was male and the other was female.
A similar stipulative move was made by a plaintiff's attorney. Consider an exchange in which a justice asked the attorney how he was defining marriage.

(3) *Line 1093, A-M = Attorney McCoy, J-W = Justice Werdeger*
A-M:The definition of marriage which we are asserting here is the commitment between two individuals to pr- to provide love uh and emotional sus- su- support to one another for the le- rest [of their lives.
J-W:[With all due respect I understand that's the uh- the definition that you are advancing, but how does court know that implicit with all the commitment and the choice and so forth is not the understanding that it's between a man and a woman?
A-M:Well I- I- think it's- uh I think history and tradition uh has showed that marriage, the common understanding of marriage, is between a man and a woman. However, our- our focus here is wh- whether the statute and the common understanding of marriage is unconstitutional on its face, whether the definition *excludes individuals in California for the right of free choice, that is right to- to choose their life partner*.

In essence, identical to the defense attorney's move, the plaintiff attorney can be seen to arguing that because the law does not allow some people to choose their life partner – his preferred definition of marriage – then the existing law is unconstitutional.

The definitional debate over this key term, "marriage" carried over to the judicial opinions. The Court opinion, endorsed by four of the seven justices, describes the plaintiffs as "not seeking recognition of a novel constitutional right to 'same-sex marriage' rather than simply the application of an established fundamental right to marry a person of one's choice" (p. 18) whereas the dissenting judges argued that " though the majority insists otherwise, plaintiffs seek, and the majority grants, a *new* right to *same-sex* marriage that has only recently been urged upon our social and legal system" (p. 15). In an analysis of the suasory power built into words, using the debate about "marriage" between same-sex couples as an example, Macagno and Walton (2010) make a similar point, highlighting how

words have built into them bits of culture and this feature is “an integral part of the language itself” (p. 2000). Disputes over definition are disputes about what is culturally desirable.

Just like in most arenas of public disputing, then, which party is seen to have the more reasonable claim comes down to which party gets to define the key term. In this case, the preferred definition of marriage held by four judges trumped the preferred definition held by the other three justices. Thus, despite the legal clothing of judges and attorneys’ talk, the dispute was a very ordinary one. As Zarefsky (1998) concluded about the act of defining: it “affects what counts as data for a conclusion about whether or what action should be taken. It highlights elements of the situation that are used to construct an argument about it” (p. 5).

4.2. Reasonable or Problematic Analogies?

One of the more ordinary of everyday reasoning tools is the analogy. In seeking to persuade justices of the reasonableness of a claim, attorneys occasionally used this device. Below I examine two analogies, one by each side, and I consider why the analogy is reasonable and why it is problematic, showing how the assessment cannot be separated from an evaluator’s positioning. In each instance, the Court decided against the side that used the analogy.

The first instance comes from *In re Marriage* where an attorney defending the existing marriage law responded to a justice’s question about potential adverse effects for society if same-sex couples were permitted to marry.

(4) *Line 2497, Attorney Staver*

I think it would undermine opposite-sex marriage in the same way that if you were to have, and this is just an illustration, *to have uh one atom of sodium and one atom of chlorine creates salt, you can’t change that name without having consequences.* You can’t simply redefine the definition of marriage to include what it’s never included, same-sex relationships…

The attorney’s analogy between marriage and salt strongly implies that just as one atom of sodium and one atom of chlorine create salt and only salt, so too is it the case with marriage and a single man and a single women. Two elements of chlorine will not create salt. In equating “marriage” to this natural substance, the inappropriateness of two men or two women being marriage partners is asserted. Although currently not popular among many US legal scholars, there is a tradition

of seeing the law as deriving from God and nature (e.g., Washington, 2002). Within such a tradition, Staver's analogy is reasonable. However, if one sees marriage, and the laws that have been created about it, as a social institution that has changed across time, then the inappropriateness of the analogy becomes obvious. The bonding between chlorine and sodium is a natural process, not at all like the bonding between intimate partners. To treat the two as analogous is inappropriate.

A second analogy comes from a plaintiff attorney in the final minutes of rebuttal during the Proposition 8 case. The attorney is making the case of the importance of the word "marriage" rather than "domestic partnership" to describe committed relationships between same-sex couples. As an analogy, he suggests the importance of having similar titles for male and female judges. He says:

(5) *Line 2769, Attorney Maroko*
Thank you, your honor. I wanna- if I may just follow up on Justice Kennard and Justice George's questions of Mr. Minter. Um aren't we basically just focusing on a very narrow aspect of Prop 8, which has changed the nomenclature, but the basic suspect class action of rights which was the core of the case stays? That's the position [of the other side]…. so I'm proposing hypotheticals, we've all been talking about hypotheticals … Back in the sixties saying that uh- cause we all know that a bar- a bartender has to be a man. Can't have a woman bar- basically simplifying it. …[So I propose a ballot initiative that will be only nomenclature] Nomenclature. Only males shall serve as members of the California judiciary. Females shall be commissioners with the same rights and powers as men. Okay, people, the people have the sovereign- sovereign people 51% passed it, 52% passed that, they have reasons. Many women get pregnant and be off the bench. It won't be- whatever their reasoning is. Women will be commissioners, called commissi- Same rights. Same rights. Justice- Justice Corrigan, Justice k- uh um Justice Kennard, Justice Werdegar [three named justices are female] you h- you can rule the same way, but you're called a commissioner, Justice Moreno [male] is not, is called a judge, justice.

This analogy seems highly appropriate, although not necessarily politically smart. In creating an analogy about the importance of names, not in principle, but in the concrete situation confronted by the three female justices, the attorney can be seen as seeking to drive home the consequentiality of the name that is given to an event or person. At the same time, his analogy is at odds with the impersonal

argument style favored by appellate court arguers. In being personal, however reasonable the analogy, the attorney violates the institutionally legitimized ways of weaving passion into argument (Bailey, 1983), therein making his emotion visible in a fashion neither expected nor acceptable in appellate exchanges.

4.3. Stance-Cuing Non-Focal Terms

In addition to the debate about the definition of marriage, a second important debate occurring in both cases concerned the significance of words. What relationship did the label "marriage" have to the already existing rights that were provided in the state's domestic partnership law? Was the right to call one's union "marriage" an important right of marriage or was the name a relatively unimportant difference? In opening minutes of the *In re Marriage* case the lead plaintiff attorney argued, "Words matter. Names matter." Soon after, this issue was explored in questioning.

(6) *Line 300, Justices Kennard and Chin questioning Attorney Stewart*

J-K: What is the most significant difference uh between domestic partnership and marriage? Is it that domestic partnership, according to your position, doesn't provide the *title, status, or stature of marriage*?
A-S: That is the most important distinction [and it's not the only-
J-C: [But aren't the rights and responsibilities *substantially the same*?
A-S: They- there are some differences, your honor, but they are [close.
J-C: [Aren't they the s- *substantially the same*?
A-S: They're- are the rights and- but the [tangible rights-
J-C: [Aren't the rights and responsibilities of domestic partners and marriage partners *substantially the same*?

In repeatedly pursuing the plaintiff attorney to get her to acknowledge that the rights of marriage and domestic partnership are substantially the same, a strong impression is created – which turned out to be accurate – that Justice Chin would be non-supportive of the plaintiff's claim.

While "marriage" was a key term in these oral arguments, some times the focus was on the institution, and at other times the focus was on the word. To signal which one was being discussed, justices and attorney tended to mark when they were referencing the word marriage. The words speakers used to mark that they were focused on the word included such terms as "word," "name," "nomenclature," "title" "label" "term/terminology" and "designation." To refer to

the word “marriage” in (6) Justice Kennard uses the term “title.” Of note, in over half its uses by judges or attorneys (4 out of 7) – as exemplified above – “title” co-occurred with the positive term, “status.” Table 1 displays a frequency count of the terms the judges used to refer to the word for marriage, organized by each word’s typical evaluative loadings that are explained below.

Table 1
Terms for Terms used by the Judges

Terms	#1: *In re Marriage*	#2: *Strauss v. Horton*
Positive		
Name	5	1
Word	3	0
Title	5	0
Negative		
Label	0	6
Nomenclature	0	9
Neutral		
Term/terminology	3	4
Designation	2	3

Table 1 -Terms for Terms used by the Judges

These non-focal words for terms, I suggest, implicitly cue different stances toward the consequentiality of names. To label terms as “titles,” “names,” or “words” more often grants the significance of a term. It was “names” and “words” that the plaintiff attorney used as referents in her presentation’s opening moments. Later she explicitly argued that the state legislature’s willingness to extend tangible marriage benefits to same-sex couples, but to retain “a separate *name* shows how much the status and the *word* marriage do matter.” In the *In re Marriage* case, it was the plaintiffs’ attorneys who used the terms “word,” “name” and “title,” not the defending state attorneys (14 to 2 uses).

The words used to refer to words also can carry weight in a negative direction. Those judges who referenced the term for marriage with “nomenclature” or “label” conveyed a sense that naming was a small matter. It was “just,” “only,” or “merely” a name difference. In the Preposition 8 case, Justice Chin, the same justice in (6) who strongly implied that there was little substantive difference between marriage and domestic partnership, asked: “Counselor, in what way does Proposition 8 take anything away other than the *nomenclature of marriage*?” Justice Kennard, the justice who had referred to “marriage” with the term “title” in the first case (see (6)),was one of the majority in the *In re Marriage Cases*, voting that denial of the name was a significant inequality. But in *Strauss v. Horton* where she voted to rescind the name marriage from gay couples’ unions,

she used the terms “label” and “nomenclature.” In essence, when she voted against the significance of calling same-sex unions marriage she employed different words to reference the word marriage than when she voted to uphold the significance of the name.

(7) *Line 353, Justice Kennard*
Given these precedential- precedential values that have been established by this court in previous decisions, how do you distinguish those previous decisions from this particular initiative where the people of California in essence took away the *label of marriage*, but as has been pointed out by the chief justice and other members of the bench, it left intact most of what this court declared to be proper under the California constitution?

If the terms to designate words are stancetaking cues, then we could expect to find a different pattern of use between the two cases. A greater number of more positive words should have been used in the first case that supported the importance of words whereas in the second case, where the wording difference was judged inconsequential, we would expect to see a greater number of negative, minimizing words. This pattern, in fact, was observed. A Pearson Chi-square test comparing the uses of positive and negative terms in the two cases was significant ($X2 = 27.19$, $df = 1$, $p < .001$, Cramer’s $V = .94$). In sum, through the words that judges used to refer to words, they cued their stance regarding the consequentiality of language.

An interesting question to consider is whether there is a similar pattern in the written judicial opinions. The answer is “no.” When word counts were done on the same seven words for majority, concurring, and dissenting opinions in the two cases (*In re Marriage* =172; *Strauss* = 185 pages), the pattern was different**[iii]**. One difference was that terms for words were simply used more frequently in *In re Marriage* (.65 terms per page) than in the second case (*Strauss* = .36 terms per page). This difference suggests that there may be a link between more explicit written discussion of language terms and an assessment that terms are consequential.

A second difference was in the usage of evaluative terms compared to more neutral ones. Neutral terms were used much more often in judicial opinions than in oral argument. Two terms that were used to stake out an even-handed stance toward the significance of naming issues in the oral and written genres were

"designation" and "terminology." Although either of these terms could convey a negative evaluation – as happened when the Chief Justice prefaced "designation" with the minimizer "mere" – most of the time the terms conveyed a neutral stance. Evidence for the relative neutrality of these terms is seen in their chronological placement in oral argument.

Opening moments are often taken as indicators that a party will be treated fairly. As such, we might expect a chief justice to monitor his or her language choices especially closely at the start of a case. Consider, then, how Chief Justice George, the first question-asker in each case, formulated his question about the significance of the word marriage. In *In re Marriage* he began "Is it your position that the use of the *terminology* marriage itself is part and parcel of the uh right to marry?" In the *Strauss* case, he started the questioning of the Plaintiffs referring to the many pieces of the Court's decision in the first case, including its position on "terminology." Of note, his selection of the word "terminology" was a repair from the more negative form "nomenclature," thereby cuing both the greater neutrality of "terminology" and the negative loading of "nomenclature."

(8) *Line 41, Chief Justice George*
Now, there're many things that were held in that particular ruling, uh including the um application of the suspect classification to sexual orientation, submitting that to strict scrutiny and so forth, and of course *the nomenclature, the terminology of marriage*.

When we focus on the judicial opinions and contrast the frequency of neutral and evaluative terms, we find that evaluative terms were a far bigger percentage in In re Marriage (45%) than in the Strauss case (22%). A Chi-square test indicated that this difference was significant ($X2 = 8.86$, $df = 1$, $p < .01$, Cramer's $V = .22$). See Table 2. Not only were evaluative words used more often in the In re Marriage case in which the Court decision extended the name as well as the rights of marriage to gay couples, but the tilt of the evaluative words was largely positive (71% of the 49 words). Thus, when justices saw the significance of the name "marriage" for the legal issue before them, they used a greater number of evaluative terms to refer to the naming issue. When they judged the wording issue to not warrant a favorable decision for gay couples, they used more neutral language to refer to terms.

Table 2
Stance-cuing Words for Words in Judicial Opinions

Stance Terms	*In re Marriage*	*Strauss v. Horton*
Evaluative (positive or negative)	49	15
Neutral	61	52

Table 2 – Stance-cuing Words for Words in Judicial Opinions

When speaking, communicators have little time to reflect about the very best word choices. Writing, in contrast, provides time for authors to sort through subtle wording implications. In crafting high visibility documents – what these written opinions were – we see the document language shifting from the more positive- and negative-leaning evaluative language that characterizes talk to a more neutral register. When we compare oral argument to the judicial opinions summing across both cases, the difference is marked. In the written opinions the single term "designation," in fact, occurred 98 times (55%) out of the total 177 occurrences of the seven terms. A Pearson Chi-Square test finds evidence of an association between stance and genre ($X2 = 16.27$, $df = 1$, $p < .001$, Cramer's $V = .28$). Judges used many more evaluative words to reference the wording issue when they were speaking than when they were writing

Table 3
Stance Differences between Oral Argument and Judicial Opinions

Stance Terms	Oral Argument	Judicial Opinions
Evaluative	29	64
Neutral	12	113

Table 3 – Stance Differences between Oral Argument and Judicial Opinions

An implication I would draw out of this pattern is that written judicial opinions, more than the critical discussion that shaped them, enact the dispassionate neutral style that so often is described as "legal argument." In contrast, the practice of oral argument reveals a different profile. As is common in everyday talk (Bergmann, 1998) oral argument is loaded with moral, evaluative language that makes an argument for or against a position simply through the terms that a speaker selects to describe what is favored or opposed.

5. *Conclusions*

Philips (1998) noted that "the spoken law really has an interpretive life and

culture of its own and is not just a reflection of the written law" (p. xii). What we see when we look at this one practice of law is that it has much in common with the ordinary ways communicators seek to persuade each other in situations of dispute. In oral argument, participants define terms in ways that are consistent with the conclusions they favor, they use analogies to advantage their side, and they convey the (un)reasonableness of what they are asserting or challenging through subtle wording choices. In Amsterdam and Bruner's (2000) words, legal arguers use the "small coins" of language, the immense variety of penny and five-cent tokens such as "name," "nomenclature" or "designation" to build the argumentative stance they favor.

From looking closely at oral argument about same-sex marriage in eight state supreme courts, I would assess judges and attorneys to be doing an argumentatively good job in critically examining difficult issues that divide US society. The praiseworthy arguing style that the parties enact, though, is not because they avoid the persuasive moves of ordinary speaking. Rather, appellate arguing is (usually) well done because participants take seriously the joint interpretive task before them. In mixing ordinary discourse strategies with law-specific practices, justices collectively display, to quote Davis (1997), that they are engaged in the demanding "work of worrying over the proper reading of an open text" (p. 40).

NOTES

[i] Taken from Justice Kennard's question in *In re Marriage* to a plaintiff attorney checking her understanding of their position.

[ii] Italics are used in excerpts to draw attention to words and phrases that are the focus of commentary.

[iii] Using the search option in Acrobat, instances of the seven words were searched for in each set of texts. Instances of words were examined to see if the word was connected to a reference to "marriage" or "domestic partnership." that is when terms were being used in other ways – e.g. ""in other *words*," "In long-*term* relationships" – they were not counted.

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