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ABSTRACT

This thesis examines language use in the opening statements of *Perry v. Schwarzenegger*, the California Proposition 8 trial, to determine the connection between language use and trial outcomes. In order to analyze the effectiveness of language use in the courtroom, this thesis draws from the work of Dr. Frank Luntz, a political consultant and expert on effective language use, as well as from several branches of linguistics, including discourse analysis, which studies written, spoken and conversational language within the context of discourse; rhetoric, which is the art of using effective, persuasive language; and sociolinguistics, which studies the way language functions within our society.

The opening statements are analyzed because they represent the argument of each side of the case and because they are specifically designed to have the greatest possible impact, making them ideal to examine for effective language use. The language of the judge, in his discourse with the two attorneys during their opening statements, is also examined to determine if the language used by the judge can indicate a preference for one argument over the other. An analysis of both opening statements and the discourse between the judge and the lawyers can help to determine the connection between courtroom language and trial outcome. This analysis serves to clarify the ways in which language use can affect court rulings and impact laws. This connection is important to determine because the outcome of a trial not only influences the law but also actually creates law by becoming legal precedent.

Keywords: Linguistics, Plaintiff, Defendant, Precedent, Proposition 8

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Chapter One

Language and the *Perry v. Schwarzenegger* Trial

Language permeates, influences and impacts our society in a variety of ways on a daily basis. One spectrum of our society in which language is particularly important is within the legal system, specifically in the courtroom. The language used during a trial can directly affect, as well as help predict, the outcome of a trial. This thesis analyzes the way in which language functions in a courtroom setting and determines the connection between language use and the outcome of a court case. The trial examined is *Perry v. Schwarzenegger*, the California Proposition 8 trial. This trial was chosen as the subject of this study because of its powerful implications in the legal, political, and social arenas of our society.

The widespread implications of the *Perry v. Schwarzenegger* trial make it a perfect case to establish a link between linguistic theory and legal practice. This connection is important to determine since the outcome of a trial not only influences the law but also actually creates it. Once a ruling is made, it becomes precedent¹ for future judges to follow in deciding similar cases. So while court rulings are meant to enforce the law, they also can quite literally create it as well. Therefore, if language can impact the decision of a court case, it can also impact the law as a whole.

¹ Precedent is a legal term that means a principle announced by a higher court must be followed in later cases. (USLegal) When a judge makes a ruling, he must explain the principle behind that ruling when giving his decision to the court, that principle then becomes the basis for further judges to follow in similar cases. If a ruling is overturned, it then becomes the new precedent.

Perry v. Schwarzenegger was a landmark trial, whose verdict created far-reaching social, political and legal impacts which are still reverberating throughout our nation today. The trial was centered around California's Proposition 8. Proposition 8, according to the State of California Official Voter Information Guide, was entitled "Eliminates Right of Same-Sex Couples To Marry. Initiative Constitutional Amendment" (2008). Proposition 8 passed in California on November 5, 2008, with 52.5% of the popular vote. After its passing, the state of California, which had previously allowed same-sex marriages, no longer recognized these marriages as being legally valid.

The original complaint in the *Perry v. Schwarzenegger* trial was filed in May of 2009. Two same-sex couples, Kristin Perry and Sandra Steir, and Paul Katami and Jeffrey Zarrillo, who were denied marriage licenses because of Proposition 8, filed a lawsuit claiming that Proposition 8 was an unconstitutional violation of their civil rights. The *Perry v. Schwarzenegger* trial became a nationwide controversy, dividing political parties and causing heated debates. The trial ended on August 4, 2010, when Chief Judge Walker ruled that Proposition 8 was unconstitutional. The decision was seen by some as a landmark victory for equal rights. To others, it was seen as an outrage, which defiled and defamed the institution of marriage. Regardless of opinion, the social significance of the trial was widespread and the effects of the ruling were felt across the nation.

Prior to the passing of Proposition 8, the State of California had legally acknowledged the marriage of same-sex couples. The California Supreme Court, in the decision entitled *In re Marriage Cases*, ruled on this in May of 2008: *In re Marriage Cases* ruled that marriage was a fundamental right under the California Constitution, Article 1 Section 7, and stated that "statutes that treat persons differently because of their

sexual orientation should be subjected to strict scrutiny" and also "California legislative and initiative measures limiting marriage to opposite-sex couples violate the state constitutional rights of same-sex couples and may not be used to preclude same-sex couples from marrying" (Cal. Const. art. I, § 7).

This decision overturned two earlier statutes which banned same-sex marriages, one passed in 2000, entitled Proposition 22, and the other enacted by the Legislature in 1977. Although a re-hearing was requested, the California Supreme Court denied that request as well as a petition for a stay, which would delay the effect of the decision from taking place. The California Supreme Court issued a mandate that required all county clerks, as well as the State Registrar, to comply with the ruling effective June 19, 2008 (Egelko 2008). Only five months after *In re Marriage Cases* was enacted, in November of 2008, California's electorate adopted Proposition 8, a constitutional amendment that restored the limitation on marriage to couples of opposite sexes only (Garrison, 2008).

When it was proposed, Proposition 8 was situated within a long bill of proposed law changes, most of which had nothing to do with the marriage laws. The entire text of the proposed changes is 62 pages in length, although the text of Proposition 8 is only one small paragraph long. It reads:

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution. This initiative measure expressly amends the California Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in italic type to indicate that they are new.

SECTION 1. Title This measure shall be known and may be cited as the

“California Marriage Protection Act.”

SECTION 2. Section 7.5 is added to Article I of the California Constitution, to read: SEC. 7.5. Only marriage between a man and a woman is valid or recognized in California (Official Voter Information Guide, 2008).

Immediately following the passing of Proposition 8, several lawsuits were filed that challenged its validity under both state and constitutional provisions. From one of these suits, *Strauss v. Horton*, the decision was made by the California Supreme Court that Proposition 8 was a valid, lawful enactment, but that any same-sex marriages contracted before its passing would remain legally valid (Egelko, 2008).

After Kristin Perry, Sandra Steir, Pail Katami and Jeffery Zarillo filed the suit which would become known as *Perry v. Schwarzenegger*, several other groups concerned with LGBT rights, as well as equal rights, sought to join the suit as plaintiffs. Prosecutors from the *Strauss v. Horton* trial, as well as from *In re Marriage Cases*, and the City of San Francisco filed motions to intervene in the case. Of these groups, only the City of San Francisco was permitted to intervene, in order to testify on the impact Proposition 8 had on local governments (Mintz, 2009b).

In their official complaint, the plaintiffs named the two county clerks who denied their applications for marriage license as the defendants in the claim, as well as Attorney General Jerry Brown, two officials from the Department of Public Health, and California Governor Arnold Schwarzenegger (*Perry v. Schwarzenegger*, 2010). However, of the six defendants named in the complaint, none of them sought to defend their position in court. Governor Arnold Schwarzenegger claimed that the issues arising from Proposition 8 were constitutional in nature and warranted a “judicial determination” (Leff, 2009), while

Attorney General Brown declined to defend it saying not only that Proposition 8 violates the 14th Amendment, but also that it “should be struck down” (Dolan & Williams, 2009). The official proponents of Proposition 8, an organization called Protect Marriage, led by California State Senate Minority Leader Dennis Hollinsworth, sought to take up the defense of Proposition 8 in the *Perry v. Schwarzenegger* trial. The court permitted them, as the official proponents, to step in as defendants in the stead of the state officials who refused to defend (Mintz, 2009a).

The attorney for the plaintiffs was former Bush administration solicitor general Ted Olson (York, 2009). Olson’s decision to represent the plaintiffs was seen as a shock because of his conservative political leanings. However, Olson insisted that the case was centrally about defending the constitutional rights of American citizens. Ironically, the attorney representing the defendants, Charles Cooper, who was Assistant Attorney General during the Reagan administration, shared the same conservative politics and alliances as Olson. In addition to conservative attorneys, a noted conservative judge, Chief Judge Vaughn R. Walker, heard the trial. Walker became chief district judge in 2004 and was known as an “independent-minded conservative” (Egelko, 2004).

The trial itself was widely publicized across the nation. *Perry v. Schwarzenegger* would have become the first federal trial to be broadcasted live at public courthouses in San Francisco, Pasadena, Seattle, Portland and Brooklyn, as well as online through the video-sharing website YouTube.com. However, two days before the trial was set to begin, the defendants filed emergency papers with the Supreme Court to temporarily stay the live broadcasting. Although many media organizations, such as CNN, Fox News and Court TV, responded by filing emergency papers in support of the broadcast, the court

ruled to block all live broadcasts of the proceedings.

Even without broadcasts of the trial, *Perry v. Schwarzenegger* was the subject of unprecedented media coverage. In addition to television, newspaper and radio coverage, social networking websites such as Twitter.com covered the proceedings, through feeds generated by LGBT-interest organizations such as the Human Rights Campaign and The American Foundation for Equal Rights, as well as several independent interest groups on both sides of the political spectrum. The issue sparked widespread controversy and debate across the country.

The issue of gay marriage has long been a source of heated argumentation in the political arena. On one side of the issue is the liberal or progressive belief that marriage is a right guaranteed to all Americans under the U.S. Constitution, and on the other side is the conservative belief that “marriage” is a term reserved for the union between a man and a woman. *Perry v. Schwarzenegger* intended to examine how having same-sex parents affects children and whether the allowance of same-sex marriages would undermine opposite-sex marriages. The trial also addressed the history of discrimination against gays and the effects of this discrimination towards them.

The plaintiffs argued that the right to marry was guaranteed to them under the Constitution, and that Proposition 8 was denying them their civil liberties. Their argument was centered on the difference between a marriage and a domestic partnership and how being denied the right to marry harms gay citizens psychologically and perpetuates discrimination against gay citizens in the United States. They provided testimony from expert witnesses in the fields of history, psychology, economics, and political science to show the importance of state sanctioned marriage in American

society, the benefits that marriage confers on couples, their families and the community, and the need for the institution of marriage to evolve and be enhanced through allowing same-sex couples to marry.

The defendants' argument focused on the idea that same-sex marriage undermined or defiled the institution of marriage. They argued that marriage's central purpose was procreation, and that too much was yet unknown about the effects of same-sex marriages to prove that they would not harm the institution of marriage. Their evidence, also expert witness testimony, aimed to show that the institution of marriage has historically been grounded in the procreative relationships between men and women and is primarily intended for the purpose of raising children, and that by allowing same-sex marriages the institution of marriage would change.

The trial lasted six months. Opening statements were made on January 11, 2010, and closing arguments were heard on June 16, 2010. On August 4, 2010, Chief Judge Walker ruled that Proposition 8 violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. According to the ruling, the right at issue was "the right to marry" which, he said, "has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household" (Perry v. Schwarzenegger, 2010, Ruling p. 115). Walker ruled that the State of California has no rational basis or vested interest in denying gays and lesbians marriage licenses. It was additionally noted that domestic partnership laws do not satisfy the obligation to provide gays and lesbians the right to marry because domestic partnerships do not provide the same social meaning as marriage and domestic partnerships were created "specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from

same-sex couples" (Perry v. Schwarzenegger, 2010, Ruling p. 118).

In his opinion, or the written justification of his decision, Judge Walker included 80 findings of fact and the supporting evidence. These findings of fact included that marriage is a civil issue, not a religious one; that domestic partnerships lack the social significance of marriage; that individuals cannot and do not choose their sexual orientation; that there is cost and harm to the State as well as to gay citizens that is associated with the denial of marriage to same-sex couples; and that a parent's gender is not a factor in a child's adjustment. Judge Walker ruled that an "individual's sexual orientation does not determine whether that individual can be a good parent," and that "children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted" (Perry v. Schwarzenegger, 2010, Ruling p. 97).

The result of the ruling was that Judge Walker found Proposition 8 to be unconstitutional. Immediately, the decision sent a shockwave through the nation, inciting both supporters of gay marriage and those opposed to it into further debate. Socially, the message that the decision sent was not only one of equality and anti-discrimination, but also of the changing definition of marriage in the United States. For gay rights activists and supporters, the trial was seen as an incredible victory for equal rights. For moral disapprovers and religious conservatives, it was the first step towards the "de-institutionalization" of marriage and a social plight that would increase divorce rates and out-of-wedlock childbirth.

Legally, the results of the ruling were monumental as well. The decision was the first ever to strike down a marriage ban on federal constitutional grounds, as previous

cases have cited state constitutions (Williams, 2010). Of course, opponents have stated they will appeal the ruling all the way to the U.S. Supreme Court. However, many legal experts expect the Supreme Court to agree with Judge Walker's decision. If that happens, the case will provide federal precedent, and gay marriage will be officially legal in every state.

Because of the sensitive social issues the *Perry v. Schwarzenegger* trial dealt with, it provides a unique opportunity to examine how language is used within the courtroom, and to what extent it impacts law. Because of its social significance and powerful implications, *Perry v. Schwarzenegger* is a perfect example of the impact one trial can have on our laws and our society. It also provides the perfect example to show how language can be used to achieve desired outcomes. In the following chapters, the language used in this landmark trial will be examined and analyzed to better understand the way language functions within the social and legal constructs of the case, as well as the way language and outcomes are connected.

This analysis will examine the opening statements of *Perry v. Schwarzenegger* because they represent the argument of each side of the case. During opening statements, the plaintiff and defendant respectively have the opportunity to present their arguments and discuss their evidence. These statements are usually very carefully prepared and executed so as to have the greatest impact, making them ideal to examine for effective language use. The language of the judge in his discourse with the two attorneys during their opening statements will also be examined. The purpose of this analysis will be to determine if the language used by the judge, or by the attorneys in answering his questions, can indicate a bias in any way. After analyzing both opening statements and

the discourse between the judge and the lawyers, I will connect the use of language to the outcome of the trial.

The purpose of an opening statement is to allow the counsel on both sides of the case to outline their arguments to the court, as well as to inform the judge of the evidence they will present during the trial and what that evidence is intended prove. In order for an opening statement to be effective, it should be concise, poignant and persuasive. At various points during an opening statement, the judge will typically interrupt with questions to clarify points at issue and terms that are relevant to the case. It is important that an attorney answer these questions quickly, directly and satisfactorily in order to demonstrate preparedness and confidence in the argument.

In order to analyze how effective the use of language in the opening statements of this trial was, I utilized the work of renowned political consultant Dr. Frank Luntz, whose career was built on the study and practice of effective language. In his bestselling book, *Words That Work: It's Not What You Say, It's What People Hear* (2007), Dr. Luntz presents 'ten rules for effective language,' which formed the basis of my evaluation of the language used in the opening statements. Dr Luntz's ten rules for effective language are:

- 1) Simplicity, use small words
- 2) Brevity, use short sentences
- 3) Consistency
- 4) Novelty, offer something new

5) Sounds and Texture

6) Speak Aspirationally

7) Visualize

8) Ask a Question

9) Provide Context

10) Explain Relevance

These rules form the basis of effective and persuasive language. In addition to these rules, I have also drawn from theories of persuasive language, including rhetorical structure and discourse analysis, in my assessment of the opening statements, as well as the judge's discourse with the attorneys during their statements.

The language used in this case is crucial because of its political and social sensitivity. When dealing with a civil rights issue, careful language use is critical. Both sides of this case express emphatic and passionate conflicting viewpoints. Because this case deals with a social issue that conveys many personal opinions and conflicting values, effective language is imperative in presenting each side of the case to the court persuasively.

The legal system is an important institution in our society. As such, it is important to understand the way that language is used within the legal system, specifically in the context of the courtroom. It is equally important to understand how language can be manipulated within this context in order to achieve a desired effect. This analysis will serve to clarify the ways in which language use can affect court rulings and impact law.

Chapter Two

The Plaintiffs' Opening Statement

Thanks to courtroom dramas in cinema and television, there is a perception of lawyers as being extremely effective and persuasive speakers. In many cases this is not reality, but in Ted Olson's opening statement for *Perry v. Schwarzenegger*, his language could not have been more persuasive if it had been scripted in Hollywood. His statement was rich with emotion, keeping his focus on the issue of equal constitutional rights for all American citizens. Olson's mastery of effective persuasive language influenced the perception of his argument, which impacted the decision of the trial.

As a well-known Republican who served in both the Reagan and Bush administrations, Ted Olson shocked fellow conservatives with his decision to challenge the traditional definition of marriage and defend the typically liberal issue of gay rights. Olson, however, asserted that his decision to represent the plaintiffs in this case did not conflict with his conservative views, saying: "The fact that individuals who happen to be gay want to share in this vital social institution is evidence that conservative ideals enjoy widespread acceptance" (Olson, 2010, para. 3). To Olson, and to the plaintiffs, the trial was an issue of civil rights. Olson stated that the enactment of Proposition 8 "denies federal constitutional rights under the equal protection and due process clauses of the Constitution" and that "denying individuals in this category the right to lasting, loving relationships through marriage is a denial to them, on an impermissible basis, of the rights that the rest of us enjoy" (York, 2009, para. 5).

Olson and his legal team intended to prove that Proposition 8 was unconstitutional. Their argument centered around three main points, which Olson outlined in his opening statement. First, that marriage is a vital aspect of life in American society; second, that Proposition 8 causes harm to gay and lesbian individuals, as well as to their families and communities; and third, that Proposition 8 propagates discrimination for no valid reason.

The overall themes of Olson's opening statement were discrimination, equality, and civil rights. The concept of discrimination framed his argument and gave it emotional poignancy. He used the history of prejudice against homosexuals in this country as a framework for his argument, appealing to emotions and to the sense of justice and equality that accompany a civil rights issue. Because Olson was essentially attacking an established social norm, he had to first point out the inherent wrongness of society on the issue. He did this by saying that Proposition 8 adds to the "long history of discrimination these individuals have suffered at the hands of their fellow citizens and at the hands of their government" and then elaborated by saying that homosexuals in this country "have been classified in this nation as degenerates, targeted by police, harassed in the workplace, censored, demonized, fired from government jobs." This language victimizes the plaintiffs, not because they have individually suffered any of these injustices, but because by virtue of being homosexual, they might have.

This set the stage for Olson to compare Proposition 8 to the other social injustices that homosexuals have historically endured in the United States. He referred to Proposition 8 as "government-sponsored societal stigmatization," a powerful term emphasized with alliteration, that carries undertones of government control and implies that to enact such a law is to actively support the moral judgment of others. In describing

the effects of Proposition 8, Olson said: “the roots of discrimination run deep, and their impacts spread widely. And Proposition 8 perpetuates that discrimination, and it does so for no good reason. It singles out -- Proposition 8 singles out gay and lesbian individuals alone, for exclusion from the institution of marriage.” (Perry v. Schwarzenegger, 2010). Olson’s language is extremely effective here because it places the plaintiffs in a state to be pitied.

In addition to appealing to the emotion of pity, Olson’s statement utilized persuasive language by appealing to patriotism and traditional values. He described the plaintiffs, his clients, as “two loving couples, American citizens entitled to due equality and due process under our Constitution.” In Olson’s language, the plaintiffs are not “same-sex couples” they are “loving couples.” This is a social value that people can understand and respond to – the idea of being in a loving, committed relationship. By using the words our Constitution, Olson also effectively reminded the court that it is their Constitution too, and by referring to his clients as citizens and invoking the Constitution, his words evoke emotions of patriotism and loyalty to our American democratic system. In fact, Olson’s statement often referred to gay and lesbian residents of California as gay and lesbian citizens, emphasizing unity and connotating all of the rights and freedoms that Americans cherish.

It was important for Olson to place the concept of marriage restrictions based on sexual orientation in the context of other historical marriage restrictions which were based on race and gender. However, to outright claim that the restrictions are the same may have been detrimental to his argument. Instead, Olson used President Obama to provide an example and allowed his point to be inferred: “The President of the United

States, today's president of the United States, if his mother and father had tried to get married in Virginia before the time he was born, it would have been against the law. That weakens our moral fiber in this country. It weakens our respect for the Constitution.”

Olson’s references to the Constitution and to the country reinforced the patriotic undertones of his message, and they permeated his entire opening statement.

Olson then had to outline how he intended to prove that the denial of marriage rights to same sex couples caused them grievous harm. When asked by the judge what evidence he would present to the court to support this claim, Olson had a number of witnesses who would provide testimony, the first four of whom would be the plaintiffs themselves:

As I said, the plaintiffs will describe the harm that they suffer every day because they are prevented from marrying. They will describe and experts will describe -- but there is no better voice to express it than the people themselves -- how demeaning and insulting it can be that they are still free to marry, as long as they marry someone of the opposite sex; not the person that they love; not the person who is their choice (*Perry v. Schwarzenegger*, 2010).

Olson’s words here evoke the intense emotion of forbidden love. When the judge pointed out that gay and lesbian couples could still form a domestic partnership without violating Proposition 8, Olson’s language became even more impassioned:

...relegating gay men and lesbians to domestic partnerships is to inflict upon them badges of inferiority that forever stigmatize their loving relationships as different, separate, unequal, and less worthy, something akin to a commercial venture.

That's what a domestic partnership looks like, sounds like, feels like. Not a loving union (Perry v. Schwarzenegger, 2010).

This language is beyond persuasive; it is downright emotional. It appeals not only to the court and the parties in the trial, but also to the much greater values of love and equality. Olson continues his rebuttal against the argument that a domestic partnership is a suitable substitution for state-sanctioned marriage by using an effective tool of argument and turning the words of his opposition against them:

Indeed, the proponents of Proposition 8 acknowledge that domestic partnerships aren't the same as traditional marriage. They proudly proclaim, in the papers they filed with this court -- and we don't disagree with this -- that under Proposition 8, in their words, the unique and highly-favorable imprimatur by the state, of marriage, is reserved to opposite-sex unions. That's something special. That's something important. That's something that's unique. And it's highly favorable. And it's reserved to people of the opposite sex, when they wish to marry (Perry v. Schwarzenegger, 2010).

Olson's use of short, simple sentences and parallel structure enhances the emotional impact of his words and displays his mastery of persuasive speaking. His language does not simply illustrate the pain and suffering of his clients, it asks one to empathize, to attempt to feel what they feel. Olson continues his use of victimizing language in his assertions that Proposition 8 propagates discrimination towards same-sex couples because "we are branding them as different, as inferior and as less worthy, and their relationships as less worthy of recognition, it increases the likelihood they will

experiences discrimination and harassment. It causes immeasurable harm.” (Perry v. Schwarzenegger, 2010).

The emotionally charged language Olson employed in his opening statement is extremely effective because it appeals to sympathy and elicits pity. Another effective method employed by Olson was to appeal to authority. Throughout his statement, Olson evoked the authority, not only of the U.S. Constitution, but of both the United States Supreme Court and the California Supreme Court to reinforce his theme of discrimination.

As I said just a moment ago, the California Supreme Court specifically addressed this and said that, relegating these individuals, preventing them from marrying a same-sex partner, relegates those individuals, to use the phrase of the California Supreme Court, to second class citizenship, and tells their families and them and their neighbors and their co-workers that their love and their desire for a sanctioned marital partnership is not worthy of recognition (Perry v. Schwarzenegger, 2010).

If the California Supreme Court ruled that denying same sex couples the right to marry makes them “second-class citizens,” then Olson’s assertion that Proposition 8 is discriminatory is effectively proven.

Olson’s entire argument that Proposition 8 was unconstitutional relied on the assertion that it was explicitly intended to revoke the rights of citizens. Olson stated outright that this was the intent of Proposition 8: “We are talking about a purpose to eliminate a right that some people had under the California Constitution,” but he made

the point more relevant by making it relatable. He accomplished this by saying: “the state is telling me, if I wish to marry the person that I love, another decent citizen of California, I can marry that person provided the sex of that person is right.” (Perry v. Schwarzenegger, 2010). His language here appeals to anyone who has ever been in love, and it forces people to think about what it would be like to be told that the government would not accept that love because something about that person wasn’t “right.”

Olson’s language retains a high level of emotion throughout his statement, but it is tempered with appeals to authority which rationalize and reinforce his emotional appeals: “The State of California, who has this proposition in its Constitution, has no justification, none, for the decision to eliminate the fundamental right to marry for a segment of its citizens. It offers no defense. And its chief legal officer, the Attorney General of California, admits that none exists; that this is unconstitutional” (Perry v. Schwarzenegger, 2010). Olson’s powerful repetition “no justification, none” is tempered with the fact that even the Attorney General of California admits that there is no justification.

Repetition, a powerful tool of effective language, is another key factor in Olson’s argument. He used the words “discrimination” and “discriminate” twenty five times in his opening statement. This repetition by Olson, knowingly or unknowingly, embeds the concept of discrimination, and all that it implies, into the essence of his argument. He also frequently uses repetition to reinforce a point once he has made it: “Proposition 8 perpetrates this irreparable, immeasurable, discriminatory harm for no good. No good reason.” (Perry v. Schwarzenegger, 2010).

Much of Olson’s opening statement, like all opening statements, was prepared

beforehand with careful attention to be as effective and persuasive as possible. For this reason, it is essential to examine the language of the discourse with the judge in order to get a more accurate sense of language use when it is reactionary and not scripted. In Chapter five, I will further discuss the language of the judge in his discourse with both Mr. Olson and Mr. Cooper, the attorney for the defendant. However, an assessment of Mr. Olson's argument would not be complete without examining his responses to the questions which the judge asked during his opening statement.

During the opening statement, the presiding judge will often interrupt an attorney with questions about points at issue, evidence, and statements of fact. The way in which the attorney responds to these questions indicates the extent to which he is knowledgeable about and confident in his argument. These questions must be answered directly and concisely, both to satisfy the judge and to continue with the statement. Chief Justice Judge Walker interrupted Olson's opening statement no less than thirty times to ask questions and clarify points at issue, and each time Olson responded with a direct and clear response:

THE COURT: What's the evidence here going to show that Proposition 8 was motivated by an intent to discriminate against gays and lesbians? The evidence, what's the evidence?

MR. OLSON: The evidence, in the first place, the advertising, the ballot proposition, the -- Proposition 8 itself, official title of the ballot measure, in a sense, said it all. "Eliminates right of same-sex couples to marry." Now, discrimination, it can take various forms --

THE COURT: Wasn't that a formulation devised by the attorney general?

MR. OLSON: That's not only the official title of the statute, it's the way it was characterized. It was the way it was characterized in the official ballot measure information that's sent to every voter in the state: "Eliminate the right of same-sex couples to marry." There is no question, Your Honor, that what Proposition 8 did and was intended to do was to take away a right of same-sex couples to be in the marital relationship and to confine them to domestic partnerships or some other relationship. It put them in a different category. Now, that's discrimination (*Perry v. Schwarzenegger*, 2010).

Not only did Olson answer the questions immediately and directly, but he also answered them persuasively. In both responses Olson repeated the name of the Proposition 8 ballot, "Eliminates right of same-sex couples to marry," which reinforced his claim that its intent was to take away a right from certain citizens. He answered the questions satisfactorily while building upon the framework of his argument and his theme of discrimination.

One of the main arguments of Proposition 8 was the idea that allowing same-sex couples the right to marry would in some way change the institution of marriage at a fundamental level. The judge asked Olson about this directly in order to get a better sense of his argument in relation to the presumed argument of the defense, and again Olson responded with confident and effective language:

THE COURT: If same-sex couples are permitted to enter this institution, this esteemed institution of marriage, doesn't that change the institution?

MR. OLSON: No, Your Honor. I am going to come to that. It will not damage the relationship of opposite-sex couples to have the opportunity to marry. It won't

change the institution. It will fulfill the institution. The history, a point I was just about to make, of marriage has evolved. It has changed to shed irrational, unwarranted and discriminatory restrictions and limitations that reflected the biases, and prejudices, and stereotypes of past. Marriage laws that disadvantaged women or people of a disfavored race or ethnicity have been eliminated. Some of those changes have come from court decisions, and some of those changes have come from legislative changes. But those changes have not harmed the institution of marriage. They have not harmed the institution of marriage. (Perry v. Schwarzenegger, 2010).

Olson's response was direct, concise and relevant, and it also included elements of effective persuasive language. He used descriptive language and parallel structure in the phrase to shed irrational, unwarranted and discriminatory restrictions and limitations that reflected the biases, and prejudices, and stereotypes of past. He also spoke aspirationally about the evolution and fulfillment of the institution of marriage.

But perhaps the most effective use of language of Olson's entire opening statement came from his response to the judge's last question, and not from his own prepared statement:

THE COURT: Mr. Cooper [the attorney for the defendants] frequently makes the point that this is really a subject from which the courts should abstain, should not involve themselves; that this is an issue that's being played out through the political process. We've seen it play out in the last few months in the political process. Why shouldn't the courts stand back and let this develop politically?

MR. OLSON: Because that is why we have courts. And that is why we have a Constitution. That is why we have the Fourteenth Amendment. When individuals who may not be the most popular people, who are different than we are, are treated differently under the Constitution, when they are excluded from our schools or when they are put in separate schools, or when they are not allowed to marry because of the color of the skin of the partner of their choice is different, they come to the courts. And time after time the courts have addressed these issues, and time after time the courts have addressed those issues notwithstanding that very, very point. Leave it to the political process. We wouldn't need a Constitution if we left everything to the political process, but if we left everything to the political process, the majority would always prevail, which is a great thing about democracy, but it's not so good if you are a minority or if you're a disfavored minority or you're new or you're different. And that's what happens here. What Prop 8 does is label gay and lesbian persons as different, inferior, unequal and disfavored. It says to them, your relationship is not the same. And it's less approved than those enjoyed by opposite-sex couples. It stigmatizes gays and lesbians. It classifies them as outcasts. It causes needless and unrelenting pain and isolation and humiliation. We have courts to declare enactments like Proposition 8 that take our citizens, our worthy, loving, upstanding citizens who are being treated differently and being hurt every single day, we have courts to declare those measures unconstitutional. And that is why we are here today (Perry v. Schwarzenegger, 2010, p. 46).

In his response to this question, Olson consistently used almost all of the elements of persuasive and effective language from Dr. Luntz's framework. Olson used parallel structure and repetition of the phrase "that is why," he appealed to the authority of the Constitution, he spoke inspiringly about the role of the courts to protect minorities, and he appealed to emotions in describing the pain and suffering of those affected by Proposition 8. However, it is not only these factors that made Olson's response so effective. His language is beyond effective; it is moving and aspirational. His words evoke the best and most idealistic emotions tied to democracy.

Overall, Olson's opening statement was well organized, well prepared and well delivered. He spoke confidently and persuasively, and he utilized language to make his statement as effective as possible. His statement adhered to most of Dr. Luntz's ten rules for effective language: simplicity and brevity in his wording, credibility in his appeals to higher courts and the Constitution, and consistency in his use of repetition and parallel structure. Olson's novelty was a new perspective on the institution of marriage, and he spoke aspirationally about changing that institution to reflect the American values of equality and freedom. His language use made the plaintiffs' opening statement inspiring, effective, persuasive, and convincing.

Chapter Three

The Defendants' Opening Statement

After the eloquent, powerful and persuasive opening statement made by Ted Olson, lead defense attorney Charles Cooper had his work cut out for him. Instead of rising to the challenge, however, Cooper's statement started strong but fell apart quickly. Though he tried to keep a focus on the traditional definition of marriage and the importance of marriage as a social institution, his statement was disorganized and plagued by a lack of confidence. The poor use of language by Cooper rendered his opening statement extremely ineffective, negatively impacting the perception of his argument and influencing the outcome of the trial.

Charles Cooper was a former Assistant Attorney General during the Reagan administration and is also a well-known conservative, who is “part of the same conservative Washington, D.C. legal establishment as Olson” (Mercury News, 2010, para. 1). Cooper, who was named one of the ten best civil litigators in Washington by *The National Law Journal*, seems like a natural choice to lead the defense team for the Proposition 8 sponsors because he has represented many conservative causes in his career, including a challenge to an affirmative action program at the University of Michigan Law School.

Cooper and his legal team sought to uphold the validity of Proposition 8. Their argument centered on five main points which were discussed in the opening statement: 1) that the limitation of marriage as a union between a man and woman has been a universal

concept that crosses the barriers of time and culture; 2) that the central and defining purpose of the institution of marriage is to promote procreation within stable unions; 3) that too little is known about the effects of same-sex marriage to risk harming the institution of marriage; 4) that changing marriage's definition would lead to social harm; and 5) that voters, not courts, should decide whether to extend marriage rights to same-sex couples.

Cooper's language in his opening statement was ineffective for many reasons. He used long and complicated sentences and often failed to provide context or relevance for the claims he made. Though his statement began with a patriotic tone, it quickly became condescending. His statement followed no kind of structure, making his themes and main points hard to follow. Worst of all, Cooper exhibited a lack of confidence in his argument and became extremely flustered when questioned by the judge, which caused him to stutter, stammer and stray from the main points of his argument.

One of the main methods of persuasive speech that Cooper employed in his opening statement was appealing to the majority. Because Proposition 8 had already passed by popular vote, Cooper could claim that the majority of Californians were against gay marriage. To do this, he began his statement by reminding the court that 14 million Californians voted on Proposition 8, and that of those 14 million, "over 52 percent of those Californians voted to restore and preserve the traditional definition of marriage as the union of a man and a woman" (Perry v. Schwarzenegger, 2010). This instantly evoked a patriotic sense of the democratic process, as well as implied that the institution of marriage needed to be "restored and preserved" in the first place. Cooper then aligned his argument with not only the majority of Californians, but also the majority of society

altogether, by claiming this definition of marriage is true of the majority of all societies and all religions in all of history.

Next Cooper evoked a sense of camaraderie with other states (which he refers to as “sister states”) that have enacted similar laws and “enshrined the traditional definition of marriage” in their Constitutions. The term “enshrined” evokes religious imagery. Again he appealed to the majority by pointing out that only five states, a clear minority, have voted to allow same-sex marriages, and insisting that three of those states had that decision forced upon them. This appeal evokes feelings of oppression, as if the government is forcing laws on the people that they do not want:

Indeed, that’s how same sex marriage came to California, in a highly controversial four-to-three decision in which the California Supreme court purported to apply the people’s will, a decision that had reversed the Court of Appeals in California which had ruled to uphold the traditional definition of marriage. Five months later, after the California Supreme Court’s decision, on election day, the people took the issue up into their own hands and they corrected the California Supreme Court’s misunderstanding. While the people of California have been steadfast in their support for the traditional definition of marriage, they have also been generous, your Honor, in extending rights, benefits and protections to the state’s gay and lesbian population (Perry v. Schwarzenegger, 2010).

By saying the people “took up the issue” and “corrected the misunderstanding” Cooper again appeals to the majority and evokes the sense of the will of the people. Calling the decision to allow same sex marriage a “misunderstanding” is a particularly

harsh description. It does not even merit the term of a mistake, but instead the ruling to allow same-sex marriages is deemed only possible by some sort of lack of understanding by the courts. His tone is exceedingly condescending, and he implies that the gay and lesbian community should simply be grateful for the rights, benefits and protections that they have received from the State, and not seek out any more. In reading this, I felt that the condescension so evident in his tone served rather to reinforce the plaintiff's argument rather than refute it.

Cooper's language throughout his statement implied that the rights that the gay and lesbian community in California was already entitled to justified keeping the right to marriage from them. He recounted civil rights protections that have been enacted in California and offered domestic partnerships as an alternative option to marriages for same sex couples, saying "domestic partnerships broadly grant to same-sex couples virtually all of the substantive legal rights and benefits enjoyed by opposite-sex married couples" (Perry v. Schwarzenegger, 2010).

His use of the word "virtually" is what is referred to as "adspeak" (Luntz). The literal meaning of "virtually" is "not really" and so all Cooper actually said is that same-sex couples have "not really all of the substantive legal rights and benefits enjoyed by opposite-sex couples." This statement reinforced his earlier implications that because gays and lesbians have had some success in their political pursuit of equal rights, they should be satisfied with what they have achieved already and not push for equal treatment in regards to marriage because the State of California has already been so kind as to give them *some* equal rights.

This condescending tone was woven throughout the first half of Cooper's

statement, even when Cooper was attempting to defend the beliefs of the defendants by aligning them with those of the voters:

Now, against this backdrop the support of Californians, not once, in passage of Proposition 8, but twice recently, in the prior passage of Proposition 22, bespeaks not ill-will or animosity toward gays and lesbians but, rather, a special regard for this venerable institution (Perry v. Schwarzenegger, 2010).

This wording elicits a tone of condescension because it says that the people of California don't have "ill-will" or "animosity" towards gays and lesbians, but rather that marriage is too "special" to share with them.

His overall argument began to unravel when Cooper began contradicting ideas in his statement. His concept of "the will of the people" being against gay rights was contradicted by his discussing the vast support that gay rights have, especially in California, where Cooper claimed the majority of the people were against them. In addition to contradiction, Cooper begins to stray from the issue at hand by claiming that some of his evidence will show that California's gay and lesbian community has substantial political power and that California is strongly supportive of gay and lesbian rights. Why would the evidence show this? The issue on trial is not whether or not the gay and lesbian community wields any political power, nor is it whether California supports them or not. This type of argument is referred to as a "straw man" argument – he sets up an argument that is not that of his opposition, then quickly destroys it and uses that as a basis to claim that he is correct. In logic, this is referred to as a logical fallacy. The plaintiffs never claimed to have no political influence, nor did they claim that the

State of California was unsupportive of them. This was not the issue at hand.

Cooper attempted to refute the plaintiffs' argument by quoting a supporter of same-sex marriage who said that many Americans who believe in equal rights for gay and lesbian citizens draw the line at marriage, and then pointed out that one such American who draws that line is President Obama, who said in a campaign speech that he believed marriage to be between a man and a woman, to which Cooper added:

To be sure, your Honor, traditional marriage, as President Obama noted, has ancient and powerful religious connotations, as Mr. Olson also mentioned. And it is true, that Proposition 8 was actively and vocally supported by many from the faith community, although a substantial number – (Perry v. Schwarzenegger, 2010).

By citing the President's personal opinions on gay marriage, Cooper took his appeals to the highest authority in the United States. However, his assessment of the quotation is vague. He does not define the "faith community" nor does he discuss whether or not this issue would fall under the separation of church and State clause in the Constitution. This was the first time the judge interrupted the statement:

Mr. Olson made the point if the President's parents had been in Virginia at the time of his birth, their marriage would have been unlawful. That indicates that there is quite a change in the understanding of people's entitlement to enter into the institution of marriage. And so his argument here is that we've had a similar evolution or change in the understanding with respect to people of the same sex entering into the marital institution, isn't that correct? (Perry v. Schwarzenegger,

2010).

This interruption shows that Cooper has no hold on the judge's attention. Instead of swaying the judge with his example of President Obama, Cooper has prompted the judge to interrupt him, both bringing his tangent to an end and redirecting him to the issue at hand. His remark about the President's parents shows that the judge is already showing a slight bias towards the plaintiffs, and he insists that Cooper return to the argument about the possible evolution or change in the understanding of marriage, instead of Cooper's straw man argument.

Cooper's response to the judge is easily the worst linguistic discretion committed by Cooper in the opening statement and could quite possibly have cost him the case:

Your Honor, racial restrictions were never a definitional feature of the institution of marriage. They were never. At the time that Loving was decided, there were but 15 states or so left that included those loathsome restrictions. The racial restrictions were clearly a product of white supremacy doctrine and were plainly violations of the Equal Protection clause, the core purpose of which was to eliminate racial restrictions of generally, but precisely, that kind of detail. The limitation of marriage to a man and a woman is something that has been universal. It has – it has been across history, across cultures, across society. The loathsome restrictions based on race are of an entirely different nature, your Honor (Perry v. Schwarzenegger, 2010).

As soon as Cooper uttered the words "racial restrictions" he caused people to immediately draw a comparison, even though that is exactly what he is trying to refute. It

is a concept called framing. George Lakoff, a linguist and professor of linguistics at the University of California Berkeley, describes a frame as any image or other kind of knowledge associated with a word, that is evoked when the word is spoken. The words “racial restrictions” carry with them connotations of racism, cruelty, inequality, injustice, and other images or emotions associated with them, which compose their frame. Even though Cooper is trying to negate this connection, by using the words he did, he actually creates the frame. As Lakoff explains it, “the word is defined relative to that frame. When we negate a frame, we evoke a frame” (Lakoff). The plaintiffs, wisely, never stated any such comparisons outright. When referring to the evolution of marriage, which Olson did in his statement, he carefully avoided using terms like “racial restrictions,” which would have framed his argument in a negative light. Cooper, on the other hand, by using the words “racial restrictions” cannot avoid the negative framing of his argument.

After Cooper’s unfortunate error in language use, the judge asked Cooper what evidence he would provide to prove that restrictions against same-sex marriage are different from racial marriage restrictions – a point that Cooper would not have had to discuss had he not framed his argument in that context. By adamantly denying that a comparison can be made between restrictions on same-sex marriage and racial restrictions, Cooper opened himself up for this question from the judge, which put him in the difficult position of having to present his argument against the backdrop of racism and racial restrictions on marriage, which invites negative comparisons and causes people to think of his argument in a negative light.

At this point in the statement, Cooper became obviously flustered. His response to the judge’s request for evidence exhibited a nervousness and lack of confidence:

Your Honor, the evidence is going to show with respect to the – what we submit to you is the central societal public purpose and state interest in connection with marriage. Racial restrictions – the racial restrictions had nothing to do with the definitional feature of marriage that is between a man and a woman. And the purpose of the institution of marriage, the central purpose, is to promote procreation and to channel narrowly procreative sexual activity between men and women into stable enduring unions for the purpose – (Perry v. Schwarzenegger, 2010).

Cooper repeated the “racial restrictions” and reinforced the negative frame because he became nervous and began tripping over his own words. In this response, Cooper stuttered a lot and strayed from his intended response – what his evidence was going to prove – into discussing what he believes the purpose of marriage to be.

Regardless of the fact that Cooper put himself on a slippery slope in terms of defining marriage in a strictly religious context, to say that the purpose of marriage is to “channel narrowly procreative sexual activity between men and women” is both widely disagreeable and easy to disprove. This statement almost conjures up images of an Orwellian society where the government is controlling the sexual activity of its citizens. The judge, obviously surprised by this remark as well, did not even allow Cooper to finish his sentence before interrupting him again to ask whether procreation was the only purpose of marriage, to which Cooper responded:

Your Honor, it is the central and, we would submit, defining purpose of marriage.

It is the – it is the basis on which and the reason on which marriage as an

institution has been universal across societies and cultures throughout history; two, because it is a pro-child societal institution (Perry v. Schwarzenegger, 2010).

Cooper became so flustered by the Judge's questions that he could barely muster an intelligible response. He began stuttering and misspeaking frequently, indicating a lack of confidence in his argument. Also, Cooper's reference to marriage as a "pro-child societal institution" could be construed as his accusing gays and lesbians of having an anti-child agenda. Further damaging to Cooper's argument is the fact that at the time of this trial, gays and lesbians in California had already been granted the right to adopt and raise children. Therefore, if marriage is a "pro-child" institution as Cooper seemed to be claiming, it would stand to reason that gays and lesbians should be entitled to it as well.

Unable to spin a cohesive opening statement with effective language, and unable to discuss any of the evidence he planned to present to support his claims, Cooper had to face relentless questioning by the judge, even though legally speaking the burden of proof is on the plaintiff. The judge continued to interrupt Cooper mid-sentence to pressure him to explain to the court what his evidence intended to prove:

Your Honor, it's going to show, and in the form of our expert, David Blankenhorn. He will testify that a broad consensus of leading scholars suggests that across history and cultures, marriage is fundamentally a pro-child social institution anchored in socially-approved sexual intercourse between a man and a woman. And the core need that marriage, he will testify, aims to meet is the child's need to be emotionally, morally, practically, and legally affiliated with the

woman and the man whose sexual union brought the child into the world (Perry v. Schwarzenegger, 2010).

This explanation came almost halfway through the statement and was the first time Cooper coherently explained the heart of the defense's position. However, it is not only poorly phrased but slightly offensive as well. Here, Cooper defined marriage not only as a "pro-child institution" as he had before, but also as an institution that is anchored in "socially-approved sexual intercourse." This phrasing could not have been more ineffective. It opens up a multitude of questions as to what is socially acceptable and who determines the acceptability of a couple's sexual intercourse. It breeches privacy considerations, implying that society needs to approve of the private act of sexual intercourse. Also, it makes it appear as though Cooper and the defense are attempting to legislate morality, which is far from politically correct.

Cooper continued to present his argument by focusing on the concept of marriage as being centered around a mother and a father raising children, saying that heterosexual marriage "increases the chances that the child will be raised by both its mother and its father. It's good for the mother, who is less likely to have to raise the child by herself, and it's good for the father, because it establishes and it fixes his rights in and obligations to his child" (Perry v. Schwarzenegger, 2010). This argument, as presented, was idealistic at best, complete fantasy at worst, and altogether far too easy for the plaintiffs to refute. Is Cooper implying that single mothers are incapable of raising children or should not do so? Or that single fathers would not or could not do so? Is he implying that gay and lesbian couples that legally adopt children are damaging the children in some way? Is he

implying that all marriages between same sex couples are “enduring committed marital unions?”

Cooper’s attempt to focus on the benefits of same-sex marriage on child-raising is not only fraught with implications, but it is also completely off the subject. Cooper was asked to present evidence that would prove that legalizing same-sex marriage would cause social harm or damage the institution in some way. Once again, Judge Walker interrupted Cooper to ask for evidence that would prove that permitting same-sex couples to marry would somehow diminish the procreative aspect of marriage or denigrate the institution of marriage for heterosexuals.

Out of the twenty three times that Judge Walker interrupted Cooper’s statement, nine of them were to specifically ask for his evidence. Each time, Cooper’s response indicated a lack of confidence in his argument through stuttering, stammering and pausing. Although the stuttering distracted from his argument, what he was saying would not have made much sense even if he had said it clearly. Cooper claimed that there are “risks” of a change of marriage damaging the “pro-child” agenda, but failed to cite even one of those supposed risks. His claim that that the main purpose of marriage is to ensure that parents stay together in order to raise the children is not even applicable to the case, not only because gay and lesbian couples already had the right to raise children together, but because marriage does not ensure that a couple stays together.

However, Cooper did mention a point of dispute with the actual claims of the plaintiffs. While he admitted that he could not present evidence that would prove that any social harms would come from legalizing same sex marriage, Cooper argued that the plaintiffs could not prove that any societal harms would not come from it. This was

arguably Cooper's best strategy of arguing his case. It would be an effective argument because legally the burden of proof would fall on the plaintiff; however, at the time in his opening statement when Cooper finally mentioned this point of dispute, he had already damaged his argument irreparably through his poor framing, careless language use and stuttering.

At the end of Cooper's opening statement, he again repeated the term "racial restriction" in an attempt to refute any comparison between marriage restrictions based on race and marriage restrictions based on gender. This use of repetition was probably intended to strengthen his point, but by repeating the term yet again, Cooper reinforced the negative framing of the argument once more before his statement ended. Cooper finished his statement by appealing to the voters and the majority, as he did in the beginning of his statement:

Your Honor, I will sum up by saying simply this: That the evidence we believe, your Honor, will demonstrate again that the plaintiffs' claims that Proposition 8 and the traditional definition of marriage that it restored to California law, that their claims that Proposition 8 is the product of animosity and that there can be no possible legitimate explanation for that traditional definition of marriage are unsupported and they are unsupportable. The people of California were entitled to make this critical decision for themselves and they have (Perry v. Schwarzenegger, 2010).

Although Cooper probably intended to reinforce the main themes of his argument – tradition and the will of the people - his wording here was unnecessarily verbose. Cooper

does make good use of parallel structure by saying the plaintiffs' claims are "unsupported and unsupportable." His last sentence is the most effective of the entire statement. It is short, simple, and powerful in that it emphasizes that the people have already given their opinion on the issue in the form of their votes, placing emphasis on the importance of the democratic process. However, these small linguistic breakthroughs came much too late at the very end of the statement.

Cooper's opening statement had no structure, no rhythm and no persuasion. The main points of his argument were muddled, disorganized and confusing. His statement did not follow even one of Dr. Luntz's rules for effective language. His sentences were overly complex, his words had no rhythm or texture, and his words were not inspirational in any way. In addition, he established almost no credibility and the only contexts he provided for his argument had negative connotations. Although he tried to frame his argument with concepts of traditional values, the will of the people and respect for the democratic process, his poor use of language damaged these themes. Instead of convincing the judge what the beliefs of the defense were, poor framing forced Cooper to convince the court of what their beliefs were not. Perhaps worst of all, his stuttering and stammering when responding the judge's questions indicated a lack of confidence in his argument, which rendered it almost completely ineffective.

Chapter Four

The Language of the Judge

In addition to determining how language use by the two attorneys in the *Perry v. Schwarzenegger* case affected the outcome of the trial, it is useful to examine language use by the judge in this case as well. Whereas the attorneys' language was analyzed for its effectiveness, the judge's language must be examined for traces of effects. In other words, how did the language used by the attorneys affect the judge's responses and what conclusions can be drawn about the outcome of the trial based on those responses? A close examination of the judge's language in his discourse with the two attorneys can reveal the judge's perception of and reaction to their respective arguments and indicate which way he is inclined to rule.

Rather than analyzing the judge's language according to Dr. Luntz's rules of effective language, since it is not the intention of the judge to persuade, it is better to analyze it through the framework of discourse analysis, a subdivision of linguistics. Discourse analysis examines the way language users create meaning through interaction. One of the ways to understand this created meaning is through contextualization, or the way language use signals relevant aspects of an interactional or communicative situation. In other words, utterances can take on various meanings within different contexts (Linguistic Society of America, n.d.).

Because context is such an important part of understanding meaning, it is also useful to examine the judge's language from a pragmatic standpoint. Pragmatics, another subdivision of linguistics, examines the way context contributes to meaning. Pragmatics is extremely useful in this analysis because it includes implicature (what is suggested by an utterance, though not explicitly stated or directly implied), presupposition (an implicit assumption in an utterance the truth of which is taken for granted), and Speech Act Theory. Speech Act Theory, developed by western philosopher J.L. Austin in 1962, states that all utterances of speech are also acts of some kind. These acts, termed 'speech acts' are performed any time a person says something. Any utterance made is not only something being said but also something being done, whether it is asserting, implying, persuading, questioning, explaining, criticizing, or any other number of things that a statement can do (Hutton, 2009).

Austin's Speech Act Theory explains that all utterances have an implied meaning or force behind them, which he termed 'illocutionary force.' Illocutionary force is not the literal meaning of the utterance, but refers to the implied meaning behind it. Austin explains, "we may be quite clear what 'shut the door' means, but not yet at all clear on the further point as to whether as uttered at a certain time it was an order, an entreaty, or whatnot" (Austin, 1962). All utterances of speech have some kind of illocutionary force behind them, which the listener can detect and comprehend depending upon the tone and context in which the words are said. No matter how neutral or essentially unaffected a statement or assertion may seem, it will always have an implied force, and therefore no type of language can ever be truly neutral.

Therefore, if no type of language is ever truly neutral, it is safe to assume that the

language used by the judge in his discourse with the two attorneys in this trial can be analyzed for some indication of bias or preference to one attorney's argument. If a judge's preference for one argument over the other can be influenced by the language of the attorneys and detected in the judge's discourse with the attorneys, then it can also reflect how language directly affects trial outcomes.

Chief Justice Vaughn R. Walker, who presided over the *Perry v. Schwarzenegger* trial, was a district judge of the United States District Court for the Northern District of California until his recent retirement in February of 2011 (Federal Judicial Center). Walker had long been considered to be an "independent-minded conservative" judge. It is interesting that Chief Judge Walker chose to preside over the Proposition 8 trial because his history with regards to homosexuals is not without bias. When Ronald Reagan nominated Walker to the bench in 1987, his nomination was stalled in the Senate Judiciary Committee. Two dozen House Democrats, led by Nancy Pelosi of San Francisco, opposed his nomination on the grounds that Walker was "insensitive" towards gays and the poor. This perceived insensitivity was the outcome of a controversy over Walker's representation of the United States Olympic Committee in a lawsuit that prohibited the use of the title "Gay Olympics" (Egelko, 2004, para. 3).

Despite this perceived "insensitivity" towards homosexuals, there have been reports that Chief Justice Walker is himself gay. In February of 2010, the San Francisco Chronicle reported that Judge Walker has "never taken pains to disguise – or advertise – his [sexual] orientation" and that his own homosexuality would not influence his decision in the Proposition 8 trial (Matier, 2010). However, Judge Walker has never officially commented on his sexual orientation, and the debate over whether or not Walker is

homosexual still continues to this day.

I mention both of these perceived biases both because they suggest the possibility for Walker to be predisposed to either argument, and because they may potentially indirectly influence the context of the trial. However, sexual orientation and perceived insensitivities will not be taken into account in this analysis of Walker's language use. I will not call into question the integrity of Chief Judge Walker by assuming or implying that any of his personal preferences or biases influenced his ruling in *Perry v. Schwarzenegger*. This thesis does not seek to analyze Chief Judge Walker's language for hints of sexual orientation, personal preference, or bias, but rather to examine his language in response to the attorneys' language.

As the two previous chapters have already explained, the language used by the attorney for the plaintiffs, Ted Olson, differed greatly from the language used by the attorney for the defendants, Charles Cooper. Olson's language followed almost every one of Dr. Luntz's rules of effective language use, and his opening statement was cohesive, comprehensive and persuasive. In contrast, Cooper broke almost every rule of effective language, and his opening statement was jumbled, ineffective and negatively framed. Consequently, the language used by the judge in his discourse with these two attorneys also differed greatly.

During the course of an opening statement, the presiding judge will typically interrupt the attorney in order to clarify points at issue and to ask questions about what evidence will be presented. How the attorneys respond to these questions is important, as discussed in the previous chapters, but how the questions are asked is equally important in determining the judge's assumptions and perceptions of the arguments being

presented.

Ted Olson's opening statement was clear and concise; therefore, when the judge interjected with questions, those questions were also clear and concise. For example, when Ted Olson made the assertion that Proposition 8 categorizes people, Judge Walker interrupted him to ask:

THE COURT: Does Proposition 8 classify people?

MR. OLSON: It does.

THE COURT: It doesn't classify individuals, does it? It simply restricts marriage to opposite-sex couples.

MR. OLSON: When it does so, it classifies people into separate categories. And I will point out later in my statement that there are now four categories of Californians under -- in connection with the status of marriage. And that matters a great deal (*Perry v. Schwarzenegger*, 2010).

After Olson answers the Judge's question, he responds with another question. Instead of telling Olson "it doesn't classify individuals" or asking him how he feels the proposition classifies individuals, the judge appeals to Olson as if he were the authority by asking, "it doesn't classify individuals, does it?"

It is also interesting to note that this is one of only four times throughout the opening statement that the judge actually interrupts Olson in the middle of a sentence. Out of those four interruptions, two of the interruptions were actually made so that Walker could make jokes:

MR. OLSON: I haven't spent a great deal of time studying that, but I suspect Your

Honor has. And I'm not dispute –

THE COURT: Don't count on it. But I believe that's true. (Laughter) (Perry v. Schwarzenegger, 2010).

This lighthearted manner suggests a sense of ease. Clearly, Judge Walker feels comfortable enough with Olson and what he is saying to make jokes. Even when Judge Walker asks a question about a point at issue, his joking language suggests a friendly disposition towards Olson:

THE COURT: Get out of the marriage business. That would solve this problem, wouldn't it?

MR. OLSON: I think that politically it would not happen. Now, I'm not offering myself as an expert –

THE COURT: As a political expert. (Laughter)

MR. OLSON: -- on political science or what the voters do, because I've been wrong again and again. I'm just handed a note, and I don't know -- I haven't researched this -- that only opposite-sex couples over 62 years old can receive the domestic partnership treatment. I have not researched this, and I advance it on the basis of someone on our team obviously has.

THE COURT: Good authority, as it were. (Laughter) (Perry v. Schwarzenegger, 2010).

Throughout most of Olson's statement, the judge refrained from interrupting him. The judge usually interjected with questions only after Olson had completed his sentence, suggesting Chief Judge Walker's respect for Olson and for what he was saying. Indeed,

because Olson's argument was so well prepared and well delivered, it commanded a sense of respect. In fact, at one point, the judge actually allowed himself to be interrupted by Olson:

THE COURT: Are not discrimination based on sex and discrimination based on sexual orientation different?

MR. OLSON: They can be different.

THE COURT: Well –

MR. OLSON: In this case, they are both... (Perry v. Schwarzenegger, 2010).

Notice that after Olson succinctly responded to the judge's original question, the judge was going to say something else, possibly expand upon his original question or rephrase it, but Olson interjected and continued to make his point, as if he anticipated what the judge's next question was going to be. The fact that the judge allowed this interruption suggests a confidence in Olson that he did, in fact, know what the next question was going to be and would answer it as directly and completely as he answered all of the other questions the judge had asked.

Because Olson's responses to all of the judge's questions were direct, concise and relevant, Judge Walker responded to Olson with a level of respect for his opening statement. All of the judge's points at issue were clarified, and all of his questions addressed fully so that there could be no holes found in Olson's argument.

The same cannot be said, however, for Charles Cooper's argument. The opening statement for the defense, delivered by Cooper, was disorganized and ineffective.

Therefore, the judge's responses to Cooper were completely different than his responses

to Olson. For example, while the judge only interrupted Olson four times (two of which were to make jokes), he interrupted Cooper eleven times and with no trace of the lighthearted demeanor that he had exhibited with Olson.

In fact, much of the judge's language in his discourse with Cooper suggests a feeling of frustration. As the previous chapter mentioned, the judge had to ask Cooper nine times to explain to the court what his evidence was going to show. Surely, this could have caused the judge to feel some frustration:

THE COURT: I was going to ask, what's the evidence? You used that in your proposed findings, that extending marriage to same-sex couples would, and I quote, radically alter the institution of marriage. Okay. What's the evidence going to show that would support that finding? (Perry v. Schwarzenegger, 2010).

When the judge says "I was going to ask, what's the evidence?" pragmatics tells us that the presupposition is that he was going to ask another question before Cooper started talking again. Unlike the interruption from Olson, this suggests a sense of annoyance at Cooper for not allowing the judge to complete his entire question thus causing him to interrupt again.

The way the judge phrases his quotation of Cooper's proposed findings also suggests a sense of annoyance or frustration in that it can be read as being subtly sarcastic. The use of the phrases "You used..." and "and I quote..." in context suggests an illocutionary force of sarcasm, especially because they are followed by the one-word sentence: "Okay" and yet another question about evidence.

Another instance in which Judge Walker interrupted Cooper came just as Cooper

was about to tell the judge what the judge had been asking so frequently to hear, what the defense's evidence would show:

COOPER: Your Honor, it is the central and, we would submit, defining purpose of marriage. It is the – it is the basis on which and the reason on which marriage as an institution has been universal across societies and cultures throughout history; two, because it is a pro-child societal institution. The evidence will show-

THE COURT: Where do the other values associated with marriage come in - companionship, support? All of those things that attend a marriage that have nothing to do with procreation. What's the evidence going to show, that those are secondary, those unimportant values associated with marriage? (Perry v. Schwarzenegger, 2010).

Judge Walker interrupted Cooper just as he finished uttering the words “the evidence will show” which is exactly what the judge had been asking Cooper to tell him. This interruption subtly suggests that Judge Walker was either not confident in what Cooper's evidence will show or not interested in it.

More important than the interruption, however, is what the judge said after interrupting Cooper. Judge Walker asks about the other values associated with marriage and uses the words “companionship, support,” which evoke powerful emotions and suggest that these values are important. Then he asks: “What's the evidence going to show, that those are secondary, those unimportant values associated with marriage?” This question presupposes that Cooper and the defendants believe that companionship and

support are secondary and unimportant to marriage. It can also be inferred as being tinged with sarcasm, further showing that the judge does not have a positive perception of Cooper's argument.

As Cooper's argument progressed, it followed no organizational structure as Cooper often strayed from his main points into tangents. This required Judge Walker to interrupt frequently in order to keep the statement on subject. In the previous chapter, I mentioned such an interruption made by the judge after Cooper mentioned that President Obama has said he is against gay marriage. After this comment, Judge Walker interrupted to say:

THE COURT: Mr. Olson made the point if the President's parents had been in Virginia at the time of his birth, their marriage would have been unlawful. That indicates that there is quite a change in the understanding of people's entitlement to enter into the institution of marriage. And so his argument here is that we've had a similar evolution or change in the understanding with respect to people of the same sex entering into the marital institution, isn't that correct? (*Perry v. Schwarzenegger*, 2010).

I am using this interruption as an example again in this chapter because not only does it show that the judge has recognized Cooper's straw man argument and is redirecting the argument to the issue at hand, but also because it can be interpreted as showing a preference for Olson's argument. He repeats Olson's original point, that had the President's parents been in Virginia at the time of his birth, their marriage would have been unlawful, but then he adds a statement of opinion: "That indicates that there is quite

a change in the understanding of people's entitlement to enter into the institution of marriage." Considering that much of Cooper's argument rests on marriage being a long-standing tradition that should not be changed, Judge Walker's perspective of the institution having already undergone profound changes indicates that he is more receptive to Olson's argument than to Cooper's.

Towards the end of Cooper's statement, Judge Walker began to interrupt systematically to ask questions about the proposed findings submitted by the defense. This was probably an attempt to structure Cooper's disorganized statement and keep his argument to the points at issue. However, at one point, the judge interrupted Cooper as he was responding to one such question, not to clarify a point or to expand upon the question, but to express a distaste for the proposed finding itself:

THE COURT: You stated in one of the proposed findings that: Extending marriage to same-sex couples would increase the likelihood that bisexual orientation could form a basis for a legal entitlement to group marriage." What's the evidence that will support that proposed finding?

COOPER: Your Honor, I think that is — I think that is a legal proposition founded in —

THE COURT: It sounds like a finding of fact to me (*Perry v. Schwarzenegger*, 2010).

Interrupting Cooper as he attempted to answer the question suggests that the judge was not interested in whatever Cooper's answer is going to be. His interruption explains why he was not interested. By saying that Cooper's proposed finding "sounds like a finding of fact" Judge Walker is implying that he should be the one making that decision and that the defense is presuming to do his job as the judge. This statement can be construed as contextually sarcastic or defensive and indicates not only a frustration with the argument but also, subtly, a contempt for it.

Chief Judge Walker responded in completely different ways to the two opening statements. Ted Olson's eloquent, effective speech elicited respect, and, at times, a lighthearted familiarity from the judge. Charles Cooper's statement, on the other hand, was fraught with poorly organized and poorly delivered language use, and the judge responded to it with frustration and contempt. Thus, Judge Walker, in questioning and responding to both attorneys' opening statements, clearly indicated through his own language use both his perception of the two opening statements as well as his preference for Olson's well-organized and well-delivered opening statement.

Chapter Five

Trial Outcome and the Language Connection

On August 4, 2010, Chief Judge Walker issued his ruling on *the Perry v. Schwarzenegger* Proposition 8 trial. His verdict found that Proposition 8 violated the Due Process and Equal Protection clauses of the Constitution. The freedom to marry is recognized as a fundamental right protected by the Due Process clause, and the Equal Protection clause states that no state shall “deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. art. XIV, § 1).

In support of his verdict, Chief Judge Walker offered several findings of fact². The findings of fact gave the judge’s decision on whether the evidence showed just support for California’s refusal to recognize marriage between two people because of their sex, whether the evidence showed that California has an interest in differentiating between same-sex unions and opposite sex-unions, and whether the evidence showed that Proposition 8 enacted a private moral view without advancing a legitimate public interest.

First, Judge Walker had to show that there was no evidence to support the refusal to recognize same-sex marriage. In order to do this, he had to rely on California State laws and legal precedent set by other cases. There was legal precedent to support the defendants’ case. Judge Walker’s findings acknowledge this precedent:

² Finding of fact are conclusions drawn by a judge or jury on the issues relating to the facts submitted for decision by the court. The findings of fact ultimately influence the verdict and provide support for the judgment.

...the legislature in 1977 amended the marriage statute, former Cal Civ Code § 4100, to read “[m]arriage is a personal relation arising out of a civil contract between a man and a woman * * *.” Id. That provision became Cal Fam Code § 300. The legislative history of the enactment supports a conclusion that unique roles of a man and a woman in marriage motivated legislators to enact the amendment (Perry v. Schwarzenegger, 2010, pg. 65).

Despite the existence of precedent that would support the defendants’ argument, the overwhelming number of California State Laws cited in Walker’s findings support the plaintiffs’ argument. To refute the statutes that restrict marriage to being solely between a man and a woman, Walker relied heavily on the decisions made in *In re Marriage Cases*:

In 2008, the California Supreme Court held that certain provisions of the Family Code violated the California Constitution to the extent the statutes reserve the designation of marriage to opposite-sex couples. *In re Marriage Cases*, 183 P3d at 452. The language “between a man and a woman” was stricken from section 300, and section 308.5 (Proposition 22) was stricken in its entirety. Id at 453.

California has eliminated marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their dependants (Perry v. Schwarzenegger, 2010, pg. 66).

Walker’s reliance on the findings of *In re Marriage Cases* provides a perfect example of legal precedent and its place in creating law in the legal system. *In re Marriage Cases* was a landmark decision, and the findings of fact in its verdict gave support to *Perry v. Schwarzenegger*, another landmark decision, in its verdict.

Chief Judge Walker also cited several California laws in his written ruling, including the Cal Fam Code, which states that marriage is a civil matter, and while religious institutions have the right to independently recognize or refuse to recognize a marriage or divorce, they do not have the right to determine who may enter or leave a civil marriage. It also states that California, like every other state, has never required that individuals entering into a marriage be able or willing to procreate.

Interestingly, Walker also cited the racial restrictions that were placed on marriages after the emancipation of the slaves in his ruling. Although Walker already had enough legal precedent to support his decision in the form of California State Law, he included the history of racial restrictions on marriage as well:

Race restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre. FF 23-25. When the Supreme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change. 388 US at 12. Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry (*Perry v. Schwarzenegger*, 2010, pg 112).

Judge Walker's inclusion of the history of racial restrictions on marriage rights indicates that the negative framing of the Cooper's argument left a very distinct impression on the judge. His characterization of racial restrictions on marriage as archaic, shameful and bizarre implies that he believes the restriction of marriage between only opposite-sex couples shares the same characterization. Because the Court recognized that

racial restrictions “stood in stark contrast to the concepts of liberty and choice inherent in the right to marry,” it is only natural that the Court recognize that the restrictions on same sex couples stand in stark contrast to those concepts as well. The negative framing by the defense in its opening statement invited the comparison between the restrictions, which eventually served to justify finding them unconstitutional.

After providing the findings of fact, a judge must issue his conclusions of law³. These conclusions of law are influenced by the findings of fact and support the final judgment. Judge Walker’s conclusions of law directly addressed the points of issue raised by the plaintiffs and defendants. His conclusions of law were: 1) that the right to marry protects an individual’s choice of marital partner regardless of gender, 2) that domestic partnerships do not satisfy California’s obligation to allow plaintiffs to marry, and 3) that Proposition 8 is unconstitutional because it denies plaintiffs a fundamental right without a legitimate (much less compelling) reason.

Not only does Judge Walker find that Proposition 8 has no legitimate reason, but he adds the phrase “much less compelling” (*Perry v. Schwarzenegger*, 2010, pg. 116). These three words indicate the complete ineffectiveness of the defense’s argument on the judge. Not only was Judge Walker not persuaded, but he also did not find the argument to be compelling at all.

It is not my intention to claim in any way that the decision made by Judge Walker in the *Perry v. Schwarzenegger* case was biased or influenced solely by language rather than by matters of law. Certainly, the sheer volume of laws cited in ruling in support of

³ A conclusion of law is the judge’s final decision on a question of law which has been raised in a trial or hearing, particularly a question of law that is vital to the judgment.

the judgment testify to the fact that Judge Walker's decision was thoroughly researched and legally valid. I also do not intend to claim that if the argument of the defense had been delivered effectively with more persuasive language, that the judge would have made a different decision. However, there appears to be a strong correlation between language use and trial outcome. If the defense had utilized more effective and more persuasive language, perhaps the judge would have been more compelled to consider their argument.

The consequence of Mr. Cooper's ineffective language in the defense's opening statement resounded in Judge Walker's echoing of racial restrictions on marriage in his written ruling. The negative frame evoked in the defense's opening statement continues to frame the debate all the way through the trial to its conclusion. In addition, the lack of organization and confidence displayed by Mr. Cooper in the opening statement results in an argument that is found to be "much less compelling."

On the other hand, the persuasive and emotionally moving language utilized by Mr. Olson in the opening statement for the plaintiffs reverberated throughout Judge Walker's written ruling, especially in his conclusion:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is

unconstitutional (Perry v. Schwarzenegger, 2010, pg. 135).

Judge Walker's language mirrors that of Mr. Olson in his opening statement: Proposition 8 singles out gay men and lesbian women, it enshrines the notion that opposite-sex couples are superior to same-sex couples. It discriminates and prevents the state from fulfilling its constitutional obligation to provide marriages on an equal basis. Walker could have said something like: Proposition 8 is unconstitutional because it is not the right of the state to determine who, out of consenting adults, can enter into a civil union, and by presuming to do so Proposition 8 violates the Equal Protection and Due Process clauses of the Constitution. But he didn't, his language in his conclusion was much more emotionally aligned with Mr. Olson's language.

This case provides a clear example of the impact that language can have on the outcome of a trial. The importance of this connection cannot be overstated. As I've discussed in previous chapters, the decision of a trial becomes precedent, which in turn influences the decisions of future judges in future trials. The outcome of a trial does not only enforce the law, but in essence it creates it. Therefore, the impact that language can have on the decision of a court case can also impact the law.

The social and political implications of this trial have been widespread and the effects of the decision are still being felt today. When Walker's ruling on *Perry v. Schwarzenegger* was announced, it created a nationwide controversy. To this day, the debate over the rights of same-sex couples to marry still rages on. This landmark case marked an important milestone in the struggle for gay rights, and it created precedent for other landmark cases which will surely arise in the future. As the issue of same-sex marriage continues to be debated on a national scale, *Perry v. Schwarzenegger* will

provide legal precedent for those still struggling for equal rights to marry.

Hopefully a lesson can be learned from the language of this trial as well: Do not underestimate the importance and power of language. The influence of language, in any context, cannot be denied. In the courtroom, effective language use is a powerful tool to achieve a desired effect. This tool should be examined, analyzed, and practiced with careful consideration, as it not only has the power to affect a trial, but also a legal system, and a society.

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Linguistics and the Law: An Analysis of Language in the Courtroom

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WORK EXPERIENCE

The Learning Center, Penn State Brandywine, Media, PA, Peer Tutor Spring 2007

- Assisted students taking Beginning and Intensive Spanish courses
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Outstanding Academic Achievement in the University College 2006, 2008-2011

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- Carfagno, J. Contract Law and a Changing Music Industry. Presented at the Northeast Regional Honors Conference, Harrisburg, PA, April 12, 2010. Presented by undergraduate author J. Carfagno.

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Volunteer, Volunteer Organizer, Sweat For Hope 2008, Ridley, PA
 Profugo – an organization that facilitates microeconomic development worldwide

- Gave presentation to raise awareness of Profugo
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Volunteer, Fair Acres, Lima, PA
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Spanish, basic proficiency in spoken and written