

MARRIAGE, LIBERTY AND CONSTITUTION: A CORPUS-ASSISTED STUDY OF VALUE-LADEN WORDS IN LEGAL ARGUMENTATION

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Abstract

This paper investigates the interplay between judicial argumentation and evaluative or emotive language identified in two US Supreme Court landmark cases on the right of same-sex couples to marry. The analysis of both majority and dissenting opinions leads to two main observations. First, *marriage* and *liberty* are indeed emotive words and they represent two major sites of contention between the concurring and dissenting judges. Second, there are important differences within the argumentative strategies employed by the judges. While (re)defining the concepts remains the major argumentative goal for both types of opinion, the majority opinions tacitly integrate the redefined concept of marriage into their argumentation. It is the dissenting opinions that explicitly raise the issue of (re)definition in order to defend and retain the original sense of marriage.

Keywords: legal argumentation, judicial discourse, evaluative language, US Supreme Court, same-sex marriage

”The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.”

1. Introduction

The excerpt from the epigraph comes from the majority opinion in *Obergefell vs. Hodges* delivered by a US Supreme Court Justice, Anthony M. Kennedy, in which it was held that the right to marry is a fundamental liberty protected by the Constitution. This example shows an attempt at redefining the highly debated and controversial concept of marriage. The use of the word *nature* implies the universality and acceptability of the new definition. There are also several value-laden words such as *enduring bond*, *freedoms*, *intimacy* or *spirituality* which express a highly positive evaluation of the concept of marriage, thus making it potentially easier to accept for different audiences. The power of emotive words has been recognized and acknowledged in various discourse contexts, including

legal texts (Macagno and Walton 2014). Macagno (2016) in his study of definitional aspects in *Obergefell vs. Hodges* demonstrates how the majority judge resorts to various rhetorical and argumentative moves to present the redefinition of the concepts of marriage and liberty. This study adopts a linguistic perspective to examine how judges, while pursuing their rhetorical and argumentative goals, often employ highly evaluative and emotive language.

According to a stereotypical and somewhat idealized perception of judicial discourse, judges in their decisions should confine themselves to communicating facts and propositional information related to the decision-making process. Judges are expected to draft their decisions in a way that reflects the application of relevant legal norms to the facts of the case with little or no degree of subjectivity. They are expected to speak decisively and to rely on a corpus of law and neutral principles to decide cases (Solan 1993:2). It is surprising to see that, contrary to popular belief, judicial discourse is not devoid of emotive and attitudinal expressions. Indeed, legal battles are fought through language. The language of the courtroom and the ensuing judicial opinions is inevitably highly evaluative and it reflects different and conflicting value systems. This seems particularly true of the controversial and highly divisive issue regarding same-sex union and its marital status.

Despite the long tradition of studying evaluation in linguistics (e.g. Thompson and Alba-Juez 2014), this phenomenon has not been given much attention in rhetorics and argumentation studies. Similarly, while evaluation has been investigated in a range of different discourse contexts, it remains relatively underresearched in legal discourse and especially in judicial opinions.

This paper attempts to demonstrate how value-laden, evaluative language and argumentation are woven together in judicial reasoning. In doing so, it focuses on the three basic concepts of *marriage*, *liberty* and *constitution* which are regarded as ethical or emotive words (Macagno and Walton 2014). It offers a detailed linguistic analysis of their co-occurrences in order to bring to light how these concepts are combined and used in the arguments found in majority and dissenting opinions in two landmark civil rights cases: *United States v. Windsor*, and *Obergefell et al. v. Hodges et al.* While the latter case is recognized as a judicial precedent effectively recognizing same-sex couples' right to marry on the same terms as opposite-sex couples, it is the former case, decided two years earlier in 2013, that paved the way for *Obergefell et al. v. Hodges et al.*¹ In *United States v. Windsor*, the court's ruling struck down the federal Defense of Marriage Act (DOMA), enacted in 1996, which defined marriage as a legal union between one man and one woman. This provision was at odds with legislation passed in several states which had authorized same-sex marriage. Edith Windsor and Thea Clara Spyer were married in Toronto, Canada, in 2007, and their marriage was

¹ This brief description of these cases is based on information obtained from Cornell's Legal Information Institute (LII), Justia, and Chicago-Kent College of Law found in <https://www.oyez.org/about>.

recognized by New York state law. After Thea Spyer died in 2009, Windsor became the sole executor and beneficiary of her late spouse's estate. Since their marriage was not recognized by the federal law, she had to pay \$363,000 in taxes. If their marriage been recognized, the estate would have qualified for a marital exemption, and no taxes would have been imposed. On November 9, 2010 Windsor filed suit in district court seeking a declaration that the Defense of Marriage Act was unconstitutional. If this case concerned the incompatibility between the federal law and the state law regarding the recognition of same-sex marriage, the *Obergefell et al. v. Hodges et al.* challenged the constitutionality of certain states' bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in jurisdictions that provided for such marriages. Several same-sex couples sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee arguing that the states' statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and one group of plaintiffs also brought claims under the Civil Rights Act. When their consolidated case appeared before the US Supreme Court, the judges invoking the Fourteenth Amendment affirmed that a state is required to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex that was legally licensed and performed in another state.

2. From evaluative language to values in judicial argumentation

It is relatively recently that the evaluative function of language in legal discourse has begun to attract more attention among legal linguists. This upsurge of interest has taken place in the wake of a similar trend within the study of evaluation in linguistics (Alba-Juez and Thompson 2014: 5) and the existing research into legal discourse has mirrored, to some extent, the proliferation of terms and concepts found in other domains of language use. The preoccupation with judicial discourse as the object of evaluation studies is not surprising given the central importance of stance or evaluation for judicial argumentation. Indicating an attitude towards a legal entity, process or interactant is inherent in the process of legal argumentation. A substantial part of judicial opinions involves expressing agreement or disagreement with decisions given by lower courts, opinions expressed by counsel representing the parties, as well as the opinions arrived at by fellow judges on the same bench. When judges express their opinion, they also reflect their value systems and the ideologies existing in their community and in the legal system at large.

The applicability of the concept of evaluation or evaluative language to judicial argumentation has become the focus of several recent studies (e.g. Heffer 2007, Mazzi 2010, Finegan 2010), Szczyrbak 2014, Goźdz-Roszkowski 2018a; 2018b). These studies are essentially corpus-based or corpus-driven and they aim to identify recurrent patterns of evaluative expression in order to examine their discourse functions. The object of the inquiry stems from the conceptualization of

evaluation as a linguistic resource used to express the speaker's or writer's "attitude or stance towards, view point on, or feelings about the entities or propositions that he or she is talking about. That attitude may relate to certainty or obligation or desirability or any of a number of other sets of values" (Thompson and Hunston 2000: 5). For example, a study reported in Goźdz-Roszkowski (2018b) examines the distribution of a selection of nouns found in a grammar pattern with nouns governing *that*-clauses across different discourse functions. It shows that judicial opinions tend to rely on a range of status-indicating nouns to express five major functions: evaluation, cause, result, confirmation and existence. Interestingly, it is the evaluative function that appears to play a central role in judicial writing and most status-indicating nouns are used to signal sites of contentions, i.e. challenged propositions are likely to be labelled as *arguments*, *assumptions*, *notions* or *suggestions*. The goal of these studies is to determine linguistic strategies adopted by judges to make assessments in their opinions. At issue is the important question related to the tension between the judge's own individual position and a position which reflects the epistemological beliefs and values of their professional or disciplinary community. From the linguistic perspective, it is essential to determine whether evaluation is communicated in patterned and systematic ways characteristic of the judicial community, what culturally available resources judges have to align themselves with various audiences, and what boundaries may restrict their authorial 'voice'. In short, linguistically-oriented studies tend to focus on the construal of evaluation in judicial argumentation rather than on any specific content or issue found in it.

One way of moving beyond this linguistic orientation is to shift attention from words and phrases signaling the evaluative function of language to items denoting specific values. If one assumes that the purpose of any legal justification is to define the reasons and arguments for reaching a particular decision, then judicial argumentation may embrace specific values as a starting point. Perelman and Olbrechts-Tyteca (1969) argue that values enter, at some stage or other, into every argument and this is particularly characteristic of law, politics and philosophy. Goźdz-Roszkowski 2018^c shows how the semantic category of (dis)respect is used in both majority and dissenting opinions as a value premise to advance and develop their arguments.

In a similar vein, this paper focuses on exploring the use of value-laden lexemes which have been identified as significant to two US Supreme Court landmark civil rights decisions. Value-laden words are here understood as ethical words, i.e. words "that have the power of directing attitudes" (Macagno and Walton 201: 31) because defining or redefining such words involves persuading the reader to redirect and intensify their attitudes. Used appropriately, they can become a powerful instrument of persuasion. They are also referred to as emotive words because of the close connection between ethics or value judgments and emotions. Three such words constitute the object of the present analysis: *marriage*, *liberty* and *constitution*. The definitions of the first two concepts have

become the centre of considerable debate and controversy in these two cases. The third is inevitably drawn into any debate involving the issue of constitutionality. The redefinitions of *marriage* in the majority opinions amounted to an act of persuasion bringing together evaluation and argumentation.

3. Data and methodology

The analysis reported in this study relies on two major data sets: the majority opinions (16,760 words) and the dissenting opinions (31,987) written in the two cases of *United States v. Windsor*, and *Obergefell et al. v. Hodges et al.* In both these cases, Justice Anthony M. Kennedy delivered the opinion of the court (majority opinion). The dissenting opinions in *United States v. Windsor* were written by Chief Justice Roberts, Justice Scalia, and Justice Alito. In the *Obergefell et al. v. Hodges et al.*, there were as many as four dissenting opinions, which means that each judge who voted against the decision chose to write their own opinion. These included Chief Justice C.J. Roberts, the late Justice Scalia, Justice Thomas and Justice Alito.

This study relies on quantitative methods to reveal words which can potentially denote values or evaluative language, but it also relies on close reading of co-texts surrounding these words to determine their semantic content and the function they perform in the analysed texts. The methodological approach adopted corresponds to what is now known as *corpus-assisted discourse studies* or CADS. Partington (2004) is credited with coining this term and defining it as: “that set of studies into the form and/or function of language as *communicative discourse* which incorporate the use of computerised corpora in their analyses” (cited in Partington et al., 2013: 10). According to this approach, the use of computerised corpora and computational tools provides output which is treated as a starting point for a detailed and thorough qualitative analysis which examines not only the immediate co-texts of a given lexical item, but also the wider institutional, social or legal contexts in which the analysed text or texts are embedded.

The analysis was aided with two computer programmes: *Wmatrix 3* and *Sketch Engine*. The former is the web interface to the USAS and CLAWS corpus annotation tools developed at Lancaster University. This tool enables one to study the characteristics of whole texts by identifying key words and key semantic domains. This is possible by assigning part-of-speech and semantic field (domain) tags which leads to the extraction of key domains by applying the keyness calculation to tag frequency lists (Rayson, 2008). This programme was used to extract keywords in majority and dissenting opinions and then determine which keywords are shared in both types of judicial opinion. It should be pointed out that keywords are understood here as those words whose frequency is unusually high in comparison with some norm (Scott 2008) and their identification requires carrying out a keyword analysis. This type of analysis involves comparing two lists. One wordlist is based on the words from a collection of texts which is the

object of analysis, i.e. majority and dissenting opinions in this study. The other wordlist is a larger reference list. Table 1 shows results for the keyword analysis in both majority and dissenting opinions according to the log-likelihood (significance) test using *Wmatrix*. O1 is observed frequency of words in the two types of opinions, while O2 is observed frequency in the reference corpus (BNC Written). In addition, %1 and %2 values show relative frequencies in the texts. Only words with the frequency cut-off of 5 were considered. The adopted criteria were meant to ensure that only statistically significant words were selected for the analyses.

The *Sketch Engine* is a tool to create and process large collections of text data. In this study, it was used to create word sketches of keywords pre-selected for the analysis. The reason for generating a word sketch is that it provides a convenient summary of the word's grammatical and collocational behaviour. It shows the word's collocates categorised by grammatical relations such as words that serve as an object of the verb, words that serve as a subject of the verb, words that modify the word etc.² The word sketches of three value-laden keywords *marriage*, *liberty* and *constitution* provide initial input for subsequent qualitative analyses.

4. Results and discussion

This section starts with an overview of those keywords that are shared by judges writing in both types of opinion. The fact that these items are salient across the entire spectrum of judicial opinion enables one to gain direct insight into the major issues addressed by the judges in their writing.

Table 1 Keywords shared in majority and dissenting opinions

item	O1	%1	O2	%2	keyness
marriage	486	0.95	10	-	3,095.24
sex	300	0.59	52	-	1,682.72
couples	142	0.28	1	-	921.89
same	289	0.57	986	0.08	611.10
doma	88	0.17	0	-	578.56
liberty	155	0.30	0	-	564.62
marry	85	0.17	2	-	539.94
marriages	58	0.11	0	-	381.29
institution	57	0.11	23	-	280.48
majority	136	0.27	481	0.04	279.97
right	191	0.38	1227	0.09	228.48

² More information about the programme can be found at <https://www.sketchengine.eu/what-can-sketch-engine-do/>

item	O1	%1	O2	%2	keyness
woman	42	0.08	10	-	225.94
married	38	0.07	5	-	219.27
their	251	0.49	2079	0.16	216.30
laws	122	0.24	590	0.05	194.82
constitution	127	0.25	670	0.05	186.90
dignity	44	0.09	33	-	186.59
people	95	0.19	359	0.03	186.14
equal	64	0.13	146	0.01	173.62
fundamental	65	0.13	158	0.01	170.20
opposite	44	0.09	46	-	168.02
man	47	0.09	77	-	150.26
freedom	47	0.09	93	-	137.37
society	45	0.09	83	-	136.15
protection	74	0.15	339	0.03	123.96
gays	20	0.04	1	-	123.50
and	1198	2.35	21972	1.68	120.62
lesbians	19	0.04	1	-	117.03
loving	21	0.04	4	-	116.36
rights	96	0.19	623	0.05	113.41
recognition	35	0.07	63	-	107.13
couple	19	0.04	4	-	103.94
family	37	0.07	89	-	97.44
marital	18	0.04	5	-	94.61
definition	57	0.11	267	0.02	93.62
refund	17	0.03	5	-	88.54
spouse	17	0.03	5	-	88.54
intimacy	13	0.03	0	-	85.45
women	21	0.04	20	-	82.75
persons	60	0.12	347	0.03	80.44

One way of looking at the keywords is to examine their evaluative potential. Seen from this perspective, it emerges that there are two general categories. First, there are items with intrinsic evaluative weight, such as *liberty*, *dignity*, *equal*, *protection* or *freedom*. Their (positive) evaluative meaning can be easily detected, even if these items are viewed in isolation, without having recourse to the contexts in which they are used. They signify what are commonly perceived as desirable qualities. Some of these (e.g. *liberty*, *dignity*, *freedom*) represent ethical words “whose descriptive meaning cannot be distinguished from the emotive one” (Stevenson 1944: 206). These items, which are “essentially contested” (Gallie 1955) due to their vague or potentially vague meaning characterised by open-

texture (Hart 1961:120; Bix 1991) raise an interesting issue linked to controversies surrounding their definition.

Second, there are items which are predominantly denotational or deictic and they are generally evaluatively neutral (cf. Partington et al. 2015: 53), at least when considered out of context. Words such as *marriage*, *woman*, *constitution*, *gays*, *recognition*, *family*, *right*, etc. would be found in this category. In fact, it is possible to distinguish two further subcategories. One that groups ‘ordinary’ lexis encountered in general, non-specialised language (e.g. *people*, *woman*, *persons*) and the other which includes more technical words characteristic of legal language such as *doma* (name of the contested federal act), *constitution*, *refund*, etc. The former consists of items which may trigger different connotations within a culture. Leech (1974: 15 cited in Partington 1998: 66) demonstrates how the word *woman* used to be associated with such attributes as “frail”, “prone to tears”, “cowardly” and “irrational”, but also “gentle”, “compassionate” and “sensitive”. Baker (2006) offers a corpus-based study of the two lexemes *bachelor* and *spinster* and demonstrates how social attitudes and evaluations reflected in language corpora can vary regarding singlehood. Needless to say, such cultural connotations or evaluations are culture-specific and they evolve over time.

In addition, some of these words may be assigned terminological status characteristic of legal texts, especially in the case of statutory definitions where the legislator may rely on the ordinary use of language. The keyword *marriage* is a good example of a word used in everyday contexts, whose meaning is subject to legislative change. As a result, the traditional denotative meaning of marriage as a legally recognized union between a man and a woman may be substantially changed to include same-sex couples (cf. González Ruiz 2005). In fact, the same process of redefinition occurs as a result of the two precedential cases described in this study (see also Macagno 2016 on argumentation from classification).

In the latter subcategory of denotational or deictic items, even apparently technical terms may also acquire evaluative weight in some contexts and discourses, especially if they tend to be repeated or they are part of a cohesive chain (Partington et al. 2013). Hunston (2010) points out that evaluation can be context-dependent and cumulative. Goźdz-Roszkowski (2013) documents how the term *discovery*, which denotatively refers to the US trial practice and criminal proceedings (Black 1990), tends to be found in US Supreme Court opinions in contexts where judges express their unfavourable evaluation of it.

Importantly, many of the words assigned to this category may also be considered as emotive words which play a significant role in argumentation. Macagno and Walton (2014: 6) point out that in legal argumentation it is possible to find examples of emotive words. This seems to be particularly true for criminal cases where “the emotions of the jury can be appealed [sic] to elicit a specific judgment.”

4.1. The keyword *marriage* as a controversial concept

This study starts by considering the most frequent keyword *marriage*. Its very frequent occurrence confirms the centrality of this concept in these two legal cases. The visualization of its collocates shown in Figure 1 identifies its major collocates grouped into four categories: verbs with *marriage* as object (e.g. *recognize*, *define*, *allow*), verbs with *marriage* as subject (e.g. *be*, *have*, *become*), modifiers of *marriage* (e.g. *same-sex*, *lawful*, *opposite-sex*) and nouns modified by *marriage* (e.g. *law*, *act*, *licence*). The visualization enables one to notice which category is the most frequent proportionally (modifiers of marriage) and which words within each category are the most frequent (the size of the word circles). Not surprisingly, *marriage* is first of all framed as *same-sex marriage* since both *United States vs. Windsor* and *Obergefell vs Hodges* are concerned with the constitutionality of interpreting marriage as referring to opposite-sex unions and the fundamental right to marry guaranteed to same-sex couples, respectively.

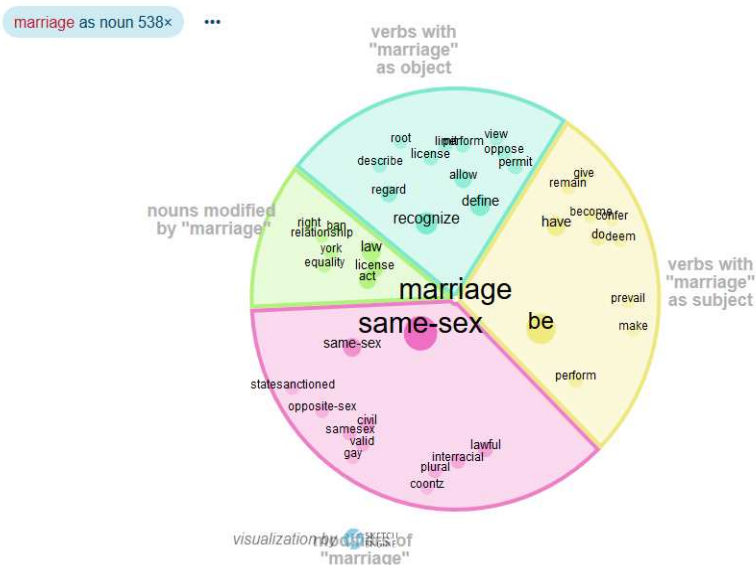


Figure 1. Visualization of the most frequent collocates of marriage in both majority and dissenting opinions

If we consider the most frequent verbal collocates with *marriage* as their object, it emerges that there seem to be two major points made regarding the concept of marriage. First, it is discoursed in terms of its permissibility, i.e. whether or not same-sex marriage should be accepted and considered formally as legal. Second, marriage is a concept that needs to be defined. The first point is reflected in the occurrence of the following collocates (raw frequencies provided in brackets): *recognize* (24), *allow* (10) and *permit* (5). While both majority and dissenting

opinions share these collocates, there are some differences in the way they are used in the respective opinions. There are nine instances (409 per million words) of *recognize* in the majority opinions, three of which are given as examples below (emphasis in bold added):

1. These cases also present the question whether the Constitution requires States to **recognize** same-sex marriages validly performed out of State.
2. Ijpe DeKoe and Thomas Kostura [petitioners in the *Obergefell vs. Hodges*] now ask whether Tennessee can deny to one who has served this Nation the basic dignity of **recognizing** his New York marriage.
3. It follows that the Court also must hold -- and it now does hold -- that there is no lawful basis for a State to refuse to **recognize** a lawful same-sex marriage performed in another State on the ground of its same-sex character.

These examples aptly illustrate the stance adopted in both majority opinions. Example 1, which comes from *Obergefell vs. Hodges*, illustrates one of the two fundamental legal questions addressed by the Court, whether the Constitution (Fourteenth Amendment) requires a state to license a marriage between two people of the same sex. This general question of recognizing same-sex marriage is reformulated in Example (2) which illustrates how this issue can be addressed in more emotive terms relying on an argument from values. The desire to enter into a lawful marriage by a same-sex couple is viewed as positive and it is justified by the fact that one of the petitioners (Ijpe DeKoe) works full time for the US military. In fact he was for some time deployed in Afghanistan. Since he served his nation, he and his partner are worthy of *the basic dignity of* having their marriage recognised. Unlike in Example (1), which may strike the reader as being a technical point, the question in Example (2) is framed as an ethical issue construed by means of value-laden lexis: *deny, serve this Nation, the basic dignity*. Both questions are answered in the affirmative in Example (3) sampled from the holding, i.e. the final disposition of the case.

In the 15 cases (369 per million words) where the lemma *recognize* is found in dissenting opinions, a large proportion reflect the practice of reiterating the majority's argument in order to provide its evaluation. This is shown in Example (4) in which the dissenting judge first refers to the majority's decision in *Obergefell vs. Hodges* and then he evaluates it as a dangerous fiction:

4. The majority's decision today will require States to issue marriage licenses to same-sex couples and to **recognize** same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the **dangerous fiction** of treating the Due Process Clause as a font of substantive rights

The same practice can be seen in in example 5, where the Court's decision is assessed as a *drastic step*:

5. Of course, those more selective claims will not arise now that the Court has taken the **drastic step** of requiring every State to license and **recognize** marriages between same-sex couples.

In a similar vein, the co-occurring lexemes *allow* and *permit* provide further textual evidence on how the judges disagree on the issue of (same-sex) marriage. Example (6) brings to light the argument made in the three dissenting opinions written in the *US v. Windsor* case that the Court lacked both the jurisdiction to review the case and the power to invalidate democratically enacted legislation referring to the *Defense of Marriage Act* enacted earlier by the Congress:

6. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to **allow marriage** between two people of the same sex. But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.

Justice Samuel A. Alito, Jr. in his dissent argued that the right to same-sex marriage is not “deeply rooted in this Nation’s history and tradition” because as shown in (7) such permission was granted as late as in 2003:

7. In this country, no State **permitted same-sex marriage** until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution.

In contrast, the majority opinions focus on the potential impact of legalizing same-sex unions arguing that the change is not likely to bring negative consequences:

8. The respondents have not shown a foundation for the conclusion that **allowing same-sex marriage** will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

In (9) the majority opinion offers a rebuttal to an argument that recognizing same-sex marriage will adversely affect opposite-sex marriages:

9. There are those who think that **allowing** same-sex marriage will seriously undermine the institution of marriage.

These collocates provide linguistic cues as to how the fundamental issue of the legality of same-sex marriage is addressed by the judges, i.e. whether same-sex marriage should be regarded as a lawful union, whether or not it is grounded in the Constitution (the legal question of the constitutionality of same-sex marriage), and which institutional body has jurisdiction to recognize same-sex marriage and enforce the relevant legislation.

The other fundamental and related issue made about *marriage* concerns its definition. Macagno (2016) argues that a deep disagreement about the nature of marriage, its definition and redefinition is at the heart of the dispute about the same-sex couples' right to marry in *Obergefell vs Hodges*. In fact, the same could be said about the earlier case of *US vs Windsor*. The linguistic evidence for the prevalence of this issue in both types of opinion comes from the co-occurrence of the keyword *marriage* and the lemmata *define* and *be*. While these linguistic markers are limited in the sense that there are other linguistic resources used to indicate a concern with the definition of marriage, they do bring to light some of the basic points made in the complex argument in majority and dissenting opinions. The data suggest that marriage is a highly controversial concept which reveals the presence of a definitional conflict of opinions. Linguistically, the co-occurrence between *marriage* and the lemma *be* involves examining the syntactic pattern where *marriage* is in subject position. There are 32 instances of this use in the majority opinions. This linguistic pattern is first of all used by judges to broaden the understanding of marriage and to describe it as a dynamic concept changing over time as illustrated in Examples (10) and (11):

10. The history of marriage is one of both continuity and change. That institution -- even as confined to opposite-sex relations -- has evolved over time. For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman.
11. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

There are also several examples indicating the use of reasoning from precedent in the majority argumentation:

12. The laws challenged in *Zablocki* and *Turner* did not define marriage as “the union of a man and a woman, where neither party owes child support or is in prison.”
13. And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95 - 96. The right to marry thus dignifies couples who “wish to define themselves by their commitment to each other.” *Windsor*, supra, at ___ (slip op., at 14).

As Macagno (2016: 318) points out *Zablocki v. Redhail* and *Turner v. Safley* are some of the past precedents in which legal restrictions to marriage were invalidated because they breached the fundamental right to marry. They are cited in the majority opinion as an argument from precedent to demonstrate that analogous restrictions should be removed in the case of same-sex unions. As seen in (14), marriage is construed as one of the fundamental rights and liberties protected by the Constitution. This eventually leads the majority to the conclusion that prohibiting same-sex marriage is unconstitutional. The explanation for regarding marriage as a fundamental right is phrased in highly emotive lexis: *a full awareness and understanding of the hurt*:

14. The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

As Macagno explains, restricting the freedom to marry represents a violation of this fundamental right “based on the previous cases in which specific restrictions to marriage (such as interracial marriage or marriage with people imprisoned) were considered as violation of such a right” (2016: 319). It is interesting to note the emotive language used to describe the nature of marriage. While elucidating on the reasons why marriage is a fundamental right, the majority opinion adds:

15. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

In contrast, the dissenting judges refer to a range of various authorities to defend the traditional definition of marriage. Such historical references while having no legal force, may still retain a certain degree of persuasion (emphasis added):

16. In his first American dictionary, Noah Webster **defined marriage** as “the legal union of a man and woman for life,” which served the purposes of “preventing the promiscuous intercourse of the sexes, . . . promoting

domestic felicity, and . . . securing the maintenance and education of children.”

17. An influential 19th-century treatise **defined marriage as** “a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex.”

Whenever dissenting opinions refer to past precedents, they aim to undermine the argument from analogy:

18. None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as “the union of a man and a woman, where neither party owes child support or is in prison.” Nor did the interracial marriage ban at issue in *Loving* define marriage as “the union of a man and a woman of the same race.”
19. Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of “marriage” discussed in every one of these cases “presumed a relationship involving opposite-sex partners.”

The dissent’s argument points out that these past precedents only remove unconstitutional limitations on marriage according to its traditional definition. By citing such precedents in the context of same-sex union, the majority implicitly redefines the concept of marriage. The dissenting judges object to the broadening of the definition arguing that any substantial change in the definition of marriage lies with the legislative power. Indeed, one of the keywords found in the dissenting opinions is *unelected*. It was Justice Scalia who argued in his dissent in *Obergefell vs Hodges* that the question of whether same-sex marriage should be recognized lies within the jurisdiction of the state legislatures, and this issue should not be decided by judges since such political change should only be brought about through the votes of elected representatives:

20. Allowing **unelected** federal judges to select which unenumerated rights rank as “fundamental”--and to strike down state laws on the basis of that determination--raises obvious concerns about the judicial role.

We now move to consider another keyword *liberty* which has already surfaced as an important axiological component in the argumentation provided in the judicial opinions.

4.2 The keyword *liberty* as a controversial concept

The word *liberty* ranks as the 6th most key word in both *US v. Windsor* and *Obergefell v. Hodges*. The analysis starts by examining the word sketch of *liberty* in order to see how this concept is discoursed in terms of its most frequently co-occurring items as shown in Figure 2. As can be seen, the most frequent category is of words which modify *liberty*: *life*, *religious*, *natural*, *civil*, etc. This is followed by verbs with *liberty* as object: *protect*, *promise*, *deny*, etc. When *liberty* is found in subject position, it co-occurs with *be*, *have*, and *do*, but also with *consist*, *carry* and *extend*. Finally, rather infrequently, there are nouns modified by *liberty*: *interest* and *implication*. With the corpus evidence available, the quantitative findings summarized in Figure 2 can be accounted for in terms similar to those discussed with regard to *marriage*: the nature and definition of this concept.

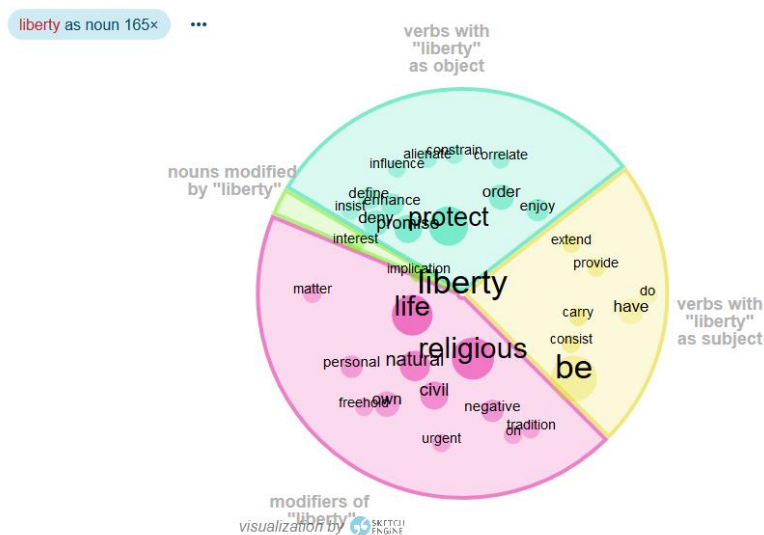


Figure 2. Visualization of the most frequent collocates of *liberty* in both majority and dissenting opinions

Linguistically, this is reflected in the numerous modifiers of *liberty* with *religious*, *natural*, *civil*, *personal* and *negative* being the most frequent. The two types of judicial opinion vary in the degree to which they rely on these qualifications. For example, the phrase *religious liberty* is found more often in dissenting opinions.

21. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is--unlike the right imagined by the majority--actually spelled out in the Constitution

Excerpt 21 is an example of how the dissenting judge raises the issue of a potential negative impact of recognizing same-sex marriage on the right to practise one's religion. Liberty emerges as a controversial concept in a conflict of values. The right to marry as a fundamental liberty is construed as opposed to religious liberty. In addition, the dissent seems to suggest a hierarchy of values with same-sex marriage evaluated negatively as "the right imagined" and religious freedom held to represent a 'higher' value because it is already enshrined in the Constitution. As already indicated, there appears to be a similarity between the concepts of *marriage* and *liberty* since both raise important definitional issues. This point is explicitly brought to light in one of the dissenting opinions implying the basic difficulty in arriving at a consensus regarding the meaning of *liberty* that would be acceptable to all audiences:

22. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

The dissent seems to suggest that *liberty* belongs to the category of ethical words, or rather emotive words (Macagno and Walton 2014: 31), which are notoriously difficult to define and any attempt at their redefinition "amounts to an act of persuasion, aimed at redirecting interests and choices."

The predominance of items modifying liberty can be attributed to the frequently cited excerpt from the Fourteenth Amendment as the legal basis for the Court's decision (emphasis added):

23. Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of **life, liberty**, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights.

This textual practice reflects the basic argument made in the majority opinion in *Obergefell vs Hodges* that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects. In addition, the examination of the verbal collocates with *liberty* as subject shows that the lemma *be* is most frequently found in contexts where different quasi-

definitions of this concept are offered. The corpus data also confirm that the definitional issue underlies the majority's arguments and dissenters' counter-arguments. Macagno (2016: 320) argues that the majority opinion rests on the premise that same-sex union can be classified as marriage, but this redefinition is implicit and it did not "explicitly challenge or rebut the traditional definition." This may explain why the linguistic markers of definition (such as the lemmata *define* and *be*) are more frequent in dissenting opinions. The examples (24) and (25) suggest a more restrictive approach whereby *liberty* is defined narrowly by spelling out what this concept does not entail (emphasis added):

24. In the American legal tradition, **liberty** has long been understood as individual freedom from governmental action, **not** as **a right** to a particular governmental entitlement.
25. Or as one scholar put it in 1776, "[T]he common idea of **liberty** is **merely negative**, and is only the absence of restraint."

The dissenting judges are at pains to point out that the concept of *liberty* does not include the right to same-sex marriage. At issue is the question of what *liberty* is under the Constitution. While *liberty* is not explicitly defined in majority opinions, it is defined in philosophical and legal terms in the dissenting opinions as *negative liberty*, i.e. as a *liberty from something* rather than a *liberty to do something*. Thus the close connection between *marriage* and *liberty* permeates both types of opinion. It is impossible to continue the discussion without taking into account the third concept of *Constitution*.

4.3 The keywords: marriage, liberty and constitution

It should be pointed out that *Constitution* is the 16th most key word in both types of opinion. Just as in the case of *marriage* and *liberty*, the lexical co-occurrences of *Constitution* have been captured in terms of four major categories: verbs with *Constitution* as subject (e.g. *protect*, *do*, etc.), followed by two almost equally sized categories of modifiers of *Constitution* (e.g. *state*, *federal*) and the category of nouns modified by *Constitution*. The most salient co-occurring items shown in the word sketch in Figure 3 reveal that *Constitution* is first of all perceived as a source of protection against the violation of applicable rights guaranteed under the Constitution. As already mentioned in the previous section, the majority's argument in *Obergefell v. Hodges* rests on the premise that the Equal Protection Clause of the Fourteenth Amendment guarantees the right of same-sex couples to marry. The refusal of that right would deny same-sex couples equal protection under the law. But that protection is also at stake in *US vs. Windsor* as the Court held that the Fifth Amendment's guarantee of equal protection was violated by the federal legislation of DOMA. As a result, the majority opinion resorts to the Constitution to argue that the federal law (*DOMA*) violates its relevant provisions

(*US v. Windsor*) and that the role of the Constitution is to protect the right of same-sex couples to marry (*Obergefell v. Hodges*):

26. The issue before the Court here is the legal question whether the **Constitution protects** the right of same-sex couples to marry.
27. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F. 3d 859, 864 - 868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage **violates the Constitution**.

constitution as noun 138x ...

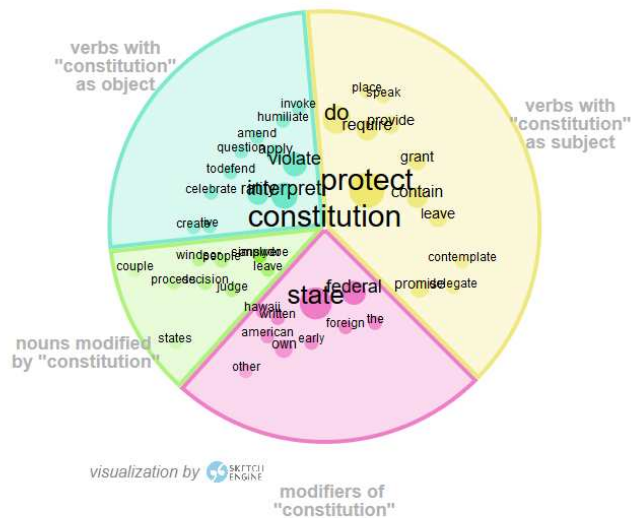


Figure 3. Visualization of the most frequent collocates of *constitution* in both majority and dissenting opinions

The frequent co-occurrence of *constitution* and *interpret* highlights the interpretive doubts and differences contained in the two types of opinion. It is interesting to observe that in the dissenting opinions, the word *constitution* co-occurs with various negation markers in 19% of the cases. This is indicated by the lemma *do* in the word sketch and other negatively charged lexis such as *neglect*. Examples (28) – (30) show that in the dissenting opinions, *Constitution* tends to be framed in terms of negative evidence, i.e. the absence of evidence for a claim made in the majority argumentation and eventually in the Court's decision:

28. In short, our **Constitution does not** enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition. Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex
29. The **Constitution** itself **says nothing** about marriage, and the Framers thereby entrusted the States with “the whole subject of the domestic relations of husband and wife” (Windsor, 570 U.S).
30. The right it announces has **no basis in the Constitution** or this Court ‘s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire to remake society according to its own “new insight” into the “nature of injustice.”
31. The opinion in these cases is the furthest extension in fact--and the furthest extension one can even imagine--of the Court ‘s claimed power to create “liberties” that the **Constitution** and its Amendments **neglect to mention**

These examples signal that one consistent line of argumentation, which runs through all the dissenting opinions, is that the majority opinion represents judicial policymaking and judicial activism as it creates a right that does not exist under the Constitution. This is possible if one assumes that the concurring judges indeed imposed a redefinition of the concepts of *marriage* and *liberty* which enabled them to hold that prohibiting same-sex marriage is unconstitutional. Macagno (2016: 328) notes that taking for granted a definition of marriage that is highly controversial and not shared could be interpreted as an alleged act of taking on the power of defining and imposing a definition. And this is exactly what the dissenting opinions seem to suggest.

5. Summary and conclusions

The findings presented in this study bring to light the close connection between evaluation and judicial argumentation. The keyword analysis has led to the identification of statistically significant lexemes which provided a useful insight into the ‘aboutness’ of the judicial opinions and their major themes. The keywords, identified computationally, provided candidates for selecting ethical or emotive words for further, more qualitative, analyses. Three words marriage, liberty and constitution found in both types of judicial opinion were selected and analysed regarding their co-occurring items. The goal of this stage of the analysis was to compare how these concepts are dealt with in majority and dissenting opinions. The analysis corroborates that marriage and liberty are indeed emotive words and represent two major sites of contention between the concurring and dissenting judges. The scrutiny of their collocational and grammatical environments has revealed important differences within the argumentative

strategies employed by the judges. Crucially, while (re)defining the concepts remains the major argumentative goal for both types of opinion, the majority opinions tacitly integrate the redefined concept of marriage into their argumentation. In other words, majority judges tend to use a redefined concept of marriage without indicating that they have indeed proposed a new definition. It is the dissenting opinions that explicitly raise the issue of (re)definition in order to defend and retain the original sense of marriage. Linguistically, this difference between the two types of opinion is reflected in the more frequent occurrence of linguistic items that construe definitions in dissenting opinions.

Regarding the methodological issue of investigating evaluative language, the analysis provided in this study combines the advantage of identifying the linguistic construal of evaluation with revealing insights into specific issues dealt with in the investigated data. Apart from its emotive and value-laden nature, the analysed words provide access to other evaluative language found in their immediate co-texts. For example, recognizing same-sex marriage in majority opinions is framed in terms of positively-charged lexis showing how concurring judges express positive evaluation of same-sex marriage. In addition, the findings of the analysis can be interpreted as linguistic cues useful in reconstructing argumentative structures or types of argument employed in the respective opinions.

While the study offers a new way of analysing evaluative language in the institutional context of judicial opinions, it is limited in that it looks at a narrow range of linguistic resources used in the argumentation. Further research should focus on other classes of keywords and key semantic domains with a view to building a more complete axiomatic picture of these landmark civil rights cases.

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