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Who Frames the Message? Countermovements and Public Perception of Social Movements' Legal Agendas

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Same-sex marriage is commonly perceived to be “the dominant issue”¹⁾ or the “central movement goal[.]”²⁾ in the social movement for lesbian, gay, bisexual, and transgender (LGBT) rights.³⁾ Since *Baehr v. Lewin*,

1) Keith O. Boykin, “Where Rhetoric Meets Reality: The Role of Black Lesbians and Gays in “Queer” Politics,” in *The Politics of Gay Rights*, edited by Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox (Chicago: The University of Chicago Press, 2000), 89.

2) Craig Rimmerman, *From Identity to Politics: The Lesbian and Gay Movements in the United States* (Philadelphia: Temple University Press, 2001).

3) The academic literature on the LGBT movement often assumes this point. See Ball, Carlos. 2002. *The Morality of Gay Rights: An Exploration in Political Philosophy* New York: Routledge, 1; Cahill, Sean, and Sarah Tobias. 2006. *Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Families* Ann Arbor: University of Michigan Press, 96 (“the prioritization of marriage as a policy goal for the LGBT movement”); Kinsley, Michael. 2007. “Abolish Marriage.” in *Justice: A Reader*, edited by Michael J. Sandel. Oxford: Oxford University Press, 383 (marriage as the “principal demand of a liberation movement”); Koppelman, Andrew. 1998. “Sexual and Religious Pluralism.” in *Sexual Orientation and Human Rights in American Religious Discourse*, edited by Saul M. Olyan and Martha Nussbaum, Oxford: Oxford University

the case that “legalized” same-sex marriage in Hawai‘i, the movement’s leading legal organizations have indeed used impact litigation to achieve marriage equality in several states.⁴⁾ However, there is evidence that the publicity that the marriage litigation strategy has received far outweighs the work that the movement has invested in achieving this goal. In an address at Yale Law School, the Legal Director of Lambda, the best-funded LGBT legal organization in the United States, stated that,

Although marriage has grabbed most of the headlines this year, Lambda Legal, like its sister organizations Gay and Lesbian Advocates and Defenders (GLAD), the National Center for Lesbian Rights (NCLR), and the ACLU’s Lesbian and Gay Rights Project, has been busy... representing unmarried lesbian and gay survivors of those who died on 9/11, defending domestic partnership laws against legal attacks, challenging businesses and government programs that deny unmarried, same-sex couples benefits provided to married, different-sex pairs, and fighting for functional approaches to relationship and parenting rights.”⁵⁾

Press, 248 (“the call for same-sex marriage is at the forefront of the gay rights movement”); Meyer, Michaela D. E. 2003. “Looking Toward the InterSEXions: Examining Bisexual and Transgender Identity Formation from a Dialectical Theoretical Perspective,” in *Bisexuality and Transgenderism: Intersexions of the Others*, edited by Jonathan Alexander and Karen Yescavage, Binghamton, NY: Harrington Park Press, 164 (“the focus of the gay and lesbian movement on marriage as an end goal”); Murdoch, Joyce, and Deb Price, 2001. *Courting Justice: Gay Men and Lesbians v. The Supreme Court* New York: Basic Books, 168 (“marriage finally shoved its way to the forefront of the gay movement in the 1990s”).

4) Ellen Ann Andersen, *Out of the Closets and Into the Courts* (Ann Arbor: University of Michigan Press, 2005).

5) Jon W. Davidson, “Winning Marriage Equality: Lessons from Court,” *Yale Journal of Law & Feminism* 17(2005): 300.

Lambda's internal documents have expressed a similar sentiment:

"Some of the media coverage surrounding our recent losses in our Washington and New York marriage equality cases...suggest that these cases form the bulk of our legal work. Nothing could be further from the truth...[O]ur quest for fairness for same-sex couples represents about 10% of our legal docket. More than 90% of Lambda Legal's efforts seek to end workplace and HIV discrimination, to safeguard the rights of LGBT youth in schools and foster care or to protect the rights of LGBT parents with children."⁶⁾

These comments suggest that there is a rupture between the messages the LGBT movement has expressed and what the public has come to understand about it. Media coverage appears to have distorted the movement's identity and popular understandings about its tactical approach.

Scholarship on legal mobilization investigates how movements use litigation produce symbolic benefits, such as publicity and increased constituent support.⁷⁾ However, this literature has not often considered how a movement's use of the law can inadvertently engage unwanted cultural symbolism that works to the detriment of the movement. When

6) Lambda Legal Defense and Education Fund, "An Overview of Current Legal Cases & Advocacy Initiatives," Internal Correspondence (1 August, 2006).

7) Michael W. McCann, *Rights at work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Christopher Coleman, Laurence D. Nee and Leonard S. Rubinowitz, "Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest." *Law and Society Review* 30(2005): 669; Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (Ann Arbor: University of Michigan Press, 1996); Steven E. Barkan, "Political Trials and Resource Mobilization: Towards and Understanding of Social Movement Litigation." *Social Forces* 58 (1980): 944-961; Michael Paris, "Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984-1995." *Law & Social Inquiry* 26(2001): 631-684.

a social movement uses any tactic—including litigation—for its symbolic value, the significance that is derived from the movement's actions is "contradictory, contestable, fragmented, and changeable".⁸⁾ A social movement's public message may be mediated by other social movements and the mainstream media. Legal mobilization scholars must therefore attend not only to the actions a movement takes, but also to the interpretations that are derived from those actions. A movement's ability to control the message it produces should not be assumed; rather, it should be empirically examined, and treated as an indication of the movement's agenda-setting ability vis-à-vis the other groups and institutions with which it vies for power.

In this paper, I argue that one social movement that uses litigation, the movement for LGBT rights, has found its message distorted in the mainstream media. Although the major LGBT legal organizations litigate on a variety of issues, the mainstream media depict those organizations as narrowly focused on same-sex marriage litigation. I show that this media depiction of LGBT legal organizations comports with the "counterframing"⁹⁾ put forth by the organized opponents of gay rights, whose rhetorical strategy consists of both emphasizing the threat of same-sex marriage and discrediting the movement's tactical use of litigation to attain this goal. Finally, I argue that the reason the countermovement has successfully influenced the media depiction of the LGBT movement is that the countermovement has drawn on populist rhetoric and "activist

8) Anne E. Kane, "Theorizing Meaning Construction in Social Movements: Symbolic Structures and Interpretation during the Irish Land War, 1879-1882." *Sociological Theory* 15 (1997): 253.

9) Robert D. Benford, "Framing activity, meaning, and social movement participation: the nuclear disarmament movement." (Ph.D. diss, University of Texas, Austin, 1987), 75.

judges" framing—discursive resources that have become readily available to conservative opponents of litigating social movements over the past fifty years. This paper therefore builds on the legal mobilization literature by examining the symbolic resources that social movement litigation provides. Yet rather than evaluating how those resources directly impact internal social movement mechanisms, I instead examine how negative symbolism that has been historically associated with social movement litigation has undercut the LGBT movement's ability to control its own public identity.

I. Previous Literature on Social Movement Framing and Meaning Construction

A social movement is involved in the production of meaning. Social movement activists "negotiate a shared understanding of some problematic condition or situation they define as in need of change, make attributions regarding who or what is to blame, articulate an alternative set of arrangements, and urge others to act in concert to affect change".¹⁰⁾ To conduct this "meaning work",¹¹⁾ movement actors deploy *frames*, or language, words, and symbols that render social facts or events meaningful by ordering them into a coherent and value-laden narrative.¹²⁾ Activists

10) Robert D. Benford and David A. Snow, "Framing Processes and Social Movements: An Overview and Assessment," *Annual Review of Sociology* 26 (2000): 615

11) David A. Snow and Robert D. Benford, "Master Frames and Cycles of Protest," pp. 133-55 in *Frontiers in Social Movement Theory*, edited by A. D. Morris and C. M. Mueller (New Haven: Yale University Press, 1992), 136.

12) David A. Snow, E. Burke Rochford, Steven K. Worden, and Robert D. Benford, "Frame Alignment Processes, Micromobilization, and Movement

strategically use frames to attain movement goals such as winning public support or rallying members.¹³⁾ 14)

Framing theory attributes quite a bit of agency to social movement participants. On the one hand, framing scholars have shown that activists are constrained as they choose frames by dominant institutionalized discourses¹⁵⁾ or ideologies,¹⁶⁾ by the frame's ability to secure media

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- Participation." *American Sociological Review* 51(1986): 464-81; Goffman 1974.
- 13) D. McAdam, J. D. McCarthy and Mayer Zald, "Introduction: Opportunities, mobilizing structures, and framing processes—toward a synthetic, comparative perspective on social movements," in *Comparative Perspectives on Social Movements*, edited by D. McAdam, J. D. McCarthy, and M. Zald (New York: Cambridge University Press, 1996).
- 14) In this paper, the *public* to which I refer is "an institutionalized arena of discursive interaction," (Fraser, Nancy, 1990, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," *Social Text* 25/26:56-80:57; Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Massachusetts: MIT Press, 1989) in which contemporary problems are processed and common values negotiated. It is in this arena that widespread, heterosexual understandings of LGBT people are constructed. The LGBT movement seeks legitimacy through this official public—even though LGBT people are alienated from it and contest its intrinsic logic (Michael Warner, "Beyond Gay Marriage," pp. 259-289 in *Left Legalism/ Left Critique*, edited by W. Brown and J. Halley (2002), 86)—because it influences politics (Fraser, "Rethinking the Public Sphere," 57). The ideologies of the dominant public also shape social behavior outside the political realm by inducing people to accept (or to resist) present power configurations (*Ibid.*, 62). A social movement that influences the dominant public discourse will also experience longer-term gains when its own interests are subsequently reinforced through a mainstream media apparatus that reproduces and reifies the dominant public's conception of reality (Habermas, *The Structural Transformation of the Public Sphere*, 161-2, 172-7; Hilgartner, Stephen, and Charles L. Bosk, "The Rise and Fall of Social Problems: A Public Arenas Model," *American Journal of Sociology* 94 (1988): 53-78.)
- 15) Myra Marx Ferree, "Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany." *American Journal of Sociology* 109 (2003): 304-344.; Marc W. Steinberg, "The talk and back

coverage,¹⁷⁾ or by the threat of counterframing by the opposition.¹⁸⁾ Yet at the same time, framing theory often depicts activists as tactically selecting from among the available cultural resources¹⁹⁾ to present a particular message to a particular audience. For example, within the same movement, activists may draw on an “institutionally anchored” discourse if they wish to reach a more mainstream audience, whereas they may use more critical, alternative frames to animate constituents.²⁰⁾ Therefore, even as the literature emphasizes the constraints on framing, it holds the activists themselves ultimately responsible for orchestrating the impact their movement will have.

One critique of the framing literature is that it “tends to focus on the speeches, writing, statements, or other formal ideological pronouncements by movement actors”.²¹⁾ This has generated what McAdam calls an

talk of collective action: A dialogic analysis of repertoires of discourse among nineteenth-century English cotton spinners.” *American Journal of Sociology* 105 (1999): 736–80.

- 16) Pamela E. Oliver and Hank Johnston, “What a good idea! Frames and ideologies in social movement research,” *Mobilization: An International Quarterly* 5(2000): 37–54. “Our Families & Relationships,” http://www.beyondmarriage.org/full_statement.html (accessed 1 May 2007). p.1.
- 17) Deana A. Rohlinger, “Framing The Abortion Debate: Organizational Resources, Media Strategies, and Movement–Countermovement Dynamics,” *Sociological Quarterly* 43 (2002): 479–507; Todd Gitlin, *The Whole World is Watching: Mass Media and the Making and Unmaking of the New Left* (Berkeley: University of California Press, 1980).
- 18) Charlotte Ryan, *Prime Time Activism: Media Strategies for Grassroots Organizing* (Boston: South End Press, 1991); J. Zuo and Robert D. Benford, “Mobilization processes and the 1989 Chinese democracy movement,” *Sociological Quarterly* 36 (1995): 131–5.
- 19) See Ann Swidler, “Culture in Action: Symbols and Strategies,” *American Sociological Review* 51(1986): 273–86.
- 20) Ferree, “Resonance and Radicalism”; Bernstein, Mary. 1997. “Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement,” *American Journal of Sociology* 103: 531–65.

“ideational bias” in the literature,²²⁾ insofar as it fails to consider how a movement’s actions and tactics may be even more critical to garnering press coverage, drawing in adherents, or conveying messages to movement participants and opponents.²³⁾ Only a few studies have examined how actions, rather than words, produce meaning for a social movement. Cadena–Roa, for example, examines one social movement that created a mascot to attract public interest to its cause.²⁴⁾ Eyerman and Jamison demonstrate that a movement may use songs to reinforce knowledge constituents hold in common.²⁵⁾ Bernstein gives examples of the ways in which movement activists take action to convey information about their constituents’ social identity.²⁶⁾ Several authors have argued that nonviolent tactics increased public support for the civil rights movement by giving the movement a stoic air, which was favorably contrasted with the white supremacists’

21) Doug McAdam, “The Framing Function of Movement Tactics: Strategic Dramaturgy in the American Civil Rights Movement,” pp. 338–355 in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, edited by D. McAdam, J. D. McCarthy, and M. N. Zald (New York: Cambridge University Press, 1996), 341.

22) McAdam, “The Framing Function of Movement Tactics.”

23) McAdam, “The Framing Function of Movement Tactics.”; see also William H. Sewell, “Historical Events as Transformations of Structures: Inventing Revolution at the Bastille.” *Theory and Society* 25 (1996): 841–881.; Stephen Ellingson, “Understanding the Dialectic of Discourse and Collective Action: Public Debate and Rioting in Antebellum Cincinnati,” *American Journal of Sociology* 101 (1995): 100–44.

24) Jorge Cadena–Roa, “Strategic Framing, Emotions, and *Superbarrio*–Mexico City’s Masked Crusader.” *Mobilization: An International Quarterly* 7 (2002): 201–216.

25) Ron Eyerman and Andrew Jamison, *Music and Social Movements: Mobilizing Traditions in the Twentieth Century* (Cambridge: Cambridge University Press, 1998), 23–4.

26) Bernstein, “Celebration and Suppression.”

violence²⁷⁾ and the police's brutal suppression.²⁸⁾

Unlike the studies of formal movement framing, which analyze *what is said*, the studies that look at tactic must analyze *what is understood*. Here the interpretation of collective action becomes the site of inquiry.²⁹⁾ It is assumed that movement activists do not construct meaning; they simply provide a venue through which a movement's meaning is socially constructed by movement participants, outside observers, and opponents.³⁰⁾

The meaning that is made of a movement, in turn, depends upon the fluctuating (and non-uniform) symbolic value of a movement's actions, as well as their context. "As 'cultural entrepreneurs' movement leaders have no ultimate control over how people will interpret symbolic rhetoric and images, what symbolic models individuals bring to bear in their interpretations, or the specific meanings individuals will construct from those symbolic elements".³¹⁾ Furthermore, there are several ways in which a movement's positions, goals, and identity might be misinterpreted. Activists can "derive multiple and seemingly contradictory meanings somewhat inadvertently from the cultural milieu",³²⁾

27) McAdam, "The Framing Function of Movement Tactics."

28) Dennis Chong, *Collective Action and the Civil Rights Movement* (Chicago and London: University of Chicago Press, 1991); Barkan, "Political Trials and Resource Mobilization."

29) Ellingson, "Understanding the Dialectic of Discourse and Collective Action"; Anne Kane, "Reconstructing Culture in Historical Explanation: Narratives as Cultural Structure and Practice." *History and Theory* 39(2000): 311-330; Sewell, "Historical Events as Transformations of Structures."

30) Kane, "Theorizing Meaning Construction in Social Movements."

31) *Ibid.*, 255.

32) Ellen K. Scott, "Everyone against Racism: Agency and the Production of Meaning in the Anti-Racism Practices of Two Feminist Organizations." *Theory and Society* 29 (2000): 788.

perhaps by using tactics that are linked to particular cultural notions of legitimacy³³⁾ or illegitimacy.³⁴⁾³⁵⁾ Alternatively, an opposing social movement (a “countermovement”) may be more successful at propagating its competing interpretations of the movement’s actions.³⁶⁾

To summarize, the framing literature, by overemphasizing “formal” framing and by underemphasizing the unintended interpretations of a social movement’s tactics, problematically assumes that a social movement is able to control the meaning it produces. This generates a “movement –centric”³⁷⁾ bias in the social movements literature, which fails to account for the ways in which the message a movement conveys to the public is reconfigured through various mediators including opponents, dominant ideologies, and the media. If one is to understand the social significance of a movement’s actions, the observer must attend to the

33) McAdam, “The Framing Function of Movement Tactics.”

34) Kimberly D. Elsbach and Robert I. Sutton, “Acquiring Organizational Legitimacy through Illegitimate Actions: A Marriage of Institutional and Impression Management Theories.” *The Academy of Management Journal* 35 (1992): 699–738.

35) For example, recent empirical studies have shown that when protests generate some sort of conflict, the mainstream media’s coverage of that event tends to focus on the specific conflict, which preempts discussion of the protestors’ specific demands (Aogan Mulcahy, “Claims-Making and the Construction of Legitimacy: Press Coverage of the 1981 Northern Irish Hunger Strike,” *Social Problems* 42 (1995): 449–467; Jackie Smith, John D. McCarthy, Clark McPhail and Boguslaw Augustyn, “From Protest to Agenda Building: Description Bias in Media Coverage of Protest Events in Washington, D.C.” *Social Forces* 79 (2001): 1397–1423). Protest is therefore one social movement tactic that evokes a different interpretation of the social movement’s goals than that intended by the activists who orchestrated it.

36) Dawn McCaffrey and Jennifer Keys, “Competitive Framing Processes in the Abortion Debate: Polarization–vilification, Frame Saving, and Frame Debunking.” *Sociological Quarterly* 41(2000): 41–61; Rohlinger, “Framing The Abortion Debate.”

37) McAdam, “The Framing Function of Movement Tactics.”

influence of these mediators,³⁸⁾

On the one hand, this study draws upon findings from the sociological literature that tactics shape public perceptions of a social movement. Here a movement's *legal* tactics have become the focus of the news coverage and of the antigay opposition. Yet this study goes beyond the current social movements and legal mobilization literatures by showing that a particular (and even secondary) tactic, same-sex marriage litigation, can be mischaracterized as a movement priority—especially when that tactic is controversial. Thus, the case furthermore demonstrates how countermovements can play a significant role in defining the identity and the ostensible aims of a social movement.

II. The LGBT Movement and its Countermovement

1. Litigation and the LGBT Movement

In the 1970s, more gay men and lesbians than ever before became politically active, creating organizations to empower gay identity and to remove the social stigma against homosexuality. Although legal organizations did not immediately become a highly-visible wing of the gay and lesbian rights movement, they rose to prominence in the 1980s, as a series of events turned LGBT people's attention toward the law. First, the community became desperately in need of legal protection as gay men (especially) fell victim to the HIV virus and the discrimination that accompanied it.³⁹⁾ Second, the Supreme Court's 1989 *Bowers v. Hardwick* decision upheld a sex-neutral sodomy law,

38) See Kane, "Theorizing Meaning Construction in Social Movements."

39) Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation*, New York: Anchor/Doubleday, 1995.

and constitutionalized the homophobia and discrimination lesbians and gay men experienced in their daily lives. Perhaps due to these external events, legal organizations in the LGBT movement acquired more funding and visibility within the movement in the late 1980s.⁴⁰⁾ Since the 1990s, three legal organizations in particular have become dominant voices in the LGBT movement: Lambda Legal (founded in 1973 in New York); the National Center for Lesbian Rights or NCLR (1977, formerly the Lesbian Rights Project, San Francisco); Gay and Lesbian Advocates and Defenders or GLAD (1978, Boston).

These leading LGBT legal organizations collectively decided to pursue marriage litigation after *Baehr v. Lewin* (1993), in which the Hawai'i Supreme Court held that the denial of marriage licenses to same-sex couples violated the state's constitution.⁴¹⁾ Since then the LGBT movement has become popularly associated with its same-sex marriage litigation.⁴²⁾ This has caused consternation within the movement among activists

40) Andersen, *Out of the Closets and Into the Courts*, 44.

41) Whereas none of the major LGBT legal organizations pushed for marriage equality on the eve of the *Baehr* (indeed, both Lambda Legal and the ACLU declined the *Baehr* plaintiffs' offer to act as co-counsel in the case), the decision shifted the organizations' priorities. Lambda agreed to represent the Hawai'i plaintiffs as the case proceeded through the appeals process. See *Baehr v. Miike* (1996 WL 694235, Hawai'i Cir.Ct. (1996); *Baehr v. Miike*, 87 Hawai'i 34 (1997); *Baehr v. Miike*, 92 Hawai'i 634 (1999). Lambda also encouraged other organizations to take marriage cases by circulating petitions and hosting forums (e.g., the Marriage Project and the Litigator's Roundtable) in which counsel from all of the major LGBT organizations met to share resources and tactical approaches to marriage equality (Andersen, *Out of the Closets and Into the Courts*, 53; David Orgon Coolidge, 1998. "Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy." *Brigham Young University* 12 (1998): 223-226. It was through these forums that GLAD devised its strategy in the *Baker v. Vermont* (1999) (Andersen, 184; 177-178).

who feel overshadowed by this legal campaign for marriage; some have even organized to push the movement "beyond marriage."⁴³⁾ Many within the LGBT community who oppose the legal pursuit of same-sex marriage argue that, while same-sex marriage should not be outlawed, activists ought not squander their energy to guarantee equal access to an institution that is so "deeply flawed".⁴⁴⁾ Marriage, many argue, is unlikely to ever shake its gendered and sexist foundations.⁴⁵⁾ Queer theorists further suggest that same-sex marriage would fully entrench heterosexual norms within the gay community, and stigmatize those who fail to capitulate to the monogamy the institution demands.⁴⁶⁾

Given the controversy that marriage litigation has inspired within the LGBT community, it is important to assess the extent to which litigating organizations in the movement have actually focused on same-sex marriage. Between 1996 and 2006, the movement's top three legal advocacy organizations (Lambda Legal, NCLR, and GLAD) devoted only a small part of their dockets to same-sex marriage litigation (see Section III). It was much more common for these organizations to take the cases of LGBT parents who sought custody, visitation rights, or second-parent adoption. Cases in which LGBT employees were fired or retaliated against also comprised a large portion of the dockets. Many other cases related to the social inclusion of LGBT people,

42) *See supra*, footnote 1.

43) Beyond Marriage (2006) "Beyond Same-Sex Marriage: A New Strategic Vision for all our Families & Relationships,"

http://www.beyondmarriage.org/full_statement.html (accessed 1 May 2007).

44) Claudia Card, "Against Marriage and Motherhood," *Hypatia* 11 (1996).

45) Nancy D. Polikoff, "We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage", *Virginia Law Review* 79 (1993): 1535-1550.

46) Warner, "Beyond Gay Marriage."

including cases in which a club, retirement home, or public housing project had refused to accommodate LGBT couples, as well as cases in which healthcare insurance companies had denied benefits to people living with HIV/AIDS, to transgender people, or to the partner of an insured LGBT person. A final major case type on the LGBT legal organizations' dockets involved LGBT and gender-nonconforming youth who did not comply with their public high school's gendered grooming standards.

The diversity of the types of cases on these organizations' dockets is challenges the belief-held by both supporters and opponents of LGBT rights-that the LGBT movement has been dominated by its focus on same-sex marriage litigation. In the following Sections, I provide a framework for explaining why the movement has become popularly associated with its same-sex marriage campaign. I argue that this construction of the movement has been propagated by opponents of LGBT rights, who have gained discursive leverage over the LGBT movement by drawing on discourse that has become prevalent in American political culture.

2. The conservative Right and the antigay countermovement

The roots of today's antigay countermovement can be found in the coalition of socially-conservative Christians (often referred to as the Christian Right) that formed in opposition to the sexual liberalization of American society that occurred during the 1960s.⁴⁷⁾ Since the 1970s, the Christian Right has been the strongest force driving organized antigay activity.⁴⁸⁾ As the LGBT movement has made progressive legal

47) William N. Eskridge, *Equality practice: Civil unions and the future of gay rights* (New York: Routledge, 2002).

advances, and as public support for LGBT issues such as employment nondiscrimination has increased,⁴⁹⁾ this countermovement has increasingly evoked the “threat” of same-sex marriage to mobilize its constituents.⁵⁰⁾ For example, the Family Research Council, Focus on the Family, and the Christian Coalition all lobbied national and state legislatures outside of Hawai'i after *Baehr*.⁵¹⁾ Between 1993 (when *Baehr* was decided) and 1996, sixteen states passed bills to ensure marriage would remain a contract between heterosexual couples. Only thirteen states have not at least introduced a bill that would do as much.⁵²⁾ The countermovement has made significant gains at the national level as well. In 1996, the Federal Defense of Marriage act was passed, specifying that only opposite-sex couples would be eligible for federal marriage benefits. Same-sex marriage also became a central issue in the 1996 election period, during which most Republican candidates signed a pledge to “defend” heterosexual marriage.⁵³⁾

In its campaign against same-sex marriage, the Christian Right has

48) John C. Green, “Antigay: Varieties of Opposition to Gay Rights.” in *The Politics of Gay Rights* edited by Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox (Chicago: University Of Chicago Press, 2000).

49) Gay & Lesbian Alliance Against Defamation (2007) “GLAAD Media Reference Guide,” <http://www.glaad.org/media/guide/infocus/polls.php> (accessed 1 May 2007).

50) Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (Ann Arbor: The University of Michigan Press, 2002); Didi Herman, “(Il)legitimate Minorities: The American Christian Right's Antigay-Rights Discourse.” *Journal of Law and Society* 23 (1996): 346–363; Jonathan Goldberg-Hiller and Neal Milner, “Rights as Excess: Understanding the Politics of Special Rights.” *Law & Social Inquiry* 28 (2003): 1075–1118.

51) Andersen, 179.

52) Sean Cahill, “The Symbolic Centrality of Gay Marriage in the 2004 Presidential Vote.” in *The Future of Gay Rights in America*, edited by H. N. Hirsch (New York: Routledge, 2005), 55.

53) *Ibid.*, 54.

avoided making the claim that LGBT people are immoral or evil, which would appeal to a set of religious norms that are not widely-shared. Instead, it has depicted the LGBT movement as a threat to society—insofar as its same-sex marriage litigation threatens both the commonplace definition of marriage as well as the American democratic tradition.⁵⁴⁾ In the following Section, I show that this framing is linked to discourses that have become particularly resonant in contemporary American political culture due in large part to their continual deployment by the conservative Right since the 1960s.

a) The discursive foundation of the antigay campaign

The American Right has consisted historically of two factions: social conservatives, like the ones that are the backbone of the antigay movement, and economic conservatives.⁵⁵⁾ These two factions within the Right espouse “different—and even opposing—views of human nature, men’s and women’s votes, the function of government, and the ideal society.”⁵⁶⁾ These two factions were able to unite in the 1960s in resistance to the vanguard of emerging social movements that espoused race and gender equality and sexual liberation. As Klatch characterizes it:

“[D]espite the very different beliefs that separate these two [conservative] worlds, it is through the naming of the forces that threaten America that the two constituencies converge. In locating who or what is responsible for America’s historical shift, the two groups are able to unite into a single cause.”⁵⁷⁾

54) Goldberg–Hiller, *The Limits to Union*.

55) Seymour Martin Lipset and Earl Raab, *The Politics of Unreason: Right-Wing Extremism in America, 1790–1970* (New York: Harper & Row, 1970).

56) Rebecca Klatch, “Coalition and Conflict among Women of the New Right,” *Signs* 13 (1988): 671–2.

As this New Right coalesced in resistance to its common enemy, it began to drive its message home by labeling this enemy as an elite group. While the term *elite* can be used to refer to the financial leaders, or the ruling class of a society⁵⁸⁾ –which many in the economically conservative right undoubtedly are–conservatives in the 1960s began to use the term to characterize the radical social movements of the 1960s as extreme, pretentious, or just *different* from everyday people. According to the conservative framing, elites were “defined not so much by class or wealth or position as they are by a *general outlook*. Their core belief...is that they are superior to We the People.”⁵⁹⁾

Having framed the enemy as the elite, this new unified Right appropriated populist ideals (once the beacon of liberal social movements of the late nineteenth century) as an affirmative counterframe.⁶⁰⁾ Populism is “a language whose speakers conceive of ordinary people as a noble assemblage not bounded narrowly by class, view their elite opponents as self-serving and undemocratic, and seek to mobilize the former against the latter.”⁶¹⁾ Ronald Reagan was one of the first conservatives to evoke populist discourse in the 1960s, in numerous speeches supporting Barry Goldwater's campaign for the presidency and in his own gubernatorial campaign in California. Nixon too appealed to populist rhetoric during

57) *Ibid.*, 54.

58) C. Wright Mills, *The Power Elite* (Oxford: Oxford University Press, 1956).

59) Laura Ingraham, quoted in Geoffrey Nunberg, *Talking Right: How Conservatives Turned Liberalism into a Tax-Raising, Latte-Drinking, Sushi-Eating, Volvo-Driving, New York Times-Reading, Body-Piercing, Hollywood-Loving, Left-Wing Freak Show* (Public Affairs: 2005), 87.

60) Jonathan Rieder, “The Rise of the ‘Silent Majority’,” in *The Rise and Fall of the New Deal Order*, edited by Steve Fraser and Gary Gerstle (Princeton, N.J., 1989), 260.

61) Michael Kazin, *The Populist Persuasion: An American History*. (Ithaca, NY: Basic Books, 1995), 1.

his presidential campaign.⁶²⁾ While Reagan mostly used populist rhetoric during his presidency in the 1980s defend proposed economic reforms,⁶³⁾ Quayle reestablished a cultural dimension to conservative populism by asserting that America was divided between “two cultures”: “the cultural elite and the rest of us.”⁶⁴⁾ Conservative politicians like Newt Gingrich in the 1990s have followed suit by promoting the vision of a morally-divided America in which the majority is subjugated to the interests of a cultural elite.⁶⁵⁾

Conservatives since the 1960s have brandished this new populism to critique the judiciary. The social movements of the 1960s and 1970s—the common enemy that united the New Right—often achieved significant legal success through sympathetic courts. Conservatives saw the judiciary and the law as permitting the social excesses of the civil rights movement, and thus as “deeply involved in sexual liberalization and the decline of the family.”⁶⁶⁾ Thus conservatives during Warren’s tenure on the Supreme Court—and in the years that followed—denounced *judicial activism*. They insisted that courts which overturn democratically-enacted laws thwart the sovereign majority’s right to pass legislation that coheres with its own morals and “values.”⁶⁷⁾

62) Nunberg, 86; Rieder, 260.

63) Joanne Morreale, *A New Beginning: A Textual Frame Analysis of the Political Campaign Film*, (Albany: State University of New York Press, 1991), 40–41. Terri Bimes, “Ronald Reagan and The New Conservative Populism,” in *Institute of Governmental Studies Working Paper* (Berkeley: University of California, 2002), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1001&context=igs>.

64) Quoted in Nunberg, 86.

65) *Ibid.*, 87.

66) Eskridge, 11.

67) Nunberg, 106; Stefanie A. Lindquist, Joseph L. Smith, and Frank B. Cross, “The Rhetoric of Restraint and the Ideology of Activism,” *Constitutional*

The contemporary conservative use of the “activist judges” language draws on populist principles by identifying judges as elites, whose values are out of line with those of the populace. When judges are seen as taking sides in the elite/populist culture wars—as enshrining their own elite values into law—they not only violate the populist ideal of majority rule against powerful special interests; they also blur the bright line in the American political tradition between law and politics. Americans “divide the world into two distinct domains: a domain of politics and a domain of law. In politics, the people rule... Law is set aside for a trained *elite* of judges and lawyers whose professional task is to implement the formal decisions produced in and by politics.”⁶⁸⁾ When judges act beyond their legitimate role as neutral enforcers of the popular will—when their actions can be interpreted as “legislating from the bench”—the judiciary is exposed to critique, resistance, and defiance by the populace and elected officials alike.⁶⁹⁾

It should be noted that populism and the related idea of judicial activism are merely discursive shells that can convey either conservative or liberal agendas. Both populist discourse and the “activist judges” frame were originally deployed by social progressives before conservatives appropriated that language in the 1960s. During the *Lochner* (1905) period, during which the Supreme Court used a new interpretation of the Due Process clause of the 14th amendment to strike down many regulations on industry, progressive critics attacked the Court for its activism.⁷⁰⁾ In that same period, progressives in the labor and prohibition

Commentary 24 (2007).

68) Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), 7, emphasis added.

69) *Ibid.*, 227.

movements drew heavily on populist discourse to rally constituents against elite business interests. The fact that “judicial activism” framing was originally deployed by social liberals before being used for conservative agendas illustrates the political neutrality of populist and judicial activist discourse. What breathes life into these frames is how they are concertedly mobilized by social movements to support a particular political cause.

In the Section that follows, I show how the antigay countermovement has drawn on populist ideals and “activist judges” framing in its opposition to same-sex marriage. This Section will lay the foundation for the part of this paper that analyzes the political consequence of the use of these frames—and in particular, how the availability of these discourses in American political culture have provided traction to the antigay countermovement in its goal of depicting the LGBT movement as focused on the undemocratic goal of same-sex marriage litigation.

b) Populist discourse in the contemporary antigay movement

Although the Christian right dominates the antigay countermovement, it has not advanced its agenda by labeling LGBT people as sinful or evil. Rather, the countermovement has drawn heavily on the New Right’s populist rhetoric, arguing that gays and lesbians seek not civil rights, but “special rights,” or legal protections for a chosen and immoral lifestyle.⁷⁰ This critique focuses on LGBT movement strategy rather than on LGBT individuals—and especially on the movement’s use of

70) Keenan D. Kmiec, “The origin and current meanings of ‘judicial activism’.” *California Law Review* (2004): 1444.

71) Goldberg-Hiller, *The Limits to Union*.

same-sex marriage litigation. This, they argue, violates the right of the populace under a democratic political framework to pass legislation based on its own moral values.⁷²⁾ According to this view, elite lesbians and gay men use their disproportionate political power to strong-arm lawmakers: "Lesbians and gays, then, are far from being an 'oppressed minority'; their wealth and power vastly exceeds their numbers. Indeed, 'normal' people, particularly orthodox, practising Christians, need protection from them and their 'retribution'".⁷³⁾

Justice Scalia's dissents in *Romer* and *Lawrence* are one example of this populist rhetoric; both dissents portray LGBT people as powerful elites and admonish the judiciary for subverting the democratic will. In *Romer v. Evans* (1996) the U.S. Supreme Court struck down an amendment to Colorado's constitution that prohibited any legislative, executive, or judicial enactment prohibiting discrimination against LGBT people. In his dissent, Justice Scalia argued that Colorado's Amendment 2 did no more than prohibit LGBT people from "obtain[ing] *preferential* treatment without amending the State Constitution."⁷⁴⁾ Scalia argued that, by challenging Amendment 2, the LGBT movement did not seek legal protection, but rather to "revise [traditional sexual] mores through the use of laws."⁷⁵⁾ Politically powerful gays and lesbians could easily enlist legislators,⁷⁶⁾ lawyers,⁷⁷⁾ and judges⁷⁸⁾ alike to further this goal,

72) *Ibid.*; Herman, "(Il)legitimate Minorities": 346-363.

73) *Ibid.*, 351.

74) *Romer v. Evans* 517 U.S. 620 (1996), 639.

75) See also Scalia's dissent in *Lawrence*: "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." 539 U.S. 558, 602 (2003) (Scalia, dissenting).

“imposing upon all Americans the resolution favored by the *elite* class” (emphasis added).⁷⁹⁾ Scalia rebukes the judiciary for “inventing a novel and extravagant constitutional doctrine”⁸⁰⁾— an act requiring the judicial effort, or *activism*—“to take the victory away from traditional [democratic] forces.”⁸¹⁾ Because the judiciary is an inherently elite institution, the imposition of its “political will”⁸²⁾ into law constitutes elite rule. This, Scalia argues, violates the American political tradition: “it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”⁸³⁾⁸⁴⁾

Scalia again applied populist rhetoric and the “activist judges” frame in his *Lawrence v. Texas* (2003) dissent. In that case, however, Scalia took the additional step of fastening this rhetoric to the inflammatory issue of same-sex marriage:

76) The fact that gay men and lesbians were able to secure protective legislation, Scalia argues, is an indication of their political power rather than their social disadvantage: “It is also nothing short of preposterous to call ‘politically unpopular’ a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.” *Romer*, 517 U.S. 620, 652 (Scalia, dissenting).

77) *Romer*, 517 U.S. 620, 654–5 (Scalia, dissenting).

78) “This Court has no business imposing upon all Americans the resolution favored by the elite class [lawyers] from which the Members of this institution are selected, pronouncing that “animosity” toward homosexuality, *ante*, at 1628, is evil.” *Romer*, 517 U.S. 620, 636 (Scalia, dissenting).

79) *Romer*, 517 U.S. 620, 636 (Scalia, dissenting).

80) *Ibid.*, 653.

81) *Ibid.*, 603.

82) *Ibid.*, 653.

83) *Ibid.*, 603–4.

84) Scalia seconds this sentiment in the *Lawrence* decision: “the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed” (*Lawrence* 539 U.S. 558, 602).

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly... Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned... This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortably assures us, this is so.⁸⁵⁾

Scalia explicitly links judicial activism with same sex marriage by arguing that the latter is the "logical conclusion" of the former. He was not the only one to draw this connection, however. Just as the Christian Right initially blamed the courts for promoting licentious sexual behavior in the 1960s, antigay activists after *Lawrence* (June 26, 2003) and *Goodridge* (Nov. 18, 2003) held the judiciary accountable for enshrining the goals of the "elite" LGBT movement (narrowly defined as same-sex marriage) into law. Scalia's dissenting opinion provided an initial platform for this rhetoric. In an interview on CNN, the reverend Jerry Falwell noted that "Judge Scalia said what most of us fear, that this is going to lead to the legalization of same-sex marriage, and I think that is an abomination."⁸⁶⁾ This sentiment then reverberated throughout the countermovement. The president of the Family Research Council emphasized that marriage is under the threat of the

85) *Lawrence v. Texas* 539 U.S. 558 (2003), 604.

86) CNN (2003) "Crossfire 16:30: Interview with Jerry Falwell, Christopher Cox" 26 Jun.

“black plague,” of “un-elected judges in black robes [who] are not only ruling against the wishes of the American people, [but] they are [also] overturning laws passed by the elected representatives of the people.”⁸⁷⁾ The Traditional Values Coalition announced “A Call to End Judicial Tyranny,” which assailed the judiciary for usurping the lawmaking role of the democratic majority. This report, as well as others by Concerned Women for America and the Catholic Action league, called for the removal of the allegedly activist judges from office.⁸⁸⁾⁸⁹⁾

87) Fancher, B., & Parker, P. (2003, October 13). Pro-family leaders speak up as ‘marriage protection week’ kicks off. AgapePress, cited in Cahill, Sean, 2005. “The Symbolic Centrality of Gay Marriage in the 2004 Presidential Vote,” in *The Future of Gay Rights in America*, edited by H. N. Hirsch, New York: Routledge.(Fancher and Parker 2003, cited in Cahill 2005: 64)

88) Cahil, 64.

89) A staffer for Karl Rove has reported that Rove pushed conservative politicians to “to attack ‘liberal activist judges’ and to present themselves as ‘people who will strictly interpret the law and not rewrite it from the bench.’ ... [T]he term ‘activist judges’ motivates all sorts of people for very different reasons. If you’re a religious conservative... it means judges who established abortion rights or who interpret Massachusetts’s equal-protection clause as applying to gays. If you’re a business conservative, it means those who allow exorbitant jury awards. And in Alabama especially, the term conjures up those who forced integration. ‘The attraction of calling yourself a ‘strict constructionist,’ as Rove’s candidates did, this staffer explained, ‘is that you can attract business conservatives, social conservatives, and moderates who simply want a reasonable standard of justice’” (Joshua Green, “Karl Rove in a Corner, Atlantic Monthly,” *The Atlantic Monthly* 1 (May, 2004): 12–15.

Whether or not the “activist judges” framing was deliberate, it is clear that the frame not only reverberated throughout the antigay countermovement after 2003 (as this Section shows), but also that it as been a powerful issue frame in other contexts of interest to conservatives. The “activist judiciary” rhetoric was evident in the public debates around a) the judiciary’s handling of Terry Schiavo’s case in 2005; b) local governments’ right to seize private property through its powers of eminent domain

The “activist judges” frame has important political repercussions because it legitimates legislative resistance to court decisions.⁹⁰⁾ Legislators are not institutionally bound to refrain from maligning the judiciary⁹¹⁾; in fact, doing so actually reinforces legislative power. After *Goodridge*, the Majority Leaders of both the Senate (Bill Frist) and the House (Tom Delay) issued statements deprecating the activist judiciary.⁹²⁾ Other politicians threatened to appoint an inspector general to regulate judges.⁹³⁾ One of the more radical positions was that taken by the head of the Republican Party, President Bush, who supported a federal constitutional amendment to tie the hands of “[a]ctivist judges [who] have begun redefining marriage by court order, without regard for the will of the people and their elected officials.”⁹⁴⁾

(Mears 2006); and c) the order to remove the Ten Commandments from an Alabama courthouse (Jannell McGrew and Roy Moore, “Backer Holds Lead,” *Montgomery Advertiser* (3 Nov. 2004), sec A, p.6.).

90) Kramer, *The People Themselves*.

91) See e. g. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

92) House Majority Leader Tom DeLay (R-Texas) said, “When you have a runaway judiciary, as we obviously have, that has no consideration for the Constitution of the United States, then we have available to us through that Constitution (a way) to fix the judiciary” (Henderson, Stephen and Ron Hutcheson “Court endorses gay marriage: Massachusetts ruling striking down barriers seen as a rights turning point,” *Milwaukee Journal Sentinel (Wisconsin)*, (19 Nov. 2003), 1A). Senate Maj. Leader Bill Frist said that heterosexual marriage “is the law of the land passed by this body, and if the courts begin to tear that down, we have a responsibility to address it” (Karen Branch-Brioso, “Gay Marriage,” *St. Louis Post-Dispatch (Missouri)* (23 Nov. 2003), B1).

93) Bill Mears, “O’Connor: Don’t Call Us ‘Activist Judges’”, CNN, 28 Nov. 2006, <http://www.cnn.com/2006/POLITICS/10/27/mears.judicialindependence/> (accessed 1 May 2007).

94) State of the Union Address, George Bush, 2004, 20 Jan., CSPAN, http://www.cspan.org/executive/transcript.asp?cat=current_event&code=bus_h_admin&year=2004 (accessed 1 May 2007).

Bush's statements were echoed in the 2004 Republican Party Platform, which declared that "anything less than a Constitutional amendment [prohibiting same-sex marriage], passed by the Congress and ratified by the states, is vulnerable to being overturned by activist judges."⁹⁵⁾

The unsurprising result of this intensified rhetoric from the legislative branch was the introduction of numerous bills and initiatives that target both same-sex marriage and the judiciary itself. The Marriage Protection Act, still in session after its passage in the House of Representatives, would remove federal courts from jurisdiction over questions arising under the Defense of Marriage Act. Congress also introduced a Federal Marriage Amendment, which would limit the power of any judge to interpret a federal or state constitution "to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Legislators debating the amendment have proposed to strip the courts of jurisdiction over same-sex marriage.⁹⁶⁾

The antigay organizations pressuring Congress to pass the Federal Marriage Amendment drew heavily on populist themes. The conservative nonprofit organization Alliance for Marriage (AFM) "argued that prudent actions stemming directly from 'the people' were warranted" in order "to reinstate order in the wake of judicial chaos."⁹⁷⁾ The argument assumed that judges did not hold the "common sense view of marriage

95) Republican National Committee, "2004 Republican Party Platform: A Safer World and a More Hopeful America," 2004, <http://www.gop.com/media/2004platform.pdf> (accessed 1 May 2007).

96) See A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2004) (statement of Prof. Katherine Spaht).

97) Bennett, JA. 2006. "Seriality and Multicultural Dissent in the Same-Sex Marriage Debate." *Communication and Critical/Cultural Studies* 3, 151

shared by the vast majority Americans."⁹⁸⁾ Other religious organizations pushing for the amendment pursued a similar rhetorical strategy, arguing that the "unelected officials" that supported same-sex marriage would "erase the legal road map to marriage and the family from American law" and erode "the understanding of marriage for future generations."⁹⁹⁾

Movements that use populist discourse and "activist judges" framing often find themselves at an advantage over their opponents because such language is quite difficult to counter. Some have argued that there *is* no counter-trope to populist discourse.¹⁰⁰⁾ A look at the historical contexts in which these discourses have been used demonstrates that this is not the case(See <Figure 1>). A major opposing discourse in the American political tradition emphasizes that the court's institutional role is countermajoritarian by nature, and thus that the court acts legitimately as a stalwart against the erratic will of the masses. Elements of this discourse have been deployed in various historical contexts in which proponents have positively reframed judicial action that contravenes majority will as "protective" rather than "activist." During the *Lochner* period, the Court insisted that it was the legitimate role of the judiciary to *protect* certain fundamental rights (including the freedom of contract and the right to work), which were not subject to popular vote. The Warren court and its supporters similarly insisted the courts must *protect* political minorities who were not adequately represented in the legislative process. Although such language can in theory act as a wedge against the populist,

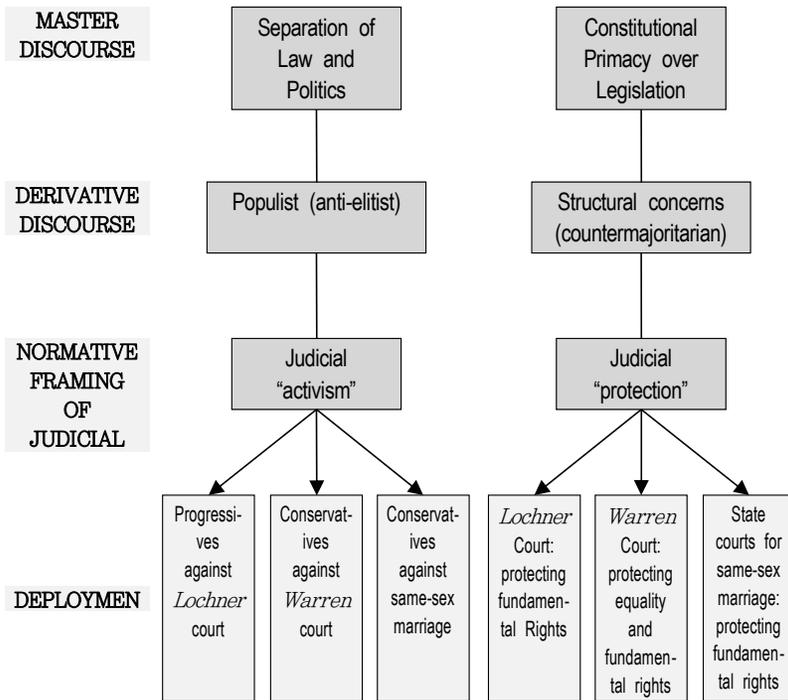
98) *Ibid.*, 153.

99) *Ibid.*, 150-1.

100) Michael Kazin, "Democracy Betrayed and Redeemed: Populist Traditions in the United States" *Constellations* 5 (1998):75-84.

“activist judges” framing, its more limited (countermajoritarian) appeal makes it less likely to draw in similar levels of popular support.

〈Figure 1〉 Law-Related Discursive Rescursive in American Political Culture



In summary, the antigay countermovement has advanced its agenda not by focusing on LGBT individuals, but rather by targeting the LGBT movement itself. The countermovement has promoted the idea that the LGBT movement uses its elite connections with “activist judges” to push same-sex marriage—a particularly divisive issue both within the LGBT community and in the mainstream—through the courts. This conception hooks into a populist political discourse, which itself

has become prevalent in American political culture during the twentieth century. The social movements literature indicates that the availability (or lack) of discursive resources for a particular movement impacts that movement's ability to make its collective action frames resonate with outside observers.¹⁰¹⁾ In the next Section, I present empirical media data to assess the effect of the antigay countermovement's discursive resources (populist discourse and "activist judges" frames) on its ability to frame the LGBT movement as heavily legalized and focused narrowly on same-sex marriage.

III. Research Methods

The data presented here are intended to measure the resonance of the countermovement's depiction of the LGBT movement—which specifically focuses on its use of litigation—within the mainstream media.¹⁰²⁾ To measure the impact of this countermovement depiction against the LGBT legal organizations' own framing, I have also collected data on the dockets of the leading litigating organizations in the LGBT movement. I address the following research questions:

- 1) Do the mainstream news media over-represent the proportion of marriage cases to other types of cases litigated by the LGBT

101) See Ferree, "Resonance and Radicalism," 304-344.

102) The acceptance of particular notions in the mainstream media is strongly connected with the acceptance of these notions in popular discourse more broadly. "Public discourse in contemporary societies is largely—though not exclusively—mediated through the institutions collectively known as 'mass media' that also contribute their own interests and standpoints in selecting and diffusing what becomes the 'mainstream' of ideas and claims" (*Ibid.*, 311).

- movement (e.g., employment, parenting, criminal justice)?
- 2) Do the media over-represent the LGBT movement's emphasis on marriage (e.g., by portraying its non-marriage cases as part of an overarching scheme for marriage equality)?
 - 3) Do the media provide more detailed coverage of the LGBT movement's marriage cases than they do to its other cases?

I selected three of the largest LGBT legal organizations (GLAD, the NCLR, and Lambda Legal) as case studies, and observed both their legal dockets and their news coverage in two major newspapers.¹⁰³ These organizations have enjoyed longstanding prominence within the LGBT movement (see Section II,1), and are together responsible for most of the movement's legal work.¹⁰⁴ Although operationalizing LGBT litigation in the actions of the movement's major litigating organizations does not offer a complete representation of the mainstream media's coverage of legality within the movement at large, the organizations' prominence allows tentative inferences to be drawn about the media's coverage of the movement's litigation.

I constructed the yearly dockets for Lambda Legal, the NCLR, and GLAD from 1996 to 2006 primarily through reference to the organizations' own (often seasonal) publications. Where these publications or my access

103) The four largest organizations that advance litigation on behalf of the LGBT community are the ACLU (total budget: \$20,000,000), Lambda (budget: \$8,700,000), the NCLR (budget: \$2,400,000), and GLAD (budget: \$525,000) (Encyclopedia of Associations 2007).

104) Although the ACLU conducts a great amount of LGBT litigation, it was excluded from this analysis. The organization is best known for its professed focus on first amendment issues. It is therefore likely that the ACLU's campaigns would not be perceived as speaking on behalf of the LGBT *movement*. This is important for the purposes of this study, insofar as the study seeks to define how coverage depicts a particular (and false) image of the LGBT movement.

to them was irregular, I supplemented them with internal documents that the organizations provided me, as well as with searches on Westlaw's Dock-all database, and on Lexis' "Federal and State Cases" and "Jury Verdicts and Settlements" databases.¹⁰⁵⁾ If an organization allocated resources¹⁰⁶⁾ to a particular case for more than one year, I included that case in the docket for each year.¹⁰⁷⁾ While this method was the

105) I used these databases to supplement the newsletters for Lambda Legal and GLAD. Lambda Legal's newsletter, *The Lambda Update*, changed format in 2002, after which it published only limited docket information. Since its previous newsletters were fairly comprehensive, I conducted Lexis/Westlaw searches for Lambda Legal only since 2002. This produced 128, 113, and 2 hits for Westlaw's "Dock-all", Lexis' "Federal & State Cases", and Lexis' "Jury Verdicts and Settlements" databases, respectively. I also supplemented these years with internal docket material provided by the organization itself.

GLAD's newsletters appeared to provide only limited docket information, and I could only gather these newsletters since the year 2000. To construct GLAD's docket, it was therefore necessary to search the Westlaw and Lexis databases for every year since 1996. The searches produced 63, 39, and 0 hits for Westlaw's "Dock-all", Lexis' "Federal & State Cases", and Lexis' "Jury Verdicts and Settlements" databases, respectively. I then supplemented this information with a partial docket provided by a GLAD attorney.

Finally, it was unnecessary to supplement the NCLR's docket through Lexis or Westlaw, since I was given access to every organizational newsletter that had been produced since its founding, along with other internal documents that contained docket information.

106) These dockets do not distinguish cases in which the organization provided amicus support from those in which the organization acted as counsel. The organizations on the whole acted as counsel in 59.2% (n=621) of the cases for which information on the organization's role was available (1049 of the 1120 cases), while they wrote amicus briefs or provided material support in the remainder of the cases. A comparison between the organizations shows that they took nearly the same ratio of counsel to amicus cases. The NCLR and Lambda both provided counsel in 58.6% of their cases (n=184 and n=356, respectively); GLAD provided amicus in 63.3% of cases listed on the docket (n=81).

most comprehensive one available, is unlikely that it produced every case in which the organizations participated.¹⁰⁸⁾

I then conducted a content analysis of all of the articles from two mainstream newspapers, the *New York Times* and *USA Today*, which reported on GLAD, NCLR, or Lambda between 1996 and 2006. The *New York Times* and *USA Today* were chosen to represent the mainstream media because they are among the newspapers with the highest subscription rates and online readership.¹⁰⁹⁾ The *New York Times*, whose articles constitute the majority of the coverage on which my analysis in this paper is based, has also traditionally been used in the communications

107) These methods produced 1120 total cases, 132 from GLAD, 672 from Lambda Legal, and 316 from the NCLR. Note that because these counts are based on yearly rather than cumulative docket information, they do not reflect the total number of cases that the organization has litigated; a case that the organization litigated for two years, for example, was counted twice.

108) Furthermore, because this paper focuses on the organizations' litigation, it fails to capture the full diversity and scope of the organizations' work. Lambda has increasingly used advocacy, education, and lobbying in the third decade since its founding (Andersen 2005:40; 50; 179-80). GLAD has done public outreach and lobbying in Massachusetts around state policies on second-parent adoption, as well as around the passage of both non-discrimination and hate crimes statutes (Levi 2004). The NCLR's seasonal newsletter indicates that it too conducts a fair amount of extra-judicial advocacy. However, my intention in this paper is to measure the resonance of the countermovement's depiction of the LGBT movement—which specifically focuses on its use of litigation—within the mainstream media. Thus, the proper area of comparison with this image is the organization's actual litigation.

109) Perez-Pena, Richard (2007) "Newspaper Circulation in Steep Slide across Nation," *The New York Times*, 1 May, sec. C, p. 6; Pew Research Center (2006) "Online Papers Modestly Boost Newspaper Readership: Maturing Internet News Audience Broader Than Deep," Pew Research Center for The People & The Press, <http://people-press.org/reports/pdf/282.pdf> (accessed 1 May 2007).

literature as a benchmark of national news coverage.¹¹⁰⁾

Using Lexis-Nexis, I retrieved every story that these sources produced between 1996 and 2006 that mentioned GLAD, Lambda Legal, or the NCLR.¹¹¹⁾ After excluding irrelevant and duplicate articles,¹¹²⁾ 267 articles remained, all of which were coded for a quantitative analysis of their content. Information coded for each article included a) the principal issue the article reports; b) whether the article discusses a particular case on an organization's docket; and c) whether the article explicitly links the topic reported into the campaign for same-sex marriage.

One disadvantage to this research method, which places an organizational filter over the content analyzed, is that it does not rule out that particular topics might receive more coverage simply because the organizations conduct more media outreach on these topics. However, statements by the organizations' representatives indicate that they did not intend for the media to focus so heavily on their marriage work,¹¹³⁾ which was

110) William A. Gamson, *Talking Politics* (Cambridge: University of Cambridge, 1992); Rohlinger, "Framing The Abortion Debate": 479-507.

111) I searched for each organization's name, and variants of its name (e.g., ["National Center" and "Lesbian Rights") and (lesbian & NCLR)]; (gay and lesbian and advocates and defenders) (to include cases that use "&"); and ("Lamda") [*sic*] in the archives of each news source on Lexis-Nexis.

112) I excluded all returned articles that were obituaries, corrections, lists of organizations or events, previews of stories that would appear later in the newspaper or on the same day in the television, duplicate stories, and letters to the editors. A total of 93 invalid articles were removed. For aggregate data on all three organizations, I also excluded duplicate articles that mentioned more than one LGBT legal organization. Four of the articles mentioned 2 organizations, and 2 articles mentioned all 3 organizations.

113) See Jon W. Davidson, "Winning Marriage Equality: Lessons from Court." *Yale Journal of Law & Feminism* 17 (2005).

the topic that received the most coverage. Another disadvantage is that these methods cannot account for cases that do receive coverage, but do not mention the litigating organization by name. However, it may be argued that the major finding of this paper—that LGBT legal organizations are most likely to be named in connection with the marriage issue—demonstrates at the very least that the media depict the legal wing of the LGBT legal movement as preoccupied with same-sex marriage.

IV. Findings

1. An increasingly defensive marriage litigation strategy

Marriage cases constituted only a small percentage of the three leading LGBT legal organizations' dockets from 1996–2006. Every year, GLAD, Lambda, and the NCLR were involved in more employment and parenting cases than they were in marriage cases. However, the organizations did take a greater percentage of marriage cases over time (see Figure 2). Although this increase would seem to indicate that the LGBT legal organizations increasingly took the offensive in their litigation for same-sex marriage, a close examination of the marriage cases challenges that hypothesis. Rather, these organizations have been compelled to participate in an increasing number of cases initiated by individuals *outside* the LGBT movement. First, in early 2004, officials in San Francisco (CA), Sandoval County (NM) and Multnomah County (OR) took the historic measure of issuing marriage licenses to same-sex couples. Several marriage cases on the organizations' dockets are the fallout from these legally-questionable unions; LGBT legal organizations took

up the cases of couples who had waited to be married and were ultimately denied licenses,¹¹⁴⁾ as well as couples that were granted marriage licenses later found to be invalid.¹¹⁵⁾

Second, a significant percentage of the marriage cases on the dockets of the LGBT legal organizations since 2004 was initiated by *opponents* of same sex marriage.¹¹⁶⁾ Antigay opponents brought some of these cases in response to the marriage licensing of early 2004.¹¹⁷⁾ Countermovement organizations have also filed suit against other public officials perceived to support same-sex marriage,¹¹⁸⁾ and against

114) *Li v. State* 338 Or. 376 (2005); *Hernandez v. Robles* 7 N.Y.3d 338 (2006).

115) *Li v. State* 338 Or. 376 (2005); *Woo v. Lockyer* No. A110451 (S.F. City & County Super. Ct.). These cases would be compiled with others and adjudicated under the title *In re Marriage Cases* 49 Cal.Rptr.3d 675 (2006).

116) This number does not include *In re Marriage Cases*, a case on the dockets of NCLR and Lambda since 2004 which combined actions initiated by proponents and opponents of same-sex marriage. Nor does this number include a decision initiated by the AG of Florida, *Advisory Opinion To Attorney General re Florida Marriage Protection Amendment*.

117) Antigay organizations Alliance Defense fund and Center for Marriage Law and the California attorney general filed petitions for an immediate stay of the San Francisco marriages, *Lewis v. Alfaro* 2004 WL 473258; *Lockyer v. City and County of San Francisco* 2004 WL 473257. These were later consolidated into *Lockyer v. City and County of San Francisco* 33 Cal.4th 1055 (2004), a case in which NCLR and Lambda Legal wrote amicus briefs in support of the City and County of San Francisco. Other antigay groups, Proposition 22 Legal Defense and Education Fund and Campaign for California Families, filed a constitutional challenge to the state's marriage statutes in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* A110651 (S.F. City & County Super. Ct. No. CPF-04-503943) and *Campaign for California Families v. Newsom* A110652 (S.F. City & County Super. Ct. No. CGC-04-428794). These cases were later consolidated into *In re Marriage Cases* S147999 (2008), in which NCLR and Lambda provided counsel.

118) In *Bowler v. Lockyer*, antigay group Campaign for California Families filed suit against the attorney general over the name that was given to an antigay ballot initiative that would have prohibited same-sex marriage.

LGBT-friendly judicial decisions.¹¹⁹⁾ A final development that accounts for the increasing number of marriage cases on the LGBT legal organizations' dockets since 2004 is the higher number of cases in which the LGBT legal organizations challenged the legality of proposed anti-marriage ballot initiatives.¹²⁰⁾

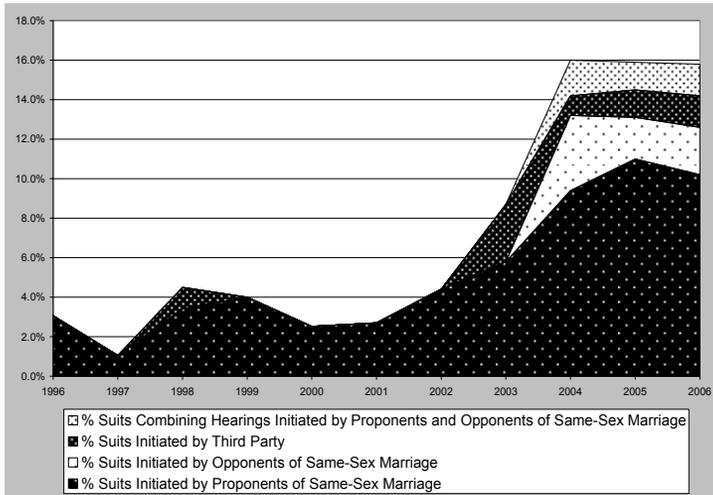
Before 2004, nearly all of the marriage cases on the leading LGBT legal organizations' dockets had been filed by LGBT couples.¹²¹⁾ The

The name indicated that the initiative would eliminate the rights of couples in a domestic partnership. NCLR and Lambda provided counsel in the suit. In another case, *Godfrey v. Spano*, the Alliance Defense Fund challenged an executive order in Westchester County, New York to recognize same-sex marriage licenses validly issued in jurisdictions outside of the state. Lambda provided counsel in the case. Finally, same-sex marriage opponents brought suit in *Protect Marriage Illinois v. Orr* to ensure that a ballot initiative, which would advise the General Assembly to amend the Illinois constitution to prohibit same-sex marriages, would be included in the November 2006 elections after it had been determined presumptively invalid. Lambda defended a Chicago city clerk and members of the city's Board of Election Commissioners in the case.

- 119) LGBT organizations have been involved in two cases filed by antigay activists in reaction to *Goodridge v. Dep't of Pub. Health*, the Massachusetts Supreme Judicial Court opinion which found that withholding marriage benefits from same-sex couples violated the due process and equal protection provisions of the state's Constitution. Citizens and a group of legislators asked the court to extend a stay on the decision in *Doyle v. Goodridge*. Another case, *Largess v. Supreme Judicial Court for State of Massachusetts*, was brought in federal court to enjoin Massachusetts from implementing the remedy in *Goodridge*.
- 120) Lambda Legal filed a brief in *Perdue v. O'Kelley* 2006 WL 1350171 (2006), arguing that a proposed Georgia ballot initiative violated the state constitution's single-subject requirement. GLAD filed suit in *Schulman v. Attorney General* (2006), arguing that a proposed Massachusetts ballot initiative would violate the state's constitution by overturning a judicial decision.
- 121) Only in two instances before 2004 were marriage cases on the LGBT legal organizations' dockets initiated by a party other than a gay or lesbian couple—and in neither case did the countermovement initiate the action.

sharp increase in countermovement-initiated cases marks a sea change in the legal organizations' marriage litigation strategy. This development, along with the increased number of cases in which LGBT legal organizations challenged anti-marriage ballot initiatives, suggests that these legal organizations took a more *defensive* stance with regard to same-sex marriage, attempting to stave off an onslaught of legal action initiated by the countermovement. As Jon Davidson, senior counsel for Lambda, has commented, "[M]ore and more often we find ourselves also battling against Liberty Counsel and similar organizations."¹²²⁾

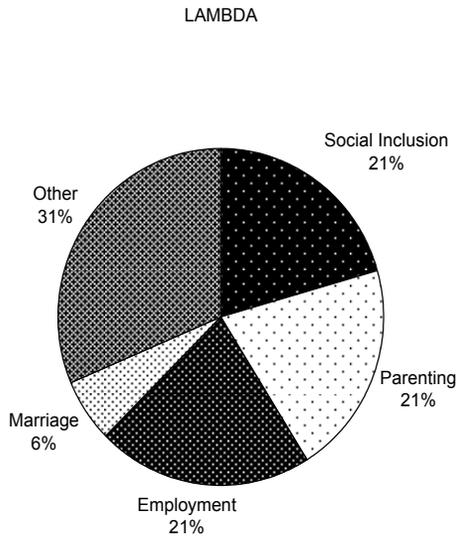
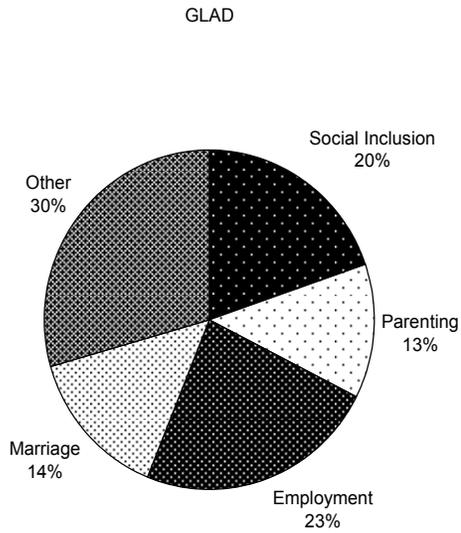
⟨Figure 2⟩ Marriage Dockets, All Organizations Combined
 (Showing Increasing Countermovement Initiation of
 Marriage Cases after 2003)



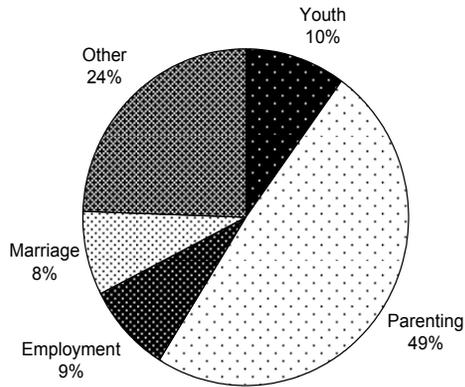
See Opinions of the Justices to the House of Representatives and In re Marriage of Simmons.

122) Quoted in Thomas Crampton, "Using the Courts to Wage A War on Gay Marriage," *New York Times*, 9 May, 2004, sec. 1, p. 14.

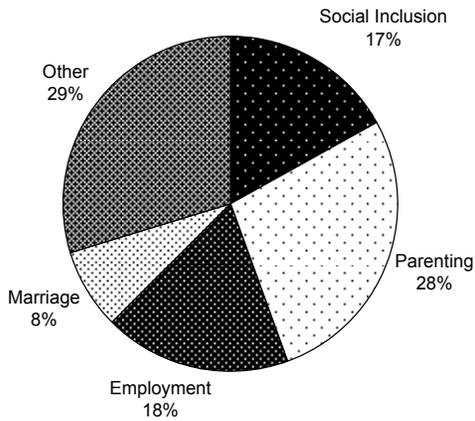
〈Figure 3〉 Dockets, All Organizations, 1996–2006*



NCLR



All Organizations Combined



* Cases involving health care, housing, and public accommodations were coded as "Social Inclusion."

2. Heightened media attention to marriage litigation

Most of the media coverage of GLAD, Lambda, and the NCLR came from the *New York Times* (215 articles, as opposed to the 52 articles reported in *USA Today*). This discrepancy was foreseeable, given that *USA Today* does not publish on Sundays. A more surprising finding was that GLAD received slightly more news coverage than the NCLR, whose budget is about twice GLAD's.¹²³⁾ Since much of this difference is accounted for by GLAD's higher number of articles focused on same-sex marriage, one might conclude that GLAD's greater focus on marriage litigation (see <Figure 3>) secured the organization more news coverage.¹²⁴⁾

The most striking finding from the media analysis is the great increase in *New York Times* articles that mentioned LGBT legal organizations in 2004; a full twenty percent of all the *New York Times*' articles on the organizations were reported that year. While this number dropped slightly in subsequent years, the *Times* continued to report a higher number of articles in 2005 and 2006 than it had during any year before this spike (see Appendix 1). In addition, *USA Today* produced so few stories on these organizations in general that

123) Lambda's budget for 2006 was \$8,700,000; the NCLR's budget was \$2,400,000, and GLAD's budget was \$525,000 (Encyclopedia of Associations 2007).

124) This finding is important in terms of the influence it could possibly have on the LGBT legal organizations. Movement activists have been known to structure particular tactics around perceived media biases (William A. Gamson and Gadi Wolfsfeld, "Movements and Media as Interacting Systems," *Annals of the American Academy of Political and Social Science* 528 (1993):114-125; Ryan, *Prime Time Activism*; William K. Carroll and R. S. Ratner, "Media Strategies and Political Projects: A Comparative Study of Social Movements," *Canadian Journal of Sociology / Cahiers canadiens de sociologie* 24(1999):1-34). A LGBT legal organization hoping to attract media attention would likely take on more marriage cases.

it would be difficult to draw any conclusions through an analysis of its coverage alone. However, since *USA Today's* marriage coverage appears to follow the same general pattern as the *Times*, this Section mostly discusses findings from the *Times* alone, referring to identifiable differences in coverage between the two sources where relevant.

The single case that produced the most coverage before 2003 was U.S. Supreme Court case *Boy Scouts of America v. Dale* (2000), which held that the Boy Scout's policy of excluding gay men was protected under the group's First Amendment right to freedom of association.¹²⁵⁾ The 1998 increase in "Social Inclusion" articles (most visible in the *USA Today* coverage) is attributable to *Bragdon v. Abbott* (1998), another Supreme Court case, in which GLAD challenged a dentist's refusal to treat a person with H.I.V. under the Americans with Disabilities Act. These Supreme Court cases, along with *Lawrence v. Texas* (2003), were responsible for most of the spikes in the LGBT organizations' news coverage. Because Supreme Court cases produced peaks in coverage, one might hypothesize that the higher the level of the court hearing a case, the more likely the case is to receive extensive news coverage. However, one other Supreme Court case litigated by the LGBT legal organizations, *Romer v. Evans* (1996), was easily overshadowed by the coverage Lambda received for its Hawaii same-sex marriage case *Baehr v. Miike*, decided that same year.¹²⁶⁾ Thus it would appear that

125) In 2000, the *New York Times* published 9 stories on Dale that mentioned the LGBT legal organizations in this study, while USA Today published 2.

126) *Romer* struck down an amendment to Colorado's constitution to prohibit any legislation, executive action, or judicial rulings against LGBT discrimination. The decision might objectively be considered newsworthy, since the Court moved away from its blistering rhetoric in *Bowers v. Hardwick* (1986), decided less than ten years earlier, to show a surprising level of compassion for LGBT people.

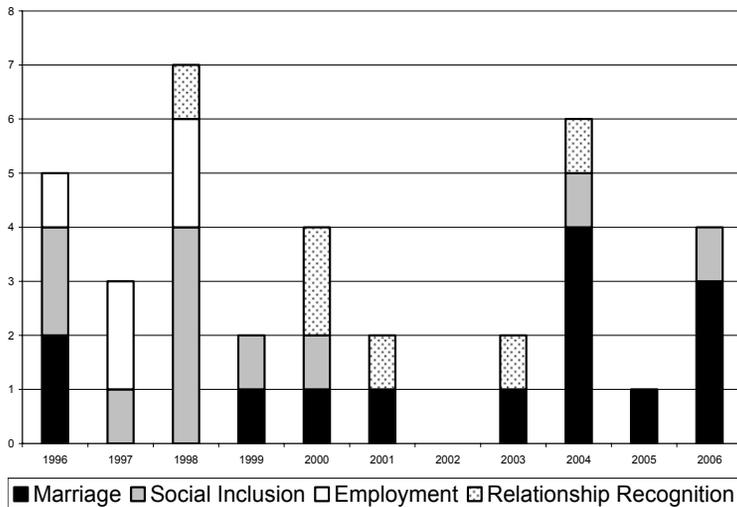
it is the topic of litigation, rather than the level of the court hearing the case, that most strongly predicts the likelihood that a case will receive extensive news coverage.

The attention the mainstream news media have devoted to marriage has been consistently disproportionate to the issue's presence on the major LGBT legal organizations' dockets. However, the gap between the newspapers' marriage coverage and their coverage of other LGBT issues has widened dramatically since 2004 (see <Figure 4>). This is partly because, after 2004, the *New York Times* did not just publish *additional* marriage articles; it also decreased the number of articles published on other LGBT topics.¹²⁷⁾

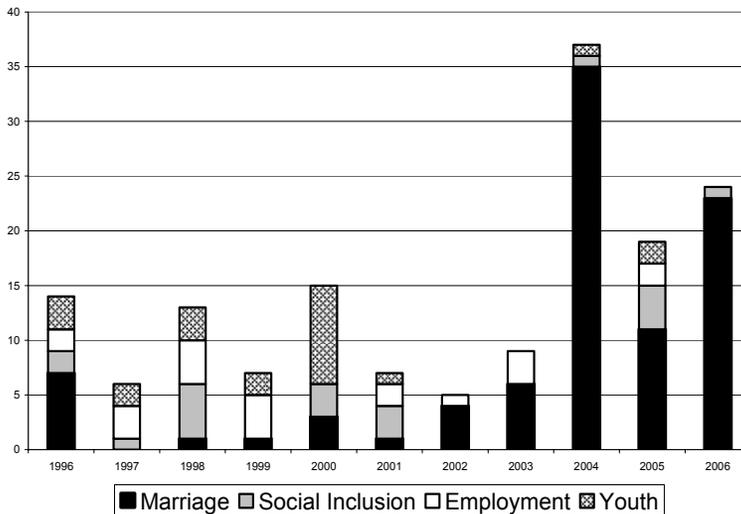
127) Before 2004, the average number of yearly articles that mentioned an LGBT legal organization in the *New York Times* whose primary topic was Parenting was 1.25. Between 2004–2006, that average fallen to 0.34 articles/year. Similarly, the *New York Times* published an average of 2,375 yearly news stories on Employment before 2004. Yet in the years from 2004–6, that number had fallen to 0.67.

(Figure 4) Comparison of the Issues Covered in the National Newspapers

USA Today, Top Issues Covered, 1996–2006



New York Times, Top Issues Covered, 1996–2006



The sheer number of articles that focus on a particular topic is not the only indication that the topic has taken a heightened level of importance in the media. Reporters might also relate topics of interest (those in the “media attention cycle”¹²⁸) to stories on other, perhaps only tangentially-related topics. To investigate this possibility, I counted how many articles, within the group of articles whose primary issue was *not* marriage, mentioned the LGBT movement’s campaign for same-sex marriage. A full 28% (n=35) of all *New York Times* articles that were *not* primarily about marriage discussed it nevertheless. Adding this to the 92 articles that were primarily about marriage, one finds that 59% (n=127) of the 215 *New York Times* articles on GLAD, Lambda, or the NCLR linked the organizations to the battle for marriage equality.

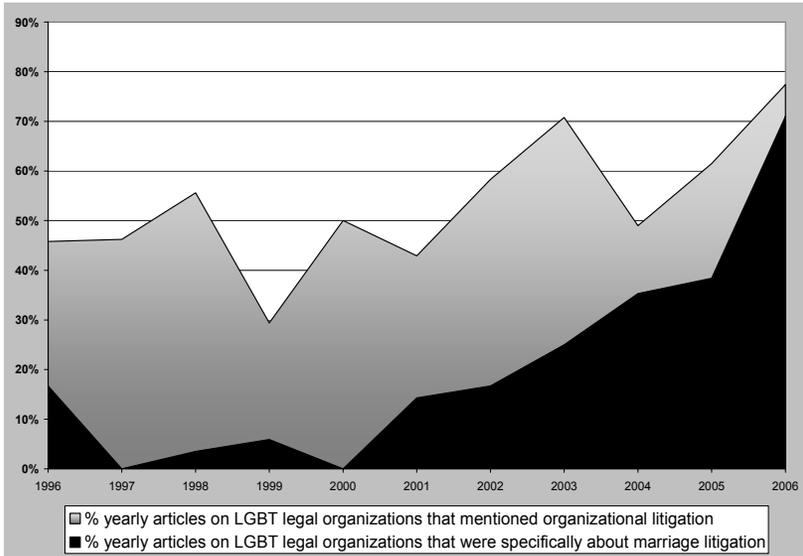
There is yet another dimension to the mainstream media’s coverage of the LGBT legal organizations’ campaign for same-sex marriage. While only about half of all the newspaper articles mentioned a particular case in which a LGBT legal organization was involved,¹²⁹ both the *Times* and *USA Today* were much more likely to cite marriage cases by name than they were other types of cases. Readers forming a mental image of the LGBT legal organizations’ dockets by reading about their specific cases in the *Times* would be led to believe that 47% of the organizations’ dockets was devoted to marriage litigation, while those reading *USA Today* would envision that 39% of the organization’s dockets was devoted to marriage litigation .

128) Anthony Downs, “Up and Down with Ecology—The Issue Attention Cycle.” *The Public Interest* 28 (1972): 38–50.

129) The *New York Times* mentioned specific cases in 56.3% of its articles on the LGBT legal organizations, while *USA Today* mentioned litigation in only 48.1% of its articles.

These sources have also covered organizational litigation differently over time. First, there has been an increase in the number of articles that report the organizations' litigation generally (marriage or otherwise) since 2003 (see <Figure 5>). Second, there has been a marked increase in the number of national newspaper articles that report on an organization's *marriage* litigation specifically. In 2006, for example, the *New York Times* published a total of 27 articles on LGBT legal organizations, 20 of which discussed specific marriage cases.

<Figure 5> Increasing National Newspaper Coverage of LGBT Legal Organization's Cases (Particularly Marriage Cases)



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
% yearly articles on LGBT legal organizations that mentioned litigation	45.8%	46.2%	55.6%	29.4%	50.0%	42.9%	58.3%	70.8%	49.0%	61.5%	77.4%
% yearly articles on LGBT legal organizations that were specifically about marriage litigation	16.7%	0.0%	3.5%	5.9%	0.0%	14.3%	16.7%	25.0%	35.3%	38.4%	71.0%

Pairing these related tendencies—the national newspapers' increased coverage of marriage, as well as their increased coverage of LGBT organizational litigation more generally—one sees that the LGBT legal organizations have been characterized as prioritizing their same-sex marriage litigation. Since these changes coincide with an increase in countermovement rhetoric similarly pigeonholing the movement as narrowly focused on promoting same-sex marriage through the courts (and movement claims to the contrary¹³⁰), one might conclude that the countermovement was successful in its own framing of the LGBT movement. This study thus shows that the countermovement's claims about the LGBT movement, which are tied to resonant discourses in American political culture, have seeped into the mainstream media's reporting on the movement. Presumably unsuspecting reporters have taken increased notice of marriage cases, and their consequentially increased reporting of these cases substantiates countermovement rhetoric on the centrality of same-sex marriage litigation to the LGBT movement. In this case, then, we see the limited reach of a movement's "collective action framing" in constructing its own image and meaning to its observers; rather, the mainstream media and the countermovement have mediated the message the LGBT legal organizations projected through their words and actions.

V. Conclusion

The antigay countermovement has attempted to associate LGBT movement with its controversial legal strategy for same-sex marriage.

130) *See* Davidson, "Winning Marriage Equality."

It has called the legitimacy of this strategy and the movement itself into question through its use of populist discourse and an “activist judges” framing. This language, which has become highly resonant in twentieth century American political culture, has provided the antigay countermovement discursive leverage over the LGBT movement itself; the countermovement’s depiction of the LGBT movement has come to dominate mainstream newspaper coverage of the leading LGBT legal organizations.

The combined result of the countermovement’s depiction of the LGBT movement and the media’s proliferation of this false image is that the LGBT movement has lost control over its own identity. While marriage litigation is certainly one of the LGBT movement’s many tactics, not even the movement’s major legal organizations would consider it the *most* important. The organizations are involved in relatively few marriage cases, and many of these cases were actually initiated by opponents of same-sex marriage. Although this misperception of the movement’s central goals developed out of the movement’s own tactics, the inflated visibility of one tactic, marriage litigation, has affected the perception of the movement within the general public as well as within the LGBT community,¹³¹⁾ and has obscured the organization’s more widely-accepted work on civil rights and employment litigation.

This finding supports a growing branch of social movement scholarship that sees a movement’s tactic as a key component of its “signifying work.”¹³²⁾ It also follows Kane¹³³⁾ and others in emphasizing that, by

131) See *Beyond Marriage* (2006); George Chauncey, *Why Marriage* (New York: Basic Books, 2004).

132) McAdam, “The Framing Function of Movement Tactics”; see also Jorge Cadena-Roa, “Strategic Framing, Emotions, and *Superbarrio*—Mexico City’s Masked Crusader.” *Mobilization: An International Quarterly* 7 (2002): 201–216.

changing the literature's focus from formal framing to the framing function of a movement's actions, scholars may identify the mechanisms that distort the public perception of a movement's professed identity. In this case, the message that LGBT legal organizations intended to project—that LGBT discrimination takes many forms, and requires a variety of tactical responses—was lost in the overwhelming media and countermovement concentration on just one aspect of their work: marriage litigation. This finding underscores the need for future research on the disjuncture between the message that a movement expresses, and that which the public actually receives.

To take up this question, social movement scholars must continue to expand the conceptual borders of social movements, and to observe movements as inextricable from their socio-political environment. This has already been done in work that examines the constitutive effect of environmental factors such as political opportunity structure,¹³⁴⁾ mainstream social discourse,¹³⁵⁾ or countermovement dynamics¹³⁶⁾; all of these "external" elements are crucial to the construction of the movement's agenda, and ultimately, its identity.

Law and society scholars, who observe the role of the law in social

133) Kane, "Theorizing Meaning Construction in Social Movements."

134) Herbert P. Kitschelt, "Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies." *British Journal of Political Science* 16 (1986): 57-85; Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970* (Chicago: University of Chicago Press, 1982).

135) Ferree, "Resonance and Radicalism."

136) Mayer Zald and Bert Useem, "Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement." pp. 247-71 in *Social Movements in an Organizational Society*, edited by M. N. Zald and J. D. McCarthy (Transaction Publishers, 1987); David S. Meyer and Suzanne Staggenborg, "Movements, Countermovements, and the Structure of Political Opportunity." *The American Journal of Sociology* 101 (1996): 1628-1660.

movements, would do well to follow this initiative of the social movement scholarship. Studies of legal mobilization investigate the multiple ways in which social movements that use litigation invoke the cultural power of the law—its moral weight, its ability to focus participants, its symbolism—to advance goals far beyond their particular legal concerns.¹³⁷⁾ What the legal mobilization scholars have generally failed to consider is that a movement's tactics, either by their context or by their complex significance, can be widely misunderstood or even intentionally misconstrued.¹³⁸⁾ Litigation is a social movement tactic that is especially likely to complicate the public's understanding of a movement's goals, as it conjures popular "legal lore,"¹³⁹⁾ including narratives of excess litigation and negative stereotypes about plaintiffs and plaintiff's attorneys.¹⁴⁰⁾ Although the movement invokes this culturally—resonant legal symbolism through its legal tactics, it does not control the interpretation these tactics evoke when they distract from the movement's goals and dominate public discourse about the movement.

In this paper, I give an example of this process, and thereby expose a gap in the legal mobilization literature. I have shown that, after the Supreme Court decided *Lawrence v. Texas*, those at the forefront of the antigay countermovement have increasingly framed the LGBT movement as a threat not only to the institution of marriage, but democracy itself.¹⁴¹⁾ The countermovement pointed to the LGBT

137) See McCann, *Rights at work*; Silverstein, *Unleashing Rights*.

138) Kane, "Theorizing Meaning Construction in Social Movements."

139) William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004), 10.

140) *Ibid.*, 258.

141) See also Goldberg—Hiller, *The Limits to Union*.

legal mobilization to portray the LGBT movement as an especially powerful threat to unite against. Countermovement claims against lesbian and gay people became more powerful—more *resonant*—because they exploited the movement's use of legal tactics. Thus while litigation can perform the beneficial functions of garnering media attention and rallying supporters for the movement that uses the tactic, the tactic's symbolic volatility may also provide the countermovement with a comparably powerful discursive resource.

Appendix 1: Article Topics, By Newspaper and Organization

NEW YORK TIMES ARTICLE TOPICS, BY ORGANIZATION

	GLAD											Total
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	
Parenting and Adoption	0	1	0	0	0	0	0	0	0	0	0	1
Other Relationship Recognition	0	0	0	0	0	0	0	0	0	1	0	1
Employment	0	1	0	0	0	0	0	0	0	0	0	1
Health care	0	0	0	0	0	1	0	0	0	0	0	1
Marriage	0	0	0	0	0	1	1	1	9	1	6	19
Public Accommodations	0	0	1	0	0	0	0	0	0	0	0	1
Multiple Legal	0	0	0	0	0	0	0	0	1	0	0	1
Total	0	2	1	0	0	2	1	1	10	2	6	25
	LAMBDA LEGAL											Total
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	
Parenting and Adoption	1	1	1	0	4	0	0	0	0	0	0	7
Other Relationship Recognition	1	0	0	0	0	1	2	2	5	1	0	12
Criminal justice	0	0	0	1	1	0	0	0	0	0	0	2
Employment	2	1	2	4	0	2	1	2	0	1	0	15
Hate crimes/Violence	0	0	1	2	0	0	0	0	0	0	0	3
Health care	0	1	1	0	0	0	0	0	0	1	0	3
Housing	0	0	0	0	0	1	0	0	0	0	0	1
Youth	3	2	3	2	9	1	0	0	0	2	0	22
Marriage	6	0	1	0	2	0	3	5	18	8	16	59
Military	0	1	2	0	0	0	0	1	0	0	0	4
Privacy	0	0	3	0	0	0	2	4	1	0	0	10
Public Accommodations	0	0	1	0	1	0	0	0	1	0	0	3
Multiple Legal	0	1	0	0	1	0	0	0	0	0	0	2
Other LGBT Legal	2	0	2	0	1	1	0	0	0	2	1	9
Other LGBT, Non-Legal	0	0	0	4	0	1	1	1	0	1	0	8
Other, Non-LGBT	1	0	0	0	0	1	0	0	0	2	0	4
Total	16	7	17	13	19	8	9	15	25	18	17	164

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	NCLR											Total
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	
Parenting and Adoption	1	0	0	0	0	0	0	1	0	0	1	3
Other Relationship Recognition	0	0	0	0	1	0	0	0	0	0	0	1
Employment	0	0	0	0	0	0	0	0	0	1	0	1
Hate crimes/Violence	0	0	0	1	0	0	0	0	0	0	0	1
Youth	0	0	0	0	0	0	0	0	1	0	0	1
Marriage	1	0	0	1	1	0	0	0	8	2	1	14
Privacy	0	0	0	0	0	0	0	1	0	0	0	1
Other LGBT Legal	0	0	0	0	1	0	0	0	0	1	0	2
Other LGBT, Non-Legal	0	0	0	0	0	0	0	0	1	0	1	2
Total	2	0	0	2	3	0	0	2	10	4	3	26

USA TODAY ARTICLE TOPICS, BY ORGANIZATION

GLAD												
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
Marriage	0	0	0	0	0	1	0	1	3	1	1	7
Public Accommodations	0	0	3	0	0	0	0	0	0	0	0	3
Other LGBT Legal	0	1	0	0	0	0	0	0	0	0	0	1
Total	0	1	3	0	0	1	0	1	3	1	1	11
LAMBDA LEGAL												
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
Other Relationship Recognition	0	0	1	0	2	1	0	1	1	0	0	6
Employment	0	1	1	0	0	0	0	0	0	0	0	2
Health care	0	0	0	0	1	0	0	0	0	0	0	1
Youth	1	0	1	0	2	0	0	0	0	0	0	4
Marriage	2	0	0	1	1	0	0	0	1	0	2	7
Military	1	1	1	0	0	0	0	0	0	0	0	3
Privacy	0	0	1	0	0	0	1	3	0	0	0	5
Public Accommodations	0	0	1	1	0	0	0	0	0	0	0	1
Multiple Legal	0	0	0	0	0	0	0	1	0	0	0	1
Other LGBT Legal	2	0	0	0	0	0	0	0	0	0	0	2
Other LGBT, Non-Legal	0	0	0	0	0	1	0	0	0	0	0	1
Other, Non-LGBT	0	0	0	0	0	0	0	0	0	0	1	1
Total	6	2	6	2	6	2	1	5	2	0	3	35
NCLR												
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
Parenting and Adoption	0	0	0	0	0	1	1		0	1	0	3
Public Accommodations	0	0	0	0	0	0	0		1	0	0	1
Other LGBT Legal	0	0	0	0	0	0	0		0	0	1	1
Other LGBT, Non-Legal	0	1	0	0	0	0	0		0	0	0	1
Total	0	1	0	0	0	1	1		1	1	1	6

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Abstract

**Who Frames the Message? Countermovements and
Public Perception of Social Movements'
Legal Agendas**

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Social conservatives have historically used populist rhetoric and “activist judges” framing to de-legitimate progressive social movements’ litigation strategies. In this paper, I show that opponents to lesbian, gay, bisexual, and transgender (LGBT) rights have used these discursive resources to draw attention to same-sex marriage litigation—a tactic that constitutes only a small part of the LGBT movement’s legal docket. I argue that as a result of this resonant countermovement framing, the LGBT movement has become widely mischaracterized in the mainstream media, in academia, and within the movement itself as dominated by its focus on same-sex marriage. This paper therefore demonstrates how a social movement’s litigation strategy can be used to support countermovement rhetoric, which may in turn distort a movement’s message and its public identity.

Key Words

Social Conservatives, Countermovement Rhetoric, Message Framing, LGBT Rights, Litigation Strategy