

MEDIA, MARRIAGE, AND THE CONSTRUCTION OF THE LGBT LEGAL AGENDA

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Abstract

Legal and sociolegal scholars have argued that social movement litigation often generates social change indirectly by drawing publicity and public attention to movement issues. Yet some cases are more likely than others to receive coverage in the mainstream news media—particularly those cases involving conflict or controversy, which resonate with established definitions of “newsworthiness.” This Article empirically examines bias in the news media’s coverage of social movement litigation through a case study of the LGBT movement, which compares the content of the litigation dockets of three major LGBT civil rights organizations to the content of newspaper coverage of those organizations from 1996–2006.

The time period examined in this study offers a unique opportunity to investigate bias in media coverage of movement litigation. This period marks the formative first decade after LGBT rights organizations began to take part in litigation for marriage equality, an issue which has since become an essential part of the LGBT movement’s public narrative. As movement litigators during these years tentatively asserted the right for same-sex couples to marry in a few select state courts, they were met with an intense conservative backlash targeting both same-sex marriage as a goal and the impact litigation strategies being used to achieve it. In examining LGBT movement litigation during this period of intense controversy around same-sex marriage, this Article illuminates the role of countermovements in shaping media constructions and broader popular

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interpretations of social movement litigation.

Findings from the study reveal that the news media reported more extensively on the LGBT movement's marriage equality litigation than on any other issue. This coverage was drastically disproportionate to the small percentage of marriage equality cases on the LGBT legal organizations' dockets during this time period. In addition, news articles on same-sex marriage litigation were significantly more likely than other articles to discuss anti-LGBT countermovement activity. These findings suggest that countermovement mobilization against same-sex marriage, dubbed a "culture war" in the media, may have created conflict that reporters found particularly newsworthy—leading the news media to focus attention on one of the LGBT movement's most contentious litigation campaigns. I explore the implications of these findings in shaping the course of social movement mobilization, countermobilization, and the possibilities for social change.

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INTRODUCTION

Over nearly two decades, the nation paid rapt attention as Lesbian, Gay, Bisexual, and Transgender (LGBT) activists waged a long and bitter struggle for marriage equality. As this struggle culminated in the

U.S. Supreme Court's historic decision declaring it unconstitutional for states to deny same-sex couples the right to marry,¹ headlines trumpeted the news, featuring photographs of rainbow-flag-bearing couples celebrating before the Court.² *Obergefell*, like the many earlier legal cases that punctuated the marriage equality struggle, drew massive attention to the LGBT movement and brought discrimination against LGBT people into sharp public focus.³

On one hand, the massive public attention to marriage equality litigation might be interpreted as a shining example of how litigation can generate extralegal advantages for social movements—publicity and visibility for movement goals—which indirectly bolster efforts for social change.⁴ Legal and sociolegal scholars have emphasized these sorts of indirect effects as key mechanisms through which litigation may produce social change.⁵ The acquisition of formal legal rights, these scholars note, may have little social significance in itself, since rights are not self-enforcing and individuals experiencing social subordination face significant obstacles to mobilizing them.⁶ The ability of litigation to shape public awareness and understandings of inequality may be one of the most significant ways that litigation can transform the broader

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

2. See, e.g., Jess Bravin, *Supreme Court Rules Gay Marriage Is a Nationwide Right*, WALL ST. J. (June 26, 2015), <http://www.wsj.com/articles/supreme-court-rules-in-favor-of-same-sex-marriage-1435180972>; Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>; Richard Wolf & Brad Heath, *Supreme Court Strikes down Bans on Same-Sex Marriage*, USA TODAY (June 25, 2015), <http://www.usatoday.com/story/news/nation/2015/06/26/supreme-court-gay-lesbian-marriage/28649319/>.

3. See generally Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC (July 1, 2015), <http://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/>.

4. The attorneys involved in marriage equality litigation often frame the importance of these cases in terms of their broader social and cultural impact. See Charles Forelle et al., *Gay Agenda Is Seen as Rallying Point*, WALL ST. J., Nov. 5, 2004, at A5.

5. See MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 57–60 (1994); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1668 (2014) [hereinafter Leachman, *From Protest to Perry*].

6. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 635–37 (1980) (noting that rights mobilization requires significant resources, including time, money, and knowledge or awareness of legal harm); Michael W. McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 33–34 (2006) [hereinafter McCann, *Law and Social Movements*] (“[E]ven when courts act favorably for disadvantaged groups, injustice in most institutional settings will go unchallenged in the absence of well-organized constituencies willing to mobilize legal resources for change.”).

patterns of social behavior that create that inequality.⁷

On the other hand, in assessing what impact the publicity surrounding marriage equality litigation has had on efforts for LGBT equality, it is important to consider the types of narratives about the movement this publicity evoked and whether other movement efforts were overshadowed in the process. Existing research would suggest that institutionalized features of mainstream journalism may produce significant bias in media coverage of social movement litigation.⁸ The corporate structure of mainstream media outlets, coupled with professional journalistic standards of “newsworthiness,” drive reporters toward more dramatic, controversial, and conflict-ridden coverage.⁹ Numerous studies have found that “reporters and editors search for events with dramatic properties and then emphasize those properties in their reporting.”¹⁰ This penchant for drama creates selection and description bias in news coverage of social movement activity outside of litigation and in coverage of litigation activity outside of social movements.¹¹ One might therefore expect coverage of social movement litigation to similarly include more stories on “controversial” litigation campaigns—like the LGBT movement’s campaign for marriage equality, which has historically been the target of enormous conservative backlash¹²—and to emphasize conflict-based narratives within that coverage. Evaluating these aspects of media bias would enhance understandings of both the contemporary trajectory of LGBT

7. Cf. McCann, *Law and Social Movements*, *supra* note 6, at 10 (“Indeed, given the copious evidence demonstrating that judicial victories often produce uneven or negligible impacts on targeted social practices, such indirect effects and uses of litigation may be the most important of all for political struggles by most social movements.”).

8. See *infra* Part I.

9. W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* 35, 37 (2d ed. 1988).

10. *Id.* at 35.

11. See WILLIAM HALTOM & MICHAEL W. MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 147–82 (2004) (finding selection bias in coverage of tort reform litigation resulting in greater coverage of litigation involving dramatically high damages awards); Pamela E. Oliver & Gregory M. Maney, *Political Processes and Local Newspaper Coverage of Protest Events: From Selection Bias to Triadic Interactions*, 106 AM. J. SOC. 463, 496 (2000) (finding selection bias in coverage of protests resulting in greater coverage of protests involving a counterdemonstration); Pamela E. Oliver & Daniel J. Myers, *How Events Enter the Public Sphere: Conflict, Location, and Sponsorship in Local Newspaper Coverage of Public Events*, 105 AM. J. SOC. 38, 40 (1999) (finding description bias in coverage of protests resulting in greater emphasis on violent aspects of protest activity).

12. Michael Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 455 (2014) (describing how marriage equality litigation “sowed panic among social conservatives” and triggered a backlash of conservative countermobilization).

politics and the institutional mechanisms that may mediate the impact of social change litigation more broadly.¹³

This Article investigates bias in news media coverage of social movement litigation through a case study of LGBT rights litigation during the first decade after LGBT legal organizations collectively began to take part in marriage equality litigation (1996–2006). The analysis proceeds through a two-part inquiry. First, I analyze original data on the legal dockets of three leading LGBT legal organizations to determine what issues were most commonly litigated during this timeframe (e.g., employment discrimination, parenting rights, criminal justice, and marriage equality). Second, I perform a content analysis of mainstream news articles covering those LGBT legal organizations' activities over the same time period and compare the issues the organizations litigated to the media coverage those organizations received. My findings reveal that the news media reported more extensively on same-sex marriage than on any other issue, and that this coverage was drastically disproportionate to the percentage of marriage equality cases on the organizations' dockets. In addition, coverage of same-sex marriage litigation was significantly more likely than coverage of any other issue to also discuss anti-LGBT countermovement activity.¹⁴ These findings suggest that conservative countermobilization against same-sex marriage, dubbed a "culture war" in the media, may have created conflict that reporters found particularly newsworthy—leading the news media to focus disproportionate attention to one of the LGBT movement's most historically contentious litigation campaigns.

The 1996–2006 period of LGBT rights litigation offers a unique opportunity to investigate bias in media coverage of social movement litigation. LGBT legal groups at this time took a decidedly cautious approach—showing much more restraint than we have seen in the more recent slew of bold federal court cases that preceded *Obergefell*.¹⁵ Marriage equality cases during this early period involved limited constitutional challenges in only a few receptive state courts;¹⁶ LGBT

13. See McCann, *Law and Social Movements*, *supra* note 6, at 23 (“[A]ny assessment of specific legal mobilization practices by social movements must be undertaken with reference to the larger context of multiple legal and extralegal norms or discourses that structure social relations.”).

14. See *infra* Table 5.

15. See Erik Eckholm, *Wave of Appeals Expected to Turn the Tide on Same-Sex Marriage Bans*, N.Y. TIMES, Mar. 22, 2014, at A20 (discussing the “slew of [marriage] cases barreling toward federal appeals courts”).

16. LESLIE J. GABEL-BRETT & KEVIN CATHCART, *Introduction to LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA* 12–13 (Kevin Cathcart & Leslie J. Gabel-

legal groups scrupulously avoided the federal courts, fearful of creating the sort of long-lasting legal repercussions that the movement had encountered in the wake of *Bowers v. Hardwick*.¹⁷ Yet, despite the narrowness of LGBT rights groups' approach to marriage equality, their efforts became the focus of intense conservative backlash.¹⁸ In the movement's first successful marriage equality case, *Baehr v. Lewin*,¹⁹ the Hawaii Supreme Court found that the prohibition of same-sex marriage required strict scrutiny under Hawaii's constitution, triggering a widespread conservative countermobilization aimed at forestalling the spread of same-sex marriage to other states.²⁰ The findings presented in this Article—that the news media focused on LGBT legal groups' marriage equality efforts during this period of intense caution and deliberately narrow engagement with the issue—thus provide key insights into how media biases can create a distorted view of a social movement's legal agenda.

Examining bias in news coverage of social movement litigation is critically important to theories of law and social change given the enormous impact that news coverage has on popular understandings of social issues.²¹ Mainstream news stories cue public attention to the issues being reported and increase the salience of those issues on the public agenda.²² While media coverage is not always determinative of public opinion, in the case of the LGBT movement, there is some evidence that the news media played a role in shaping popular views

Brett eds., 2016) (describing how LGBT rights groups "believed it prudent to allow a state-based strategy for winning marriage").

17. 478 U.S. 186, 196 (1986) (upholding the constitutionality of a Georgia anti-sodomy law). In the years between *Bowers v. Hardwick* and the U.S. Supreme Court's decision to overturn it in *Lawrence v. Texas*, 539 U.S. 558, 560 (2003), lower courts had relied on the *Bowers* decision to thwart impact litigation efforts on numerous LGBT rights issues. See SUSAN G. MEZEY, QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY 54, 201–09 (2007). LGBT rights groups litigated marriage cases in state courts to avoid the risk of creating similarly wide-reaching negative precedent. See GABEL-BRETT & CATHCART, *supra* note 16, at 12–13. See generally Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481 (2016) (discussing the genesis of the *Obergefell* decision from the perspective of the legal aid organizations).

18. See Dorf & Tarrow, *supra* note 12, at 455.

19. 852 P.2d 44, 67 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23.

20. Sean Cahill, *The Anti-Gay Marriage Movement*, in THE POLITICS OF SAME-SEX MARRIAGE 155, 168 (Craig A. Rimmerman & Clyde Wilcox eds., 2007); see also Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 460 (2005).

21. See Maxwell McCombs & Amy Reynolds, *News Influence on Our Pictures of the World*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 1 (Jennings Bryant & Dolf Zillmann eds., 2d ed. 2002).

22. *Id.*

about the movement's legal work. During the period under investigation, commentators both within and outside the LGBT movement considered it a truism that marriage equality was "the dominant issue"²³ pursued by LGBT civil rights groups.²⁴ This perception persisted despite LGBT litigators' repeated public efforts to correct it. For example, then-director of the LGBT legal organization Lambda Legal gave an address at Yale Law School, stating:

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.²⁵

An internal memo circulated to Lambda Legal staff around this time period expressed a similar sentiment: "Some of the media coverage surrounding our recent losses in our Washington and New York marriage equality cases . . . suggest[s] that these cases form the bulk of

23. Keith O. Boykin, *Where Rhetoric Meets Reality: The Role of Black Lesbians and Gays in "Queer" Politics*, in *THE POLITICS OF GAY RIGHTS* 79, 89 (Craig A. Rimmerman et al. eds., 2000).

24. The academic literature on the LGBT movement also tended to assume this point. See CARLOS BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 1 (2003) ("[N]ear the top of the gay rights movement's agenda: same-sex marriage . . ."); SEAN CAHILL & SARAH TOBIAS, *POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILIES* 96 (2007) ("[T]he prioritization of marriage as a policy goal for the LGBT movement."); Michael Kinsley, *Abolish Marriage: Let's Really Get the Government out of Our Bedrooms*, in *JUSTICE: A READER* 383, 383 (Michael J. Sandel ed., 2007) (describing marriage as the "principal demand of a liberation movement"); Andrew Koppelman, *Sexual and Religious Pluralism*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 215, 248 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) ("The call for same-sex marriage is at the forefront of the gay rights movement."); Michaela D.E. Meyer, *Looking Toward the InterSEXions: Examining Bisexual and Transgender Identity Formation from a Dialectical Theoretical Perspective*, 3 *J. BISEXUALITY* 151, 164 (2003) ("[T]he focus of the gay and lesbian movement on marriage as an end goal . . ."); JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 168 (2001) ("Marriage finally shoved its way to the forefront of the gay movement in the 1990s . . .").

25. Jon W. Davidson, *Winning Marriage Equality: Lessons from Court*, 17 *YALE J.L. & FEMINISM* 297, 300 (2005).

our legal work. Nothing could be further from the truth.”²⁶ The tone of the comment suggests resistance from within the organization to the media’s overemphasis of its marriage-related work.

It may seem strange to a contemporary reader that an LGBT legal organization would attempt to downplay its marriage equality work, now that resistance to same-sex marriage has softened substantially²⁷ and the U.S. Supreme Court has confirmed marriage equality litigation to be a successful strategy.²⁸ Yet, during the timeframe of this study (1996–2006), conservative opposition to same-sex marriage was so intense that LGBT leaders were unsure what legacy marriage equality litigation would leave for the movement.²⁹ LGBT rights groups’ perceived “focus on same-sex marriage” was met with significant internal resistance from a range of constituents.³⁰ Progressives and radicals criticized the pursuit of marriage rights as a strategy that would leave diverse, nonmarital families outside the realm of legal protection.³¹ Other activists and scholars, especially those of color, criticized same-sex marriage as a priority that primarily served white and upper-middle-class lesbian, gay, and bisexual people, rather than transgender people and other LGBT constituents experiencing intersectional race- and class-based oppression.³² Even those in the movement who were ideologically in favor of pursuing marriage rights discouraged pushing the issue during these early years, fearing it would leave LGBT people “vulnerable to a virulent backlash.”³³ In this

26. Memorandum of an Overview of Current Legal Cases & Advocacy Initiatives, Lambda Legal Def. & Educ. Fund, Inc. (Aug. 1, 2006) (on file with author).

27. Emily Swanson, *Major Survey Shows Clear Majority of Americans Support Same-Sex Marriage*, CHI. SUN TIMES (Mar. 5, 2015), <http://chicago.suntimes.com/politics/major-survey-shows-clear-majority-of-americans-support-same-sex-marriage>.

28. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

29. Dorf & Tarrow, *supra* note 12, at 455 (describing conservative backlash against marriage equality litigation).

30. See BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS, BEYONDMARRIAGE.ORG (July 26, 2006), <http://bcrw.barnard.edu/publications/nfs7/change/documents/BeyondMarriage.pdf>.

31. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 103–09 (Michael Bronski ed., 2008).

32. Darren L. Hutchinson, “Gay Rights” for “Gay Whites”?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1370–72 (2000); Craig Willse & Dean Spade, *Freedom in a Regulatory State?*: Lawrence, *Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 328–29 (2005). See Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WISC. L. REV. 655, 659–61 (2016) [hereinafter Leachman, *Institutionalizing Essentialism*].

33. *Beyond Same-Sex Marriage*, UNMARRIED EQUALITY, <http://www.unmarried.org/beyond-same-sex-marriage> (last visited Nov. 27, 2016).

context, it becomes clear how distorted media coverage of social movement litigation might have serious implications for a movement; in the LGBT movement's case, media attention to marriage sharpened the public focus on a litigation strategy that became a lynchpin for both external political resistance and internal movement debate.

This Article expands current understandings of law and social change by emphasizing the need to account for the contextual factors and institutional forces that mediate movement messages and shape the social construction of movement litigation. Previous scholarship has presented a generally optimistic view of the publicity-generating power of litigation, depicting media attention as an added benefit for social movements and a means of amplifying the cultural consequences of litigation for social change.³⁴ Yet, as my findings suggest, the media's selective focus on certain litigation issues can siphon public attention away from activists' diverse efforts to advance change in other areas.³⁵ Furthermore, when the media devotes disproportionate attention to a movement's more controversial litigation campaigns, this may actually fuel countermobilization efforts aimed at thwarting movement goals.³⁶ Existing research has yet to account for these potentially detrimental effects of media coverage of social movement litigation. In examining the content of media coverage of social movement litigation—and the processes that may produce bias in that coverage—this Article expands sociolegal understandings of the media's role in amplifying (or constraining) the cultural impact of social movement litigation.

This Article also offers unique insights into how bias in news coverage of social movement litigation may affect broader patterns of political mobilization around inequality issues. During this study's timeframe, marriage equality was a goal that was almost exclusively being pursued through the litigation efforts of LGBT legal groups; the meager public support for same-sex marriage, even in relatively progressive geographical areas, convinced activists that popular and legislatively focused efforts for marriage equality would be untenable.³⁷ However, in the years since 2006, there has been a groundswell of

34. See McCann, *Law and Social Movements*, *supra* note 6, at 29 (“[M]edia propensities to publicize legal rights claims, especially when taken to official tribunes and linked to dramatic information disclosure, can magnify the public power of legal mobilization pressure tactics in many settings.”).

35. See *infra* Section III.B.

36. See *infra* Section IV.B.

37. See ELLEN A. ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 158–60 (2005).

activism around marriage outside the courts;³⁸ LGBT activists and their allies have pushed for marriage equality through grassroots activism and lobbying campaigns.³⁹ In documenting the media's disproportionate emphasis on marriage equality, at a time when litigation was the primary vehicle being used to advance marriage equality, this Article provides insight into how social movement litigation can shape the priorities of broader social change efforts—intensifying the focus of movement activists and allies toward a movement's most media-saturated litigation strategies.⁴⁰

The Article proceeds as follows. Part I discusses the legal and sociolegal literature on social movement litigation, which suggests that litigation produces social change indirectly by stimulating publicity and directing political attention to a movement's cause. Part II examines original data on the legal dockets of three leading legal organizations in the LGBT movement from 1996–2006, discussing which LGBT movement issues consumed the greatest share of these organizations' legal dockets. Part III reports the results of a content analysis of mainstream news articles covering these LGBT legal organizations' activities over the same time period and compares the issues the organizations litigated to the media coverage they received. The findings reveal that the media covered marriage equality litigation more than any other issue; articles on same-sex marriage comprised nearly half of the total coverage of the LGBT litigating groups. This coverage was drastically disproportionate to the number of marriage equality cases those organizations litigated, which comprised only 8% of the organizations' dockets. In addition, coverage of same-sex marriage litigation was significantly more likely than coverage of any other issue to also discuss anti-LGBT countermovement activity. Section IV.A draws on previous studies of the mainstream media to explain the media's focus on marriage. I argue that countermovement mobilization against same-sex marriage may have created conflict that reporters found particularly newsworthy. Section IV.B explores the implications of the Article's findings for broader patterns of LGBT mobilization and countermobilization. I discuss how the media's focus on controversial social movement litigation may have a constitutive effect on political struggles—intensifying movement efforts around widely contested

38. See DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 148–50 (2006).

39. See *infra* Section II.A.

40. See *infra* Section IV.B. For other scholarship focused specifically on the ability of litigation to shape movement agendas, see Leachman, *From Protest to Perry*, *supra* note 5, at 1668.

goals, while simultaneously providing a platform for opponents who resist those goals. The Conclusion discusses the contributions of this study to existing understandings of law and social movements and suggests directions for future research.

I. MEDIA COVERAGE OF SOCIAL MOVEMENT LITIGATION: SYMBOLIC VALUE AND INSTITUTIONAL CONSTRAINTS

Sociolegal scholars have emphasized how social movement litigation produces “radiating effects” beyond the courtroom and beyond the material legal remedies that may result from judicial opinions.⁴¹ Litigation forces the state to articulate a position vis-à-vis movement demands, helping place movement issues on the mainstream political agenda.⁴² Litigation can also create a sense of urgency around movement issues, bolstering the leverage of movement actors in political negotiations.⁴³ The cultural impact of litigation may reverberate within the litigating movement itself, as specific legal battles may become “symbols for rallying a group, broadcasting awareness of grievance and dramatizing challenge to the status quo.”⁴⁴

One of the key mechanisms that allows litigation to produce this wide range of extralegal effects is the publicity that litigation receives.⁴⁵ Previous work has found that litigation attracts enormous media attention. In his study of the pay equity reform movement, Michael McCann found that lawsuits generated a “tremendous amount of mainstream media attention.”⁴⁶ News media coverage of litigation for pay equity reform was five to ten times greater than coverage of any other tactic, including legislation, electoral politics, and protest.⁴⁷ This author’s own study of media coverage of LGBT politics from 1985–2008

41. Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 117–18 (Keith O. Boyum & Lynn Mather eds., 1983).

42. Michael W. McCann, *How Does Law Matter for Social Movements?* [hereinafter McCann, *How does Law Matter*], in *HOW DOES LAW MATTER?* 76, 92 (Bryant G. Garth & Austin Sarat eds., 1998); Nathaniel Persily, *Introduction to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 3, 3 (Nathaniel Persily et al. eds., 2008).

43. See Douglas Nejaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941, 998–1002 (2011).

44. Galanter, *supra* note 41, at 117 (emphasis omitted); see also Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 *SOC. FORCES* 944, 944–45 (1980).

45. McCann, *Law and Social Movements*, *supra* note 6, at 26 (“[L]egal mobilization often succeeds in movement building because the mass media tend to be particularly responsive to rights claims and litigation campaigns for social justice.”); *id.* at 29 (explaining that media coverage “can magnify the public power” of litigation).

46. *Id.* at 58.

47. *Id.* at 59–60.

similarly found that litigation received significantly greater media coverage than any other tactic used by LGBT activists, including protest.⁴⁸ Because these previous studies examined only media representations—without comparing media coverage to any objective baseline record of movement events that formed the basis for that coverage—they did not definitively show that litigation is more likely than other movement tactics to be reported in the news.⁴⁹ Yet, the studies suggest an important role for social movement litigation in shaping the media image of a social movement more broadly.

While litigation may attract significant publicity as compared to other movement tactics, certain types of cases are likely to receive more publicity than others. The communications literature has shown that what gets covered depends on institutionalized features of mainstream news media production.⁵⁰ Journalistic norms, standards, and newsgathering behaviors, disseminated through professional training and reinforced by competition-minded editorial decisions, shape the content of news coverage.⁵¹ Social movement activity that fits well with these newsgathering norms and routines is more likely to receive mainstream news coverage than activity that does not.⁵²

One central journalistic norm that guides news production is the requirement that stories be *newsworthy*.⁵³ Although newsworthiness as a professional value attempts to ensure that only the most “important” stories receive coverage, the drive for newsworthiness tends to push reporters toward the more dramatic, controversial, or conflict-ridden events.⁵⁴ For example, the media disproportionately report on street protests that involve a controversial issue,⁵⁵ violence, or a

48. Leachman, *From Protest to Perry*, *supra* note 5, at 1672–73.

49. Cf. John D. McCarthy et al., *Images of Protest: Dimensions of Selection Bias in Media Coverage of Washington Demonstrations, 1982 and 1991*, 61 AM. SOC. REV. 478, 480 (1996) (noting that the “[t]he appropriate assessment of [media] selection bias issues requires a credible, objective record of the population” of social movement events, compared to media records of those events).

50. EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 18–19 (2002).

51. *Id.* at 298. See generally BENNETT, *supra* note 9, at 117–20.

52. See José Barranco & Dominique Wisler, *Validity and Systematicity of Newspaper Data in Event Analysis*, 15 EUR. SOC. REV. 301, 301 (1999); Carol Mueller, *International Press Coverage of East German Protest Events, 1989*, 62 AM. SOC. REV. 820, 825 (1997).

53. Oliver & Myers, *supra* note 11, at 45 (“Journalistic norms and standards for assessing the news value of events are widely agreed to be important in determining which events get covered.”).

54. BENNETT, *supra* note 9, at 158.

55. Oliver & Myers, *supra* note 11, at 41.

counterdemonstration.⁵⁶ Similarly, the media are more likely to cover litigation when it has dramatic qualities, such as a large money damages award.⁵⁷ Since the media selectively emphasize conflict in coverage of both non-movement litigation and non-litigation movement activity, one would expect to find the media also selectively emphasizing conflict in coverage of movement litigation.

Another journalistic norm affecting the content of mainstream news coverage is the requirement that journalists provide a neutral, or “balanced,” perspective when reporting on controversial social issues.⁵⁸ Many U.S. news sources hang their reputation on their paper’s neutrality, or lack of apparent bias, in reporting on hot-button political and social issues.⁵⁹ Journalists attempt to provide a “neutral” account of politically contentious movement issues—or at least they stake out the appearance of neutrality—by relying on scripted story formats that traditionally convey impartiality.⁶⁰ The primary example is the “balanced” story format, in which journalists give equal coverage time to perspectives that fall within the realm of “legitimate controversy,” or perspectives that fall within a live and reasonable political debate.⁶¹ The balance norm inserts the perspectives of a social movement’s opponents into coverage of the movement’s own actions.⁶² “Balanced” citations to countermovement perspectives are particularly likely where movement action has provoked debate among politicians and other political elites, who define the parameters of “reasonable” political debate.⁶³

The fact that newsgathering norms may systematically shape

56. Oliver & Maney, *supra* note 11, at 496.

57. HALTOM & MCCANN, *supra* note 11, at 155, 159, 168; Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 L. & HUM. BEHAV. 419, 426 (1996); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL’Y REV. 237, 263–64 (2004).

58. See generally DAVID T.Z. MINDICH, *JUST THE FACTS: HOW “OBJECTIVITY” CAME TO DEFINE AMERICAN JOURNALISM* (1998).

59. Alternative legitimate models of journalism may be emerging in the U.S., however. The rift between *Fox News* and *MSNBC* suggests that news networks are increasingly building subscriber networks based on politicized news reporting.

60. William A. Gamson & Gadi Wolfsfeld, *Movements and Media as Interacting Systems*, 528 ANNALS AM. ACAD. POLIT. & SOC. SCI. 114, 122 (1993) (discussing how “the media’s balance norm,” evoked in coverage of controversial issues, “requires seeking spokespersons for both sides in what journalists typically reduce to a dyadic conflict”).

61. DANIEL C. HALLIN, *THE “UNCENSORED WAR”: THE MEDIA AND VIETNAM* 116–17 (1989); see also PAMELA J. SHOEMAKER & STEPHEN D. REESE, *MEDIATING THE MESSAGE: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT* 114–15 (2d ed. 1996).

62. MINDICH, *supra* note 58, at 8.

63. HALLIN, *supra* note 61, at 116–17.

media coverage suggests that, in order to understand the cultural impact of litigation-generated media coverage—including both the impact on the movement and on the movement's potential to accomplish desired social change—it is necessary to investigate how social movement litigation is constructed in the media. Further, to build theory of the cultural impact of movement litigation, it is crucial to understand how media coverage departs from the reality of that litigation on the ground. In examining precisely that disjuncture between movement litigation and the media's representation of that litigation, this Article aims to expose how institutionalized aspects of the mainstream news reporting may shape the types of stories that are covered in the media and, as a corollary, the symbolic value of litigation-generated publicity to the movement.

II. STUDY OF LGBT MOVEMENT LITIGATION

This Part analyzes the litigation activities of three major LGBT legal organizations: Lambda Legal Defense and Education Fund (“Lambda Legal” or “Lambda”), the National Center for Lesbian Rights (NCLR), and Gay and Lesbian Advocates and Defenders (GLAD). Each of these organizations uses the impact litigation model popularized by the NAACP Legal Defense and Education Fund, with staff attorneys selecting cases that provide the opportunity to set positive precedent and thereby incrementally advance the organization's social change goals.⁶⁴ Lambda, NCLR, and GLAD are the oldest LGBT movement organizations devoted primarily to litigation,⁶⁵ and, along with the ACLU, they were the best-funded LGBT legal organizations in the nation in the time period under observation.⁶⁶

64. ANNE N. COSTAIN, *INVITING WOMEN'S REBELLION: A POLITICAL PROCESS INTERPRETATION OF THE WOMEN'S MOVEMENT* (1992); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 2* (1978); David S. Meyer & Steven A. Boutcher, *Signals and Spillover: Brown v. Board of Education and Other Social Movements*, 5 PERSP. POLIT. 81, 82 (2007).

65. Sarah E. Brewer et al., *Sex and the Supreme Court: Gays, Lesbians, and Justice*, in *THE POLITICS OF GAY RIGHTS*, *supra* note 23, at 377, 382.

66. ANDERSEN, *supra* note 37, at 47. The ACLU's National Gay and Lesbian Rights Project was excluded from this analysis, even though it received comparable funding to Lambda, NCLR, and GLAD during the time period under investigation, primarily due to the practical difficulties associated with finding relevant news coverage of the organization. Pilot searches revealed that: (1) the proportion of relevant articles received through online newspaper searches was significantly diluted due to the inclusion of coverage of non-LGBT related ACLU litigation; and (2) coverage of LGBT-related litigation typically did not clarify whether the organization involved was the national ACLU or one of the numerous ACLU state affiliates that also conducts LGBT rights litigation.

Lambda Legal, founded in 1973 in New York, has been involved in several high-profile litigation campaigns, including campaigns to overturn state sodomy laws and to require the Boy Scouts of America to allow gay youth participation.⁶⁷ Both campaigns brought lawyers for the organization before the U.S. Supreme Court.⁶⁸ Lambda has also focused on HIV discrimination, military service, and employment discrimination.⁶⁹ The NCLR, founded in 1977 in San Francisco as the Lesbian Rights Project, is traditionally identified by its representation of lesbian mothers in custody disputes.⁷⁰ While its original mission was to ensure representation of women in the “gay rights” movement—as it was previously known—the NCLR also has represented plaintiffs of all genders on a variety of issues, including housing, employment, military service, and insurance.⁷¹ Finally, GLAD was founded in Boston in 1978, under the name Park Square Defenders.⁷² A regional organization focusing on the New England states, GLAD garnered national attention for litigating *Goodridge v. Department of Public Health*,⁷³ the first state case to generate full marriage rights for same-sex couples. GLAD has also focused on police practices, violence against LGBT people, and parenting rights.⁷⁴

67. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

68. Brief for Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152352, at *i; Brief for Respondents, *Boy Scouts of Am.*, 530 U.S. 640 (No. 99-699), 2000 WL 340276, at *i.

69. Craig A. Rimmerman, *Beyond Political Mainstreaming: Reflections on Lesbian and Gay Organizations and the Grassroots*, in *THE POLITICS OF GAY RIGHTS*, *supra* note 23, at 54, 69.

70. See Heather Cassell, *NCLR Still Has an Edge at 30*, *BAY AREA REP.* (Apr. 5, 2007), <http://www.ebar.com/news/article.php?sec=news&article=1696> (“Devoted to the lesbian-feminist foundation to provide a broad perspective of advocacy and legal support for fundamental rights, [Lesbian Rights Project founders] Hitchens and Achtenberg focused their initial courtroom battles on lesbian family issues, which at that time saw lesbian mothers having to prove they were fit parents to retain child custody rights.”).

71. NCLR, *LIGHTING THE WAY FOR LGBT RIGHTS: NCLR ANNUAL REPORT 2* (2012), http://www.nclrights.org/wp-content/uploads/2013/09/NCLR_2012_annual_report_single-pages.pdf (“From a humble yet tenacious initial focus on addressing the overlooked discrimination against lesbians, NCLR has grown to expand its life- and law-changing work in order to advance the legal landscape for every LGBT person. Our programs focusing on elder law, employment, family law, federal legislation, healthcare, immigration, marriage, relationship protections, sports, transgender law, and youth create safer homes, safer jobs, and a more just world.”).

72. Sarah H. Brewer et al., *Sex and the Supreme Court: Gays, Lesbians, and Justice*, in *THE POLITICS OF GAY RIGHTS*, *supra* note 23, at 377, 382.

73. 798 N.E.2d 941, 948 (Mass. 2003).

74. Mary L. Bonauto, *Goodridge in Context*, 40 *HARV. C.R.-C.L. L. REV.* 1, 12–16 (2005).

Both the docket and media analyses examine data from the years 1996–2006. I selected this timeframe to investigate bias in media coverage of LGBT rights litigation given the repeated frustration voiced by movement lawyers at the time that coverage of marriage litigation had begun to overshadow the significant work LGBT legal organizations were doing in other areas.⁷⁵ Another reason for selecting this time frame was to cabin the observation period to the years during which the bulk of marriage equality activism was taking place in the courts, predominately by the national LGBT legal organizations in this study. Focusing on a period in which LGBT legal organizations were leading the fight for marriage creates a “hard case” for finding media bias toward marriage; if these organizations were performing most of the work, then there should be less of a gap between the amount of marriage litigation they perform and the coverage they received.

The start year of 1996 marks the first year that any national LGBT legal organization acted as counsel in a marriage equality case. Lambda Legal intervened as counsel that year in a trial court remand of *Baehr v. Lewin*,⁷⁶ the Hawaii Supreme Court decision finding that prohibitions on same-sex marriage warranted strict scrutiny under the state’s constitution.⁷⁷ Lambda Legal also established a marriage equality project to coordinate marriage equality litigation efforts.⁷⁸ Soon thereafter, all of the other national LGBT legal organizations similarly began to pursue marriage equality litigation.

A surge in countermovement activism against marriage equality also took place in 1996, making same-sex marriage a focal issue on the national political stage. As the *Baehr* decision date approached, conservative groups and religious organizations on the mainland forcefully lobbied federal and state legislatures to take action.⁷⁹ Congress responded with the 1996 Defense of Marriage Act (DOMA), which defined marriage as a heterosexual coupling and exempted states from recognizing same-sex marriages performed in other states.⁸⁰ Republicans then made marriage a central wedge issue in the 1996

75. Cf. Davidson, *supra* note 25, at 300 (discussing LGBT legal organizations’ other efforts in addition to seeking marriage equality).

76. 852 P.2d 44, 67 (Haw. 1993), *remanded sub. nom.* *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

77. *Baehr*, 1996 WL 694235, at *2, *aff’d*, 950 P.2d 1234 (Haw. 1997), *rev’d*, 994 P.2d 566 (Haw. 1999); see ANDERSEN, *supra* note 37, at 179–83 (describing Lambda Legal’s involvement in the 1996 circuit court trial and subsequent ruling in *Baehr*).

78. ANDERSEN, *supra* note 37, at 179–80.

79. *Id.* at 180–81.

80. Defense of Marriage Act, 1 U.S.C. § 7 (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

election, drawing out the conservative vote.⁸¹ Sixteen statewide “mini-DOMA” ballot initiatives prohibiting same-sex marriage were passed during that election cycle.⁸² Twenty-six more states subsequently passed mini-DOMAs from 1998–2006.⁸³

The 2006 cutoff year for the study was chosen due to the increasingly diffuse character of same-sex marriage advocacy around that time, spreading into areas of advocacy outside the purview of the LGBT legal groups. The years 2006–2007 were punctuated by a series of defeats in five state courts and one federal appeals court.⁸⁴ LGBT civil rights attorneys interpreted these defeats as a “the nail in the coffin for the litigation strategy” and a signal for activists to “tak[e] [their] case to the political bodies—the legislatures and the people.”⁸⁵ While LGBT legal organizations did not ultimately abandon their litigation strategies, their efforts in the courts were increasingly accompanied by grassroots and local campaigns aimed at these political bodies, resulting in eleven states’ subsequent legalization of same-sex marriage through legislation and popular referenda.⁸⁶

The more recent surge of marriage equality cases,⁸⁷ culminating in the 2015 *Obergefell* decision,⁸⁸ indicated further diffusion of the

81. CAHILL & TOBIAS, *supra* note 24, at 123–25.

82. *Id.* at 124–25.

83. See Raymond Christopher Burnett & William M. Salka, *Determinants of Electoral Support for Anti-Gay Marriage Constitutional Amendments: An Examination of 2006 Votes on Ballot Measures in the States*, 56 J. HOMOSEXUALITY 1071, 1071–72 (2009).

84. Jay Lindsay, *Gay Marriage Supporters Find Courtrooms Studded with Obstacles*, ASSOC. PRESS, Sept. 28, 2007, (“Last week, Maryland’s high court became the latest after New York, Washington and New Jersey to refuse to grant marriage rights to gay residents.”).

85. Claudia Rowe, *Advocates Gear up For the Next Round on Gay Marriage*, SEATTLE POST-INTELLIGENCER, July 26, 2006, at A1 (quoting Jonathan Rauch).

86. Legislation was passed in Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, and Vermont. See Emily Doskow, *Same-Sex Marriage: Developments in the Law*, NOLO, <http://www.nolo.com/legal-encyclopedia/same-sex-marriage-developments-the-law.html> (last updated Dec. 5, 2013). Ballot initiatives were passed in Maine, Maryland, and Washington. See *id.*; Abby Goodnough, *Focus of Gay-Marriage Fight Is Maine*, N.Y. TIMES (Oct. 27, 2009), <http://www.nytimes.com/2009/10/28/us/28maine.html> (discussing grassroots efforts for the voter referendum on marriage equality in Maine); Lornet Turnbull, *Same-Sex Marriage is a Four-State Campaign*, SEATTLE TIMES (Oct. 16, 2012), <http://www.seattletimes.com/seattle-news/same-sex-marriage-is-a-four-state-campaign> (describing local grassroots efforts targeting legislatures and voters to pass marriage equality bill in referenda in the “four states” marriage equality campaign).

87. See Eckholm, *supra* note 15, at A20 (“With a slew of cases barreling toward federal appeals courts . . . the legal battle over same-sex marriage is entering a new and climactic phase.”).

88. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

marriage equality struggle outside the purview of LGBT legal organizations. Private law firms played a key role in those recent cases, pursuing marriage claims in jurisdictions that LGBT legal groups, fearful of negative precedent, had scrupulously avoided.⁸⁹ Private firms' participation in marriage cases intensified as the U.S. Supreme Court appeared poised to rule on the issue.⁹⁰ Indeed, the three prominent marriage equality victories at the U.S. Supreme Court in *Perry*,⁹¹ *Windsor*,⁹² and *Obergefell*⁹³ all involved cases initiated by private counsel, some of them over the express objections of LGBT civil rights attorneys.⁹⁴ As with the shift in LGBT advocacy to the political realms, these developments suggest that LGBT legal groups played a less dominant role in the marriage equality struggle after 2006. The observation period for these groups is therefore capped at 2006 to reduce the risk of artificially increasing any gap that is observed between the marriage docket and the media's continued attention to the issue. The remainder of this Part discusses the methods used to analyze the litigation dockets of the three major LGBT legal organizations in the study from 1996–2006. This analysis is the first phase of the larger two-part study used to evaluate bias in the newspaper coverage of those LGBT legal groups. Part III follows, comparing the organizations' legal dockets to the media coverage they received.

89. Margaret Talbot, *A Risky Proposal: Is It Too Soon to Petition the Supreme Court on May Marriage?*, NEW YORKER (Jan. 18, 2010), <http://www.newyorker.com/magazine/2010/01/18/a-risky-proposal> (discussing how private attorneys in the *Perry* case chose to litigate in federal courts over the objection of LGBT rights groups).

90. Joan Biskupic, *As U.S. Gay-Marriage Battle Looms, Attorneys Fight over Fees*, REUTERS (Apr. 16, 2014), <http://www.reuters.com/article/us-usa-court-fees-insight-idUSKBN0N72G120150416> (discussing how the appeal of these cases to elite law firms has increased in recent years as marriage litigation “offered the possibility of coveted face time before the Supreme Court”).

91. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (ruling proponents of Proposition 8 did not have standing, thus allowing freedom to marry to resume in California).

92. *U.S. v. Windsor*, 133 S. Ct. 2675, 2696–97 (2013) (finding DOMA's definition of marriage unconstitutional).

93. *Obergefell*, 135 S. Ct. at 2607–08 (legalizing same-sex marriage).

94. Chris Johnson, *ACLU Opposes DOMA Lawyer's Intervention in Marriage Case*, WASH. BLADE (May 5, 2014), <http://www.washingtonblade.com/2014/05/05/aclu-opposes-doma-lawyers-intervention-marriage-case> (noting that *Obergefell v. Himes* was originally “filed by private attorneys”); Ariel Levy, *The Perfect Wife: How Edith Windsor Fell in Love, Got Married, and Won a Landmark Case for Gay Marriage*, NEW YORKER (Sept. 30, 2013), <http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife> (discussing how the lead plaintiff in *Windsor* sought representation at a private firm after LGBT legal organizations refused to represent her, stating that it was “the wrong time for the movement”); Talbot, *supra* note 89 (discussing how LGBT legal organizations publicly opposed private attorneys' decision to file the *Perry* case).

A. *Construction of the LGBT Legal Dockets Database*

The primary source of the docket data for Lambda Legal, the NCLR, and GLAD was a complete set of each organization's newsletters—monthly or seasonal—and annual member updates. To ensure that the dockets included cases that the organizations neglected to report in their newsletters, I supplemented these materials with online searches of each organization in three online databases: Westlaw's "Dock-All"; Lexis' "Federal & State Cases"; and Lexis' "Jury Verdicts & Settlements."⁹⁵

The docket dataset was arranged by year to provide an annual measure of the types of cases in which each organization participated. The unit of analysis is the case/year. A case was included in the dataset if Lambda, GLAD, or NCLR acted as counsel or wrote an amicus brief for that case during any year of the study's timeframe (1996–2006).⁹⁶ If an organization participated in a particular case for more than one year, that case would produce more than one data point. For example, if an organization litigated a case from trial court to appeal over the course of five years, that case would produce five separate data points in the study.

These methods produced a total of 1121 case/year units: 132 for GLAD, 672 for Lambda Legal, and 317 for NCLR. While the newsletter and online searches may not have identified every legal case in which the organizations participated, these were the most comprehensive methods available, and the set of cases they produced is likely to be representative of the LGBT legal organizations' complete dockets. A disadvantage of these methods is that they cannot capture the full extent of the organizations' actions outside of the courtroom, which may be substantial.⁹⁷ However, in constructing the database, I read through all newsletter accounts of the organizations' extralegal advocacy, as well as their litigation efforts, and found that the groups' extralegal work complimented and reflected the issues they litigated in court. Furthermore, since litigation was the primary tactic of these

95. Online searches generated a total of 11% of the organizations' docket information (17% of the GLAD dockets, 1% of the Lambda dockets, and 11% of the NCLR dockets).

96. The organizations acted as counsel in 59% of the case/year observations and wrote amicus briefs in the remaining observations. The sections presenting this study's findings do not distinguish organizations by their role as counsel versus amicus because a separate analysis of the data revealed no significant differences between the issues presented in these types of cases.

97. See ANDERSEN, *supra* note 37, at 40 (discussing Lambda's advocacy outside the courtroom on issues related to HIV/AIDS, parenting, and sodomy law reform); *id.* at 50 (discussing Lambda's public education work around marriage, foster care, and schools).

organizations,⁹⁸ the docket information is likely the most relevant indicator of the major issues on which the organizations focused and to which they allotted resources.⁹⁹

1. Coding Scheme

Each case identified on the organizational dockets was coded by issue. I generated the issue-coding scheme through an initial round of exploratory coding, in which I recorded minute variation in the topics raised in each case. I then grouped these data into broader issue categories that reflected observed combinations of legal topics addressed in similar cases.¹⁰⁰ Separate issue codes were also used to identify cases involving people with HIV/AIDS, transgender individuals, and/or LGBT youth, reflecting the LGBT legal organizations' own categorization of these types of cases in their newsletters.¹⁰¹

98. A review of the financial information provided in the organizations' tax documents and newsletters supports the conclusion they were primarily focused on litigation. GLAD's audited financial statement for the year 2006 lists its operating costs related to educational work to be 22% of its total expenses for program services (\$616,747/\$2,863,642), as compared to 43% for its Civil Rights program. PARK SQUARE ADVOCATES, INC., D/B/A GAY & LESBIAN ADVOCATES & DEFENDERS FINANCIAL STATEMENTS DECEMBER 31, 2006 AND 2005 TOGETHER WITH INDEPENDENT AUDITOR'S REPORT 3 (2007), <https://www.glad.org/uploads/docs/financials/glad-afs-2006.pdf>. Lambda Legal's annual report for 2009, detailing expenses for 2008 and 2009, lists its expenses for Legal Programs as 54% of its program expenses (\$9,281,895/\$17,126,081), as compared to 27% for education programs. LAMBDA LEGAL, MAKING THE CASE FOR EQUITY: LAMBDA LEGAL ANNUAL REPORT 2009, at 47 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/ar_2009_making-the-case-for-equality_1.pdf. Lambda's annual report before 2009 did not provide such a fine-grained breakdown of its expenses, just listing expenses under the single category of "Legal & Education Programs." See LAMBDA LEGAL, EQUALITY: IN FOCUS ANNUAL REPORT 2008, at 46 (2009), http://www.lambdalegal.org/sites/default/files/publications/downloads/ar_2008_equality-in-focus_1.pdf. NCLR's tax documents and newsletters did not break down its expenses by activity. However, NCLR's 2005 tax form provides a thorough "Statement of Program Service Accomplishments," which divided the organization's accomplishments into "Legal Work" and "Public Policy and Education Work"; the organization listed sixteen items under the former, versus four items listed under the latter. See Form 990—Return of Organization Exempt from Income Tax, National Center for Lesbian Rights (2005) (on file with author).

99. For an interesting discussion of alternative methods for measuring the priorities of legal organizations, see Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107, 110–11 (2014).

100. Similar methods have been used in previous work. See, e.g., Jennifer Earl et al., *Protest Under Fire? Explaining the Policing of Protest*, 68 AM. SOC. REV. 581 (2003).

101. I included separate codes for only those subgroups that the LGBT legal organizations themselves categorized separately because it indicates how they

The final coding scheme consisted of the following categories:

- *Criminal Justice*: Cases involving the rights of LGBT people in the criminal justice system, including people in jail or on parole or those who had been arrested or charged with a crime.
- *Employment*: Cases involving LGBT people who were fired, retaliated against, or otherwise discriminated against at work, including discrimination in military employment and cases challenging the military's "Don't Ask, Don't Tell" policy.
- *HIV/AIDS*: Cases involving people living with HIV/AIDS.¹⁰²
- *Immigration/Asylum*: Cases involving discrimination against immigrants and discrimination in the enforcement of immigration law, as well as asylum claims made by LGBT people. For example, *Kimumwe v. Gonzales* involved an asylum claim based on sexual orientation persecution.¹⁰³
- *Marriage*: Cases involving the right to marry for same-sex couples and transgender individuals. For example, *Andersen v. King County* was brought by same-sex couples denied marriage licenses who sought to overturn Washington

conceptualized and prioritized issues, which is what the docket analysis aims to measure. There are clearly other constituencies within the LGBT community who face distinctive sets of social and legal subordination, particularly low-income LGBT people and queers of color. See Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 580–81 (2010). While the LGBT legal organizations would sometimes mention these other constituencies in their newsletters, it was often in the context of discussing the importance of one of the broader legal issues referenced in the issue-coding scheme. See, e.g., Memorandum of an Overview of Current Legal Cases & Advocacy Initiatives, Lambda Legal Def. and Educ. Fund, Inc., 10, 14 (Nov. 1, 2006) (on file with author) (“[M]arriage discrimination disproportionately affects gay and lesbian couples of color Lambda Legal was one of the first organizations to document the hardships experienced by lesbian, gay, bisexual, transgender and questioning (LGBTQ) youth in foster care. These adolescents—predominantly youth of color—face intolerable conditions.”).

102. Most cases involving people with HIV/AIDS pertained to discrimination in the context of employment (31%) or public accommodations (39%).

103. 431 F.3d 319, 321 (8th Cir. 2005).

State's defense of marriage act.¹⁰⁴

- *Parenting*: Cases involving the parental rights of LGBT individuals, including custody, visitation rights, and second-parent adoption. For example, *A.G. v. D.W.* involved a non-biological lesbian mother's claim for custody rights.¹⁰⁵
- *Privacy*: Cases challenging state action that allegedly violated a constitutional right to privacy, such as challenges to state anti-sodomy laws or denials of reproductive rights. Also included are cases involving the right to abortion as well as cases like *Benitez v. North Coast Women's Care Medical Group, Inc.*, in which a lesbian was denied fertility treatment due to sexual orientation.¹⁰⁶
- *Relationship Recognition*: Cases ensuring the rights of domestic partners, reciprocal beneficiaries, or same-sex couples who had formed partnerships through non-marriage legal arrangements.¹⁰⁷ For example, *AAUP v. Rutgers* involved an insurance company denying benefits to domestic

104. 138 P.3d 963, 968 (Wash. 2006) (en banc), *abrogated by* Obergefell v. Hodges 135 S. Ct. 2564 (2015).

105. No. B175367, 2005 WL 1432744, at *1–2 (Cal. Ct. App. June 21, 2005).

106. 131 Cal. Rptr. 2d 364, 366 (Cal. Ct. App. 2003).

107. The decision to categorize relationship recognition separately from marriage is based on the empirical reality that these issues have been interpreted by LGBT movement actors and their opponents as distinct phenomena. It is true that many LGBT movement lawyers probably conceptualized nonmarital relationship recognition and marriage equality as being two dimensions part of a unified strategy directed at legal recognition of monogamous, committed same-sex relationships. See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (2014). However, others in the LGBT movement have interpreted nonmarital relationship recognition strategies as categorically different from marriage equality strategies. For example, many have argued that nonmarital recognition strategies are preferable because they affirm the movement's commitment to removing legal stigmatization against nontraditional families and relationships and criticize the marriage equality struggle for reinforcing the stigmatization of families that form outside of marriage. See, e.g., POLIKOFF, *supra* note 31, at 103–09; Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 227–30, 232 (2003). Furthermore—and of particular importance for the purposes of this study—anti-LGBT activists have distinguished the two issues, mobilizing largely in response to marriage equality litigation specifically (and not in response to the relationship recognition cases that became a major movement priority beginning in the 1980s). See Klarman, *supra* note 20, at 482.

partners.¹⁰⁸

- *Social Inclusion*: Cases involving discrimination in housing, public benefits programs, and public accommodations, as well as the free speech rights of individuals in public places and homelessness, including cases in which a club, retirement home, or public housing project refused to accommodate same-sex couples.
- *Transgender*: Cases involving transgender people or gender identity issues.¹⁰⁹
- *Youth*: Cases involving LGBT and gender-nonconforming youth, including those involving foster care, harassment and bullying in schools, and school punishment for an LGBT minor's failure to comply with gendered grooming standards. For example, *Henkle v. Gregory* involved a gay high school student seeking relief from harassment at school.¹¹⁰

B. Focus of the LGBT Legal Organizations' Dockets

Table 1 summarizes the distribution of issues on the LGBT legal organizations' dockets for all years of the study. The cases that appeared most frequently were those related to LGBT parenting, employment discrimination, and social inclusion. These issues fell within the top five issues litigated by each organization and constituted more than half of the organizations' combined dockets. The organizations varied in the extent of their focus on these issues, particularly on the issue of parenting; NCLR's parenting cases constituted a full 49% of the organization's docket, compared to 21% for Lambda and 13% for GLAD. NCLR also took fewer cases related to employment, social inclusion, and HIV/AIDS than did the other two organizations, perhaps on account of NCLR's emphasis on parenting and other issues that have traditionally been of greater concern to lesbians and bisexual women.¹¹¹ Aside from these differences, the LGBT

108. 689 A.2d 828, 830 (N.J. Super. Ct. App. Div. 1997).

109. Most cases involving transgender people pertained to discrimination in the context of employment (29%), public accommodations (24%), cases involving transgender parents (16%), or transgender people in the criminal justice system (11%).

110. 150 F. Supp. 2d 1067, 1069 (D. Nev. 2001).

111. Brewer et al., *Sex and the Supreme Court: Gays, Lesbians, and Justice*, in *THE POLITICS OF GAY RIGHTS*, *supra* note 23, at 377, 382.

legal organizations appeared to rank their priorities similarly, dedicating roughly the same portions of their dockets to cases involving relationship recognition, youth, marriage, privacy, transgender issues, immigration, and criminal justice.¹¹²

Table 1: Issues Litigated (by Organization)

	GLAD	LAMBDA	NCLR	Total
Parenting	13%	21%	49%	28%
Employment	23%	21%	9%	18%
Social Inclusion	20%	21%	8%	17%
HIV/AIDS	15%	20%	1%	14%
Relationship Recognition	8%	11%	7%	10%
Marriage	14%	6%	9%	8%
Youth	9%	7%	10%	8%
Privacy	8%	5%	2%	5%
Immigration	0%	4%	7%	4%
Transgender	8%	2%	6%	4%
Criminal Justice	5%	4%	0%	3%
N	132	672	317	1121

Marriage equality cases constituted only a small percentage of each of the organizations' legal dockets. GLAD, Lambda, and the NCLR were involved in more employment and parenting cases than they were in marriage cases during every year of this study. GLAD appeared to focus most heavily on marriage, devoting 14% of its docket to marriage cases

112. The organizations did not vary more than five percentage points in the percentages of their dockets allocated to cases involving relationship recognition, youth, privacy, and criminal justice. With respect to the other issues (marriage, transgender rights, and immigration): GLAD devoted slightly more docket space to marriage than did the other organizations (14% for GLAD versus 6% for Lambda and 9% for NCLR); Lambda devoted slightly less docket space to transgender issues (2% for Lambda versus 8% for GLAD and 6% for NCLR); and GLAD took no immigration cases (0% for GLAD compared to 7% for NCLR and 4% for Lambda).

(the fourth most frequent issue overall), as compared to the 6% and 9% of marriage cases on the Lambda and NCLR dockets, respectively. On the whole, marriage cases constituted only 8% of the LGBT legal groups' combined dockets, the same as the percentage of their dockets devoted to youth-related cases. A greater share of the organizations' cases during these years involved nonmarital relationship recognition rights, such as rights for domestic partners or reciprocal beneficiaries, more than marriage.

Although the docket analysis provides no support for the claim that LGBT legal organizations *prioritized* the issue of same-sex marriage, these organizations did devote an increasingly large portion of their dockets to marriage over time—particularly after 2004.¹¹³ In 2004, the LGBT legal organizations collectively devoted 16% of their legal dockets to marriage cases, a substantial increase from the 4% average docket space devoted to marriage in previous years. One reason for this increase is that the LGBT legal groups found themselves up against many more legal challenges coming from opponents of same-sex marriage.¹¹⁴ As Jon Davidson, senior counsel for Lambda Legal, explained:

We used to be up against the government when fighting for gay rights, but more and more often we find ourselves also battling against Liberty Counsel and similar organizations. . . It is clear in the case of same-sex marriage that the religious right has started using legal tactics normally associated with liberal and progressive groups like the ACLU or NAACP.¹¹⁵

A closer look at the cases the LGBT organizations' legal dockets confirms this assessment. Before 2004, all the marriage cases on the LGBT legal organizations' dockets except one had been filed by an LGBT person or same-sex couple seeking the right to marry or legal

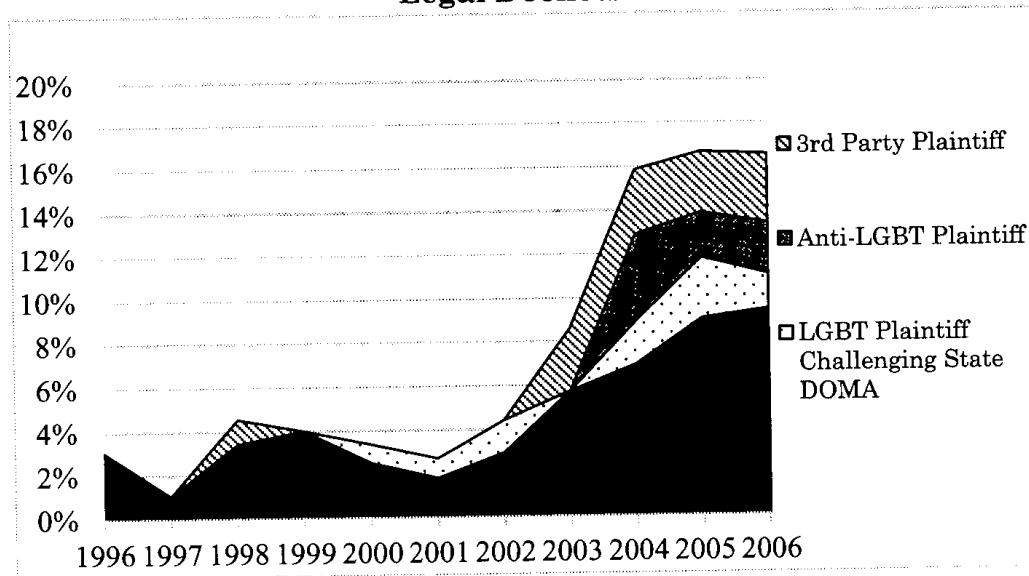
113. See *infra* fig.1.

114. The enormous media attention given to marriage equality litigation in the years before 2004 may have also contributed to the post-2004 increase in marriage cases. The media's focus on marriage equality litigation may have urged conservatives to file lawsuits of their own, to which LGBT litigators felt the need to respond. LGBT litigators may have also sought out more marriage cases to capture the media's attention to the issue and shape the developing public narrative on same-sex marriage. Section IV.B. elaborates on the potential for media coverage to have a feedback influence on the movement's receiving coverage.

115. Thomas Crampton, *Using the Courts to Wage a War on Gay Marriage*, N.Y. TIMES, May 9, 2004, at N14.

recognition of a same-sex marriage.¹¹⁶ After 2004, there was a sharp increase in marriage cases initiated by anti-LGBT organizations. Two of these cases were responsive to the LGBT movement's own marriage equality victory in *Goodridge v. Department of Public Health*, the Massachusetts high court decision finding prohibitions against same-sex marriage to violate the state's constitution.¹¹⁷ Anti-LGBT plaintiffs and legislators petitioned the court to extend a stay of judgment in that case,¹¹⁸ and then turned to federal courts for an injunction.¹¹⁹ GLAD defended against both actions.

Figure 1: Marriage Litigation as a Percentage of the LGBT Legal Dockets¹²⁰



Several other countermovement-initiated marriage cases arose in 2004 in response to action taken independently by pro-LGBT public

116. The one exception was *In re Estate of Gardiner*, a probate case in which the plaintiff sought to invalidate his father's marriage to a male-to-female transsexual under the state's prohibition against same-sex marriage. 42 P.3d 120 (Kan. 2001). Another case, *In re Marriage of Simmons*, similarly involved the claim that a transgender person's marriage was invalid under state prohibitions against same-sex marriage. 825 N.E.2d 303, 306-08 (Ill. App. Ct. 2005). However, in *Simmons*, it was the plaintiff who was transgender (female-to-male) and claiming the validity of a marriage to a female partner in order to claim parental rights to the couple's child upon the dissolution of their relationship. *Id.*

117. 798 N.E.2d 941 (Mass. 2005).

118. *Doyle v. Goodridge*, 827 N.E.2d 1255, 1256 (Mass. 2005).

119. *Largess v. Sup. Jud. Ct. for Mass.*, 373 F.3d 219, 222 (1st Cir. 2004).

120. Third-party plaintiffs are state officials not affiliated with either the LGBT movement or its opponents.

officials. In 2004, San Francisco Mayor Gavin Newsom ordered city clerks to issue marriage licenses to same-sex couples, a decision he claimed was motivated by President George W. Bush's statements opposing same-sex marriage in his State of the Union Address.¹²¹ Public officials in several localities nationwide followed suit, resulting in thousands of same-sex marriages of questionable legal validity.¹²² LGBT legal organizations defended against injunctive petitions and challenges to the validity of those marriages initiated by conservative groups and state attorneys general.¹²³ The organizations also represented same-sex couples who waited to be married and were ultimately denied licenses,¹²⁴ as well as couples that were granted marriage licenses later found to be invalid.¹²⁵

Another factor contributing to the post-2004 rise in marriage cases on the LGBT legal organizations' dockets was the increase in cases challenging state ballot initiatives that prohibited same-sex marriage.¹²⁶ While state-level Defense of Marriage Acts were not new to the movement in 2004, the LGBT legal organizations developed innovative ways of challenging state DOMAs before they even hit the ballots. These challenges were technical, procedural challenges, and they avoided claiming outright that same-sex couples had the constitutional right to marry.¹²⁷ For example, Lambda Legal argued in

121. Dean E. Murphy, *San Francisco Mayor Exults in Move on Gay Marriage*, N.Y. TIMES (Feb. 19, 2004), <http://www.umass.edu/legal/Hilbink/g%26g/San%20Francisco.pdf>.

122. See PINELLO, *supra* note 38, at 19–20.

123. See, e.g., *Lewis v. Alfaro*, No. S122865, 2004 WL 473258 (Cal. Mar. 11, 2004) (initiated by the conservative groups Alliance Defense Fund and Center for Marriage Law); *Lockyer v. City & Cty. of S.F.*, No. S122923, 2004 WL 473257 (Cal. Mar. 11, 2004) (initiated by the California Attorney General). These cases were consolidated into *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 498–99 (Cal. 2004), in which the California Supreme Court found the San Francisco City and city clerk actions unauthorized, and, thus, the marriage licenses void. Other countermovement-initiated suits opposing the issuance of marriage licenses in San Francisco, *Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco*, No. CPF-04-503943 (S.F. City & S.F. Cty. Super. Ct. Aug. 12, 2004), and *Campaign for California Families v. Newsom*, No. CGC-04-428794 (S.F. City & S.F. Cty. Super. Ct. Aug. 12, 2004), were incorporated into the *In re Marriage Cases*, 183 P.3d 384 (2008).

124. See generally *Li v. State*, 110 P.3d 91 (Or. 2005); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

125. *Woo v. Lockyer*, Case No. CPF-04-504038 (Cal. Super. Ct. filed Mar. 12, 2004).

126. See Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES (Nov. 12, 2004), <http://query.nytimes.com/gst/fullpage.html?res=9A06E6DE163FF931A25752C1A9629C8B63&pagewanted=all>.

127. See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 805 (discussing post-2004 cases challenging same-sex marriage bans not “on substantive principles of equal protection or fundamental rights,” but rather on “a procedural provision in the state constitution: the single subject rule”).

Perdue v. O'Kelley that a Georgia ballot initiative violated the state constitution's single-subject requirement.¹²⁸

In short, the increase in marriage equality cases on the LGBT legal organizations' dockets after 2004 shows the LGBT legal organizations taking more marriage cases sparked by countermovement action. An increasingly large portion of the organizations' marriage dockets was devoted to defending against challenges by marriage equality opponents, a marked shift from previous years. The ballot initiative challenges similarly suggest a more defensive posture, with the groups responding to the work of their opponents. Yet even as the LGBT legal organizations expanded their dockets to confront new and existing obstacles to marriage equality, marriage never became the top priority on any of these organizations' dockets, during any year. Even after 2004, these organizations devoted a greater portion of their dockets each year to employment and parenting cases than they did to marriage. Thus, even as the marriage dockets grew, marriage cases never became the most heavily litigated issue on the LGBT legal organizations' dockets.

III. NEWSPAPER COVERAGE OF LGBT MOVEMENT LITIGATION

The second phase of this study examines the mainstream news media coverage of GLAD, Lambda Legal, and NCLR to determine: (1) which LGBT legal issues were reported most frequently in the coverage of these organizations; (2) whether the issues covered in the media differed from the issues on those organizations' legal dockets; and (3) whether the quality of coverage varied depending on the issue reported.

A. Construction of the News Coverage Database

Three national newspapers, the *New York Times*, *USA Today*, and the *Wall Street Journal*, were used to represent coverage in the mainstream news media. These sources were selected for their ability to

128. 632 S.E.2d 110, 112 (Ga. 2006) ("Plaintiffs-appellees filed an action seeking a declaration that the amendment was unconstitutional because the ballot language was misleading and because the amendment contains multiple sections dealing with more than one subject, thereby violating [Georgia constitutional requirements] that voters be allowed to vote on amendments separately."); see also Brief for Appellee-Respondent, *Perdue v. O'Kelley*, 632 S.E.2d 110 (No. S06A1574) 2006, GA S. Ct. Briefs LEXIS 216, at *2-6 (Appellees including Lambda Legal asserting the single-subject claims). *Perdue* was one of many cases at the time that raised single-subject challenges to state same-sex marriage bans. See Gilbert, *supra* note 127 (discussing similar recent claims in *Forum for Equal. PAC v. McKeithen*, 893 So. 2d 715, 720 (La. 2005), and *Wood v. Commonwealth ex rel. Grayson*, Civ. A. 04- CI-01537, 2005 WL 1258921 (Ky. Cir. Ct. May 25, 2005)).

reach the most news consumers; during the timeframe of the study, these three newspapers had the highest circulation rates¹²⁹ and online readership.¹³⁰ The *New York Times* is also commonly used in communications research as a benchmark of national news coverage because it tends to set the agenda of other major U.S. news outlets.¹³¹ Given the widespread syndication and corporate ownership that characterizes the contemporary mainstream media, I do not expect there to be significant variation between the coverage in these three newspapers as compared with other mainstream news sources.¹³² Indeed, previous work has found that radio and televised news tend to echo stories covered in newspapers.¹³³

Since the late 1990s (the initial years of this study's timeframe), there has been a dramatic increase in collaborative forms of news gathering, such as blogging.¹³⁴ Despite the popular perception of blogging as a democratizing force that makes a broader range of stories publicly available, empirical studies have found that blog content relies heavily on mainstream news sources, particularly those examined in this study, as primary sources of information for both news reporting and commentary.¹³⁵ This suggests that blogs may be derivative of

129. Maxwell T. Boykoff, *Flogging a Dead Norm? Newspaper Coverage of Anthropogenic Climate Change in the United States and United Kingdom from 2003 to 2006*, 39 *AREA* 470, 472 (2007) (providing average daily circulation of U.S. newspapers in 2006).

130. PEW RES. CTR., *ONLINE PAPERS MODESTLY BOOST NEWSPAPER READERSHIP* 22 (July 30, 2006), <http://www.people-press.org/files/legacy-pdf/282.pdf> (surveying online news readership showing the *New York Times*, the *Washington Post*, and *USA Today* as the top three newspapers respondents reported having read the previous day).

131. ANDREW ROJECKI, *SILENCING THE OPPOSITION: ANTINUCLEAR MOVEMENTS AND THE MEDIA IN THE COLD WAR* 39 (1999) ("The *New York Times*[...] by its prestigious standing, influences the news agendas of many other news outlets, print and electronic."); Deana A. Rohlinger, *Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Countermovement Dynamics*, 43 *SOC. Q.* 479, 486–87 (2002) (noting that the *New York Times* is "often considered the arbiter of national news").

132. See generally BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 3–4 (2004) (discussing the major conglomerates that distribute a majority of the media content in the United States).

133. LEONARD DOWNIE, JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* 64 (2002); Peter Clarke & Eric Fredin, *Newspapers, Television and Political Reasoning*, 42 *PUB. OPINION Q.* 143, 150 (1978); James P. Winter & Chaim H. Eyal, *Agenda Setting for the Civil Right Issue*, 45 *PUB. OPINION Q.* 376, 381–82 (1981).

134. D. Travers Scott, *Tempests of the Blogosphere: Presidential Campaign Stories That Failed to Ignite Mainstream Media*, in *DIGITAL MEDIA AND DEMOCRACY: TACTICS IN HARD TIMES* 271, 275 (Megan Boler ed., 2008).

135. Tanni Haas, Note, *From "Public Journalism" to the "Public's Journalism"?* *Rhetoric and Reality in the Discourse on Weblogs*, 6 *JOURNALISM STUD.* 387, 387 (2005).

mainstream news, rather than independent of it. Moreover, the blogs that are most popular and widely read rely on mainstream news sources to an even greater extent than lesser known blogs.¹³⁶ Thus, the increase in blog coverage during this time period is unlikely to detract from the influence of major newspapers like these—and indeed, it may have provided an echo chamber of commentary on the stories covered in those newspapers.

Using Lexis-Nexis' online newspaper database, I retrieved every newspaper article published in the *New York Times*, *USA Today*, and the *Wall Street Journal* between 1996 and 2006 that mentioned GLAD, Lambda Legal, or the NCLR. Search terms included each organization's name, as well as variants and abbreviations of its name (e.g., "NCLR or ['lesbian rights' & center]") and misspellings (e.g., "Lamda"). Irrelevant articles, including obituaries, corrections, events lists, letters to the editor, and articles that did not report on GLAD, Lambda, or NCLR were excluded.¹³⁷ This method left a total of 288 articles for analysis.¹³⁸

1. Coding Scheme

Articles were coded to account for three separate aspects of news coverage of LGBT legal organizations: the primary issue each article reported, the prominence of the article's placement, and the depth of coverage. Each of these codes represents a separate indicator of a story's newsworthiness.¹³⁹ First, articles were coded by issue to create a measure of the frequency with which each issue was reported. The frequency of newspaper reporting on a given issue helps gauge how journalists, publishers, and editors have collectively evaluated that issue's newsworthiness.¹⁴⁰ A preliminary analysis of the articles

136. LINDA J. KENIX, *ALTERNATIVE AND MAINSTREAM MEDIA: THE CONVERGING SPECTRUM* 111 (2011).

137. Sometimes a single news article would report on more than one of the organizations in this study: twelve of the articles mentioned two organizations in the same article, and two of the articles mentioned all three organizations. I report these as separate articles only when summarizing data for individual organizations. *E.g.*, *infra* Table 2).

138. Of the 288 articles analyzed, 214 were from the *New York Times*, 51 from *USA Today*, and 23 from the *Wall Street Journal*. Previous research on newspaper coverage of social movements has found similarly higher coverage rates in the *New York Times* as compared to the other newspapers. *See* Boykoff, *supra* note 129, at 479 n.1.

139. Richard J. Lundman, *The Newsworthiness and Selection Bias in News About Murder: Comparative and Relative Effects of Novelty and Race and Gender Typifications on Newspaper Coverage of Homicide*, 18 *SOC. F.* 357, 366–67 (2003).

140. MARIAN MEYERS, *NEWS COVERAGE OF VIOLENCE AGAINST WOMEN: ENGENDERING BLAME* 85–102 (1997).

revealed that the same coding scheme used for the analysis of the LGBT organizations' legal dockets also fit with the issue content analysis of the news articles. Thus, each article was coded as reporting on one of the following primary issues: criminal justice, employment, HIV/AIDS, immigration, marriage, parenting, privacy, relationship recognition, social inclusion, transgender issues, and youth. Table 2 reports the percentage of coverage devoted to each of these issues by organization.

Second, the prominence of an article's placement within the newspaper is another indicator of its newsworthiness. Editors tend to place stories they consider to be newsworthy more prominently in the newspaper, such as on the front page.¹⁴¹ Editors may also select more newsworthy issues for Sunday coverage because advertising costs and readership are higher for Sunday papers.¹⁴² Although the prominent placement of articles in hard copy newspapers may have become less salient in recent years, as news consumption increasingly moves to the Internet, the prominent placement of articles continues to serve as an indicator of editorial assessments of newsworthiness. Thus, articles were coded to indicate whether they had front page or Sunday placement. To account for the possibility that article prominence may be driven by the level of the court deciding a covered case, the articles were also coded to indicate whether they featured coverage of a case at the U.S. Supreme Court.

Third, depth of coverage is another factor indicating a story's newsworthiness. Editors give more print space to articles they believe will stimulate reader interest, allowing the reporter to contextualize a story and provide greater detail. Quotations by an LGBT legal organization representative also indicate that the article goes into more depth about the actions and perspectives of those organizations. Accordingly, articles were coded for length (measured by word count) and for whether they quoted an LGBT legal organization representative. In addition, articles were coded to indicate whether they mentioned a specific legal case on the LGBT legal dockets by name, to provide a separate indicator of the depth of coverage of LGBT legal organizations.

141. Ann E. Reisner, *The News Conference: How Daily Newspaper Editors Construct the Front Page*, 69 *JOURNALISM Q.* 971, 973 (1992).

142. Rick Edmonds et al., *Newspapers: By the Numbers*, in *THE STATE OF THE NEWS MEDIA* (2011), <http://stateofthemedias.org/2011/newspapers-essay/data-page-6/>.

Table 2: Issues Reported (by Organization)¹⁴³

	GLAD	LAMBDA	NCLR	Total
Marriage	72%	35%	46%	40%
Employment	3%	13%	3%	11%
Youth	0%	12%	3%	9%
Relationship Recognition	3%	9%	3%	8%
Social Inclusion	6%	7%	5%	7%
HIV/AIDS	14%	6%	0%	7%
Parenting	3%	4%	16%	5%
Privacy	0%	4%	3%	4%
Criminal Justice	0%	2%	3%	2%
Transgender	0%	1%	8%	2%
Immigration	0%	0%	0%	0%
Other	3%	9%	14%	9%
N	36	225	37	298

Finally, articles were coded for the depth of coverage given to opponents of LGBT rights. To capture coverage of anti-LGBT countermovement activity, articles were coded for whether they mentioned a countermovement organization or whether they quoted a representative of a countermovement organization. Given the central role conservative legislators have played in anti-LGBT countermovement politics and mobilizing opposition to LGBT rights,¹⁴⁴ articles were also coded to indicate whether they mentioned or quoted a politician opposed to LGBT rights. These codes provide a measure of whether certain articles were framed as evoking controversy or conflict; articles that give prominent attention to countermovement activity suggest that the issue being reported falls within the realm of

143. There were 288 total articles. Totals in Table 2 amount to 298 because some articles reported on more than one LGBT legal organization.

144. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* 15–18, 116–19 (2012).

“legitimate controversy.”¹⁴⁵

B. Focus of the News Coverage

Marriage was the dominant issue featured in coverage of LGBT legal organizations.¹⁴⁶ Marriage was the primary topic of 40% of the articles surveyed, receiving more than triple the amount of coverage given to the next most frequently reported topic, employment (11%). The focus on marriage was consistent across all three of the national newspapers in this study; statistical tests revealed no significant differences between the papers in their coverage of marriage.¹⁴⁷

In addition to being the most frequently covered issue, marriage was also the issue receiving the most drastically disproportionate coverage, as compared to the amount of docket space LGBT groups devoted to it. Of all the issues reported, only marriage and youth received more news coverage than the LGBT legal groups’ devoted docket space. For youth-related issues, however, the imbalance between the organizations’ caseload and news coverage was very slight; LGBT youth were featured in 9% of news coverage versus 8% of the LGBT organizations’ legal dockets.¹⁴⁸ Marriage coverage, on the other hand, showed a much more substantial imbalance; the percentage of articles covering marriage was five times higher than the percentage of marriage cases on the dockets (40% of news coverage versus 8% of cases). The only other issue for which the news coverage did not roughly approximate the LGBT legal organizations’ docket space was parenting, which went largely underreported in the mainstream news (5% of news

145. HALLIN, *supra* note 61, at 116. *See supra* Part I.

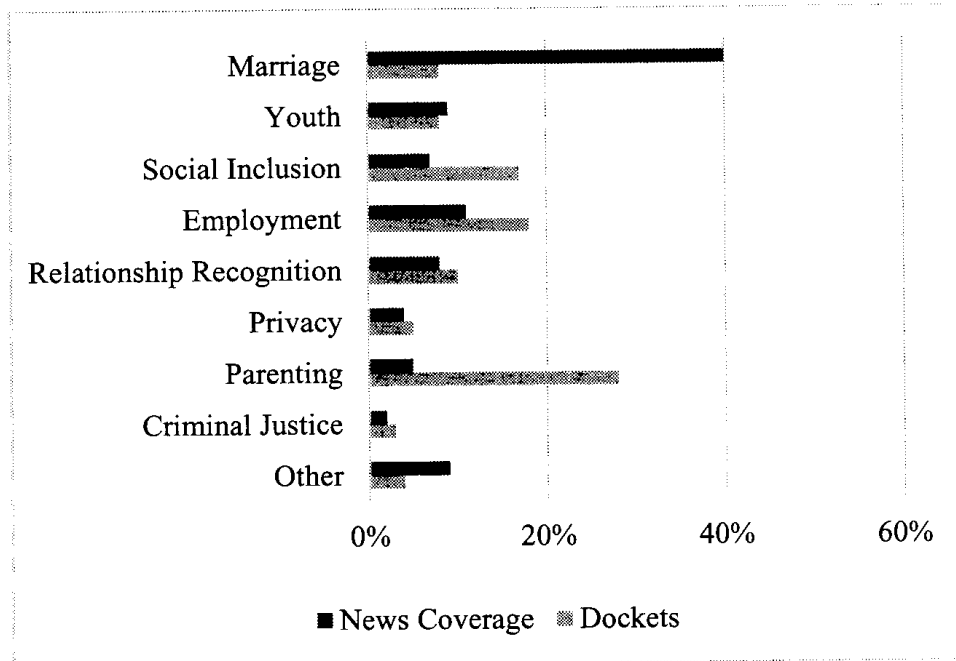
146. *See supra* Table 2.

147. Statistical tests did reveal some significant variation among the newspapers on other issues: the *Wall Street Journal* had significantly more employment coverage (26% of articles versus 9% in the *New York Times* and 10% in *USA Today*); the *New York Times* had significantly more social inclusion coverage (9% of articles versus 0% in the other newspapers); and *USA Today* had significantly more relationship recognition coverage (12% of articles versus 7% in the *New York Times* and 4% in the *Wall Street Journal*). These differences appear to be somewhat indicative of editorial focus, as the *Wall Street Journal* traditionally focuses on business and commerce, and *USA Today* is known for its human interest stories. Because no variation was found in the primary variable of interest here—marriage coverage—the remainder of this analysis will focus on coverage patterns across, rather than within, individual newspapers.

148. Most (57%) of the youth-related articles involved gay boy scouts, suggesting that the boy scouts issue, rather than LGBT youth, more generally was considered a particularly newsworthy topic. More than half of the articles on the boy scouts appeared in the years before the issue arrived at the U.S. Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 1 (2000). This suggests that the issue itself, rather than the level of the court, was driving this coverage.

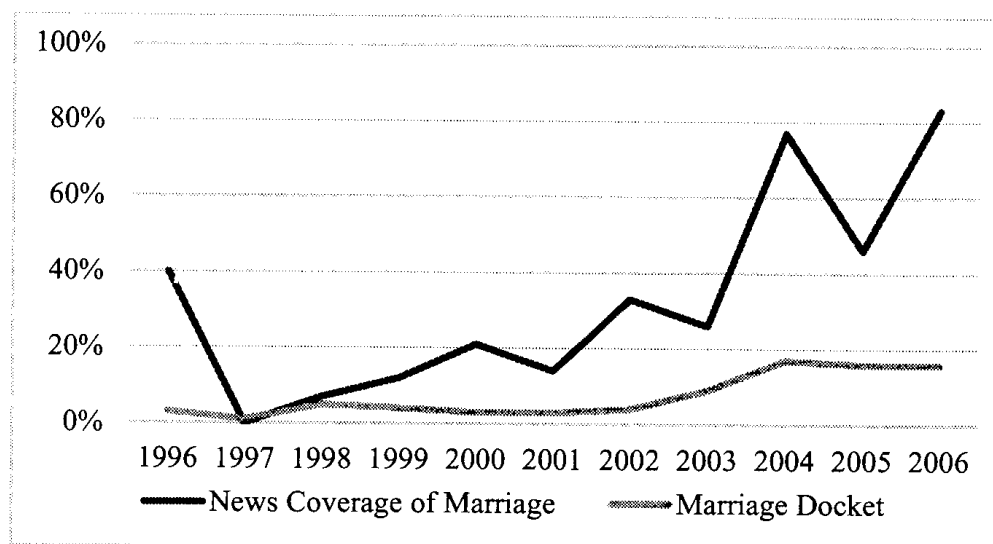
coverage versus 28% of docket space). For all other issues, the difference between the percentage of news coverage and percentage of docket space fell within 10%.¹⁴⁹

Figure 2: Emphasis of LGBT Legal Dockets Versus Emphasis of News Coverage



149. For social inclusion, the percentage of news articles was 10% lower than the percentage of LGBT legal cases. For HIV/AIDS and employment, the percentage of news articles was 7% lower than the percentage of LGBT legal cases. For relationship recognition, transgender issues, privacy, youth, and criminal justice, the percentage of news articles was 1–2% lower than the percentage of LGBT legal cases. Immigration issues received no coverage at all.

Figure 3: Same-Sex Marriage: Percent Coverage Versus Percent Dockets



GLAD, the organization that devoted the largest percentage of its docket (14%) to same-sex marriage, received the most disproportionate marriage coverage: 72% of the articles covering GLAD were primarily about same-sex marriage.¹⁵⁰ However, articles on the NCLR and Lambda also had a disproportionate focus on same-sex marriage, with 46% of NCLR's articles and 35% of Lambda's articles focusing on same-sex marriage (compared to the 9% and 6% of these organizations' respective docket space).¹⁵¹ No other significant differences emerged between these organizations in the types of issues covered. The remainder of this Section, therefore, discusses findings regarding all organizations in the aggregate.

While the newspapers consistently devoted disproportionate attention to marriage across all years, the gap between coverage of marriage versus coverage of other LGBT issues widened in 2004¹⁵²—the same year that LGBT legal organizations began taking increasing numbers of countermovement-initiated marriage cases.¹⁵³ In that year, there was both an increase in the number of articles per year covering same-sex marriage and a decrease in the articles covering other

150. *See supra* fig.2.

151. *See supra* fig.2.

152. *See supra* fig.3.

153. *See supra* Section II.B.

issues.¹⁵⁴

In addition to the frequency of marriage coverage, the content of the articles on marriage also varied from the other articles in significant ways, helping to explain why the media may have focused so strongly on marriage. Tables 3, 4, and 5 summarize the descriptive qualities of articles that covered marriage versus articles that covered all other LGBT legal issues. Tables 3 and 4 show how the marriage articles compared with other types of articles in their depth of coverage and the prominence of their placement in the newspaper (factors which, like the frequency of coverage, are indicators of an article's newsworthiness). Table 5 compares coverage of countermovement activity in articles on marriage to articles on other issues. Significance values are reported for all statistically significant differences.¹⁵⁵

Given that the frequency of coverage is an indicator of newsworthiness, one would expect marriage articles to also exhibit greater depth of coverage and more prominent placement than articles on other topics. Yet marriage articles showed few significant differences from other articles in these alternative measures of newsworthiness. Marriage articles were not significantly different from other articles in terms of their length or tendency to quote an LGBT legal organization representative.¹⁵⁶ Articles on marriage did, however, provide more depth in their discussions of LGBT rights litigation; journalists were more likely to mention specific marriage cases by name than they were to mention the names of other types of LGBT rights cases. While this difference was only significant at the $p < .10$ level, it does seem to suggest editorial interest in not just the issue of same-sex marriage, but also the use of the courts in particular as a strategy for achieving marriage equality.

154. The news media reported an average of four articles on marriage per year before 2004, compared to an average of twenty-seven articles per year after 2004 (as compared to an average of eighteen non-marriage articles per year before 2004 and an average of eleven articles per year afterward).

155. A t-test was used to measure statistically significant differences between marriage and non-marriage articles in article length (an interval independent variable). A chi-squared test was used to measure statistically significant differences for all the remaining (categorical) variables.

156. See *infra* Table 3.

Table 3: Depth of Media Coverage of Marriage and Non-Marriage Issues

	Marriage Articles (N=116)	Non-Marriage Articles (N=172)
Average Word Count	971	978
Quotes LGBT Representative	93 (80%)	126 (73%)
Names LGBT Rights Case	82 (71%)+	103 (60%)

Table 4: Prominence of Media Coverage of Marriage and Non-Marriage Issues

	Marriage Articles (N=116)	Non-Marriage Articles (N=172)
Front Page	15 (13%)	26 (15%)
Sunday Edition	21 (23%)	26 (21%)

Table 5: Countermovement Coverage in Marriage and Non-Marriage Articles¹⁵⁷

	Marriage Articles (N=116)	Non-Marriage Articles (N=172)
Reports Countermovement Organization	61 (53%)***	42 (24%)
Quotes Countermovement Organization	54 (47%)***	42 (24%)
Reports Anti-LGBT Politician	37 (32%)***	12 (7%)
Quotes Anti-LGBT Politician	30 (26%)***	7 (4%)

In terms of the placement of articles, marriage articles did not receive significantly more prominent placement than other articles.¹⁵⁸ The only articles that received significantly more prominent placement were those covering U.S. Supreme Court cases, which were slightly more likely than other articles to appear on the front page (24% of U.S. Supreme Court articles as compared to 11% of other articles).¹⁵⁹ Articles on U.S. Supreme Court cases did not receive more frequent coverage than articles on lower-court cases, perhaps due to the relatively small number of LGBT rights cases to reach the Court.¹⁶⁰ Since no article during this time period covered marriage equality litigation at the U.S. Supreme Court, the level of court does not explain the media focus on marriage.

157. For all tables, statistical significance is indicated with the designation "+" where $p < 0.10$; "*" where $p < 0.05$; "***" where $p < 0.01$; and "****" where $p < 0.001$.

158. See *supra* Table 4.

159. This difference was only minimally significant ($p < 0.10$).

160. The only U.S. Supreme Court cases covered in the news reports surveyed in this study were *Romer v. Evans*, 517 U.S. 620 (1996) (striking down an amendment to Colorado's constitution to prohibit any legislation, executive action, or judicial rulings against LGBT discrimination), *Bragdon v. Abbott*, 524 U.S. 624 (1998) (challenging a dentist's refusal to treat a person with HIV under the Americans with Disabilities Act), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas sodomy law).

The findings regarding countermovement coverage go further toward explaining the high frequency of marriage articles.¹⁶¹ Articles on marriage were significantly more likely than articles on other issues to report activity by a countermovement organization or to quote a countermovement organization representative. In addition, articles on marriage were significantly more likely to report on or quote an anti-LGBT politician. Differences between marriage and non-marriage articles were quite pronounced in this respect; while nearly one-third of marriage articles reported on anti-LGBT politicians, only 3% of articles on all other issues reported on anti-LGBT politicians.¹⁶²

The coverage of anti-LGBT activists and politicians in marriage articles often followed a common pattern, wherein journalists would follow up discussions of marriage equality litigation with the oppositional reaction of conservative activists and legislators. For example, one article covering the 1996 *Baehr* case in Hawaii,¹⁶³ which found the State's prohibitions on same-sex marriage unconstitutional, went on to report:

Alarmed at that possibility [that other states would have to recognize Hawaii same-sex marriages], legislators on the mainland are seeking an exemption from the "full faith and credit" provision on the grounds that same-sex marriages would violate the public policies of their states as defined by law. They are backed by conservative groups like the Christian Coalition, Concerned Women for America, and Eagle Forum. "My concern is that a limited number of judges in Hawaii will be dictating public policy in California," said Assemblyman William J. Knight, a Republican from the Antelope Valley, outside Los Angeles.¹⁶⁴

This pattern of incorporating anti-LGBT perspectives into coverage

161. See *supra* Table 5.

162. One example was in an article on the *Lawrence v. Texas* decision, which reported Texas State Representative Warren Chisum's opposition to the ruling and quoted him as saying, "I think the court really opened the Pandora's box here that legislatures are going to deal with for many years in the future if they are concerned about the moral values of this country." Dean E. Murphy, *THE SUPREME COURT: THE REACTION; Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, (June 27, 2003), <http://www.nytimes.com/2003/06/27/us/supreme-court-reaction-gays-celebrate-plan-campaign-for-broader-rights.html>.

163. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *18-22 (Haw. Cir. Ct. Dec. 3, 1996), *rev'd*, 994 P.2d 566 (1999).

164. David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13.

of marriage equality litigation suggests that journalists considered conservative backlash to be an essential part of the story of same-sex marriage.¹⁶⁵ Given that journalists are generally more likely to report stories that involve elements of controversy or conflict, this conflict-based framing of marriage may help explain why the media disproportionately focused on that issue.¹⁶⁶

The strong presence of countermovement perspectives may also help explain why articles on marriage were more likely to cite the names of specific marriage cases than were articles discussing other LGBT rights issues.¹⁶⁷ Conservative opposition to same-sex marriage has tended to focus on the use of the courts as a vehicle for advancing marriage equality.¹⁶⁸ Using litigation to advance social change, opponents argued, violates the right of the democratic populace to pass legislation based on its own moral values.¹⁶⁹ As indicated by the California legislator's quote in the previous paragraph—voicing concern that “a limited number of judges in Hawaii will be dictating public policy in California”¹⁷⁰—articles quoting countermovement opposition to same-sex marriage frequently cited language directly attacking the courts and judiciary. Some conservative politicians went so far as to

165. The wave of conservative activism focused on same-sex marriage presumably played a large role in “making” opposition to same-sex marriage an essential part of the story of marriage equality. See *infra* Section IV.A. Explaining the sources of this conflict-based framing in coverage of marriage equality litigation is beyond the scope of this Section, however. Rather, the purpose of this Section is to report empirical differences in the coverage of marriage equality litigation (including its tendency to focus on countermovement opposition), which may explain the media's disproportionate coverage of the LGBT movement's marriage equality litigation.

166. Coverage of countermovement activity is used as the primary indicator of conflict-based or controversial framing in the articles. The articles were not specifically coded for “conflict framing” in itself, given the interpretive difficulty of qualifying what language does or does not emphasize a conflict narrative. However, many of the marriage articles (even ones that did not specifically cite to countermovement activity) framed the discussion of same-sex marriage in a manner that most readers would likely interpret as emphasizing conflict. See, e.g., Melanie Kirkpatrick, *Rule of Law: Gay Marriage: Who Should Decide?*, WALL ST. J., Mar. 13, 1996, at A15 (starting off the article with the sentence, “If you think abortion is the most contentious issue dividing Americans today, just wait for one now on the Western horizon—gay marriage”).

167. See *supra* Table 3.

168. See generally JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* (2002).

169. See, e.g., John D. McKinnon, *Ruling OKs Nuptial Pact for Gays*, WALL ST. J., June 11, 1997, at A1 (“Rep. Byrd, a Plant City Republican, criticizes the new ruling's ‘legal gymnastics,’ explaining: ‘It's just one more example of an unelected judge seizing the opportunity to formulate basic public policy that ought to be done by the legislative branch.’”).

170. Dunlap, *supra* note 164.

threaten to “fix the judiciary.”¹⁷¹ The fact that the controversy over marriage was tied so specifically to the courtroom may have heightened journalists’ focus on the details of specific marriage cases.

A closer look at countermovement coverage in the post-2004 marriage articles also suggests that the news media’s intensified coverage of marriage after that year may have been triggered by the escalated countermovement activity and political tension around marriage that developed in the wake of the *Goodridge* decision in Massachusetts.¹⁷² Half of the forty articles on same-sex marriage in 2004 cited conservative politicians’ bitter reactions to the *Goodridge* decision—including that of President George W. Bush, who denounced the opinion as the work of “activist judges” and called for a federal constitutional amendment banning same-sex marriage.¹⁷³ Journalists also took notice of marriage equality opponents’ increasing formal involvement in marriage litigation in 2004. Over a quarter of articles on marriage that year (thirteen of forty) specifically discussed a conservative group’s participation as a party to litigation opposing same-sex marriage. No article before that year had mentioned any formal countermovement involvement in a marriage case.

IV. CAUSES AND CONSEQUENCES OF THE MEDIA’S FOCUS ON MARRIAGE

This Article has shown that, at a time period when marriage cases comprised only a small portion of the legal dockets of the leading LGBT legal organizations, marriage was simultaneously the primary focus of the news media’s coverage of those organizations. In addition, the content of the articles covering the LGBT organizations’ marriage work varied significantly from other articles in the amount of attention they focused on opposition to LGBT rights. More than half of the articles on marriage reported some countermovement activity, and many others

171. Karen Branch-Brioso, *Gay Marriage*, ST. LOUIS POST-DISPATCH, Nov. 23, 2003, at B1 (Quoting Senate Majority Leader Bill Frist saying 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”); Stephen Henderson & Ron Hutcheson, *Court Endorses Gay Marriage; Massachusetts Ruling Striking down Barriers Seen As a Rights Turning Point*, MILWAUKEE J. SENTINEL, Nov. 19, 2003, at A1. After *Goodridge v. Department Public Health*, 798 N.E.2d 941 (2005), the majority leaders of both the Senate (Bill Frist) and the House (Tom Delay) issued statements deprecating the activist judiciary. *Id.* 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.” *Id.*

172. 798 N.E.2d 941.

173. Charisse Jones & Fred Bayles, *First Weddings Intensify Gay-marriage Debate*, USA TODAY, May 18, 2004.

detailed this coverage by directly quoting the views of same-sex marriage opponents. In short: the media focused disproportionately on marriage, and emphasized conservative opposition to the issue. This Part discusses the institutional factors that may have contributed to the media's coverage of marriage equality litigation, and the consequences it may have brought to bear on the broader landscape of political struggle around LGBT rights.

A. *Explaining the Media Focus on Marriage*

If the news media's portrayal of LGBT rights litigation did not accurately reflect the movement's actual litigation on the ground—portraying marriage as LGBT legal groups' primary focus at a time when it was a narrow piece of their larger dockets—what explains this distortion? As an initial matter, it is important to consider the possibility that marriage cases may have simply had more inherent news value than other types of LGBT rights cases. Marriage equality cases, one might argue, have an intrinsic social importance: marriage in the United States has maintained a central role in structuring intimate relationships and family formation patterns; it symbolizes traditional family structures, stable social relationships, and social acceptance. Litigation aiming to alter such a deeply engrained social institution thus represents the possibility of profound change to a powerful and enduring social institution—and thus should arguably “automatically” qualify as newsworthy.

Yet, LGBT legal groups have pursued numerous cases outside of marriage that also target deeply engrained social institutions, which received relatively little media attention. Cases seeking to enforce LGBT people's rights as parents—one of the most central features of the LGBT legal agenda—is a prime example. Parenting rights, like marriage rights, deeply affect the structure and stability of family relationships. LGBT legal groups have played a pivotal role in restructuring the modern family through their parenting cases, expanding the ability of LGBT people to form families and to create enduring familial ties with their children.¹⁷⁴ If litigation reshaping the nature of social institutions is inherently newsworthy, one would expect that parenting cases, which deeply shape the institutional structure of

174. See Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 305, 323 (John D'Emilio et al. eds., 2000).

the family, would receive significant news attention.¹⁷⁵ However, as this Article has shown, the significant work that LGBT legal groups have done in this area has gone largely unnoticed in the mainstream media.

I would suggest an alternative interpretation of the media's focus on marriage equality litigation—one that is informed by the vast empirical literature on the mainstream media.¹⁷⁶ The existing literature suggests that issues acquire newsworthiness not because of some inherent or fixed social importance, but rather because they resonate with institutionalized journalistic norms and reporting routines.¹⁷⁷ In the field of mainstream journalism, reporters internalize particular norms and values regarding legitimate reporting practices and definitions of what constitutes “news,” which, in turn, dictate what stories are covered and how they are framed.¹⁷⁸ Journalists over-select stories that contain elements of controversy or conflict, as these attributes have become a stand-in for importance in assessing a story's news value.¹⁷⁹ At the same time, when covering controversial issues, journalists aim to achieve the appearance of “balance” by giving “equal time” to viewpoints on “both sides” of the issue.¹⁸⁰ My findings, which show the media's disproportionate focus on marriage coinciding with an emphasis on countermovement coverage, suggest that marriage equality litigation may have evoked precisely the type of conflict-based narrative that resonates with traditional news storylines. Marriage equality cases featured a “controversial” issue, for which same-sex couples and their political rivals represented “both sides” of the conflict.

As this analysis suggests, the backlash against LGBT rights looms large in explaining the media focus on marriage. Just as no issue is inherently “newsworthy,” no issue is inherently “controversial” either; Religious-Right counter mobilization against same-sex marriage helped to define marriage equality litigation as controversial. Political elites'

175. Indeed, the relatively few articles that do discuss LGBT parenting tend to emphasize the implications of parenting rights litigation for the structure of the family, suggesting that the institutional implications of LGBT parenting do have news value. See Joan Biskupic, *Same-Sex Couples Are Redefining Family Law in USA*, USA TODAY (Feb. 18, 2003), http://usatoday30.usatoday.com/news/nation/2003-02-17-cover-samesex_x.htm (“Recent cases in Pennsylvania and Delaware symbolize the new age in family law, and judges' increasing flexibility in defining parental roles.”).

176. See *supra* Part I.

177. BENNETT, *supra* note 9, at 117–20.

178. See *id.*; HERMAN & CHOMSKY, *supra* note 50, at 2.

179. See generally HALTOM & MCCANN, *supra* note 11.

180. WILLIAM A. GAMSON, *TALKING POLITICS* 75 (1992). Many have critiqued this “balance” approach for inflating controversies and engendering artificially dichotomous perspectives on complex issues. See generally TODD GITLIN, *THE WHOLE WORLD IS WATCHING: MASS MEDIA AND THE MAKING AND UNMAKING OF THE NEW LEFT* (1980).

involvement in the backlash against marriage equality also likely influenced journalists' interpretation of the issue. Journalists do not give "equal time" to just *any* backlash movement resisting social change; rather, they tend to report countermovement activity within the scope of "live" debates among political elites.¹⁸¹ As the protection of marriage became a staple of the Republican Party platform,¹⁸² marriage equality was subsumed within the scope of a "legitimate controversy."¹⁸³ My findings that the media were significantly more likely to quote anti-LGBT politicians in coverage of marriage supports the conclusion that the involvement of conservative political elites played a critical role here.¹⁸⁴

This discussion paints a complex picture of the multiple and mutually reinforcing institutional factors that may contribute to the construction of social movement litigation in the mainstream media and, to some extent, other social fields. It may be impossible to determine the individual causal impact of each of these factors independently; indeed they appear to be highly interrelated, with no one independently responsible for the media's construction of a marriage-centric LGBT legal agenda. The purpose of identifying these factors is not to isolate them analytically, but rather to help build theory regarding the complex network of institutional dynamics that may shape the cultural construction of movement litigation—and by extension, the type of social change that movement litigation is able to advance.

181. SHOEMAKER & REESE, *supra* note 61, at 116–17.

182. The 2004 Republican Party platform 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." *The Republicans: The Convention in New York; The Platform on Gay Marriage*, N.Y. TIMES (Aug. 30, 2004), <http://www.nytimes.com/2004/08/30/us/the-republicans-the-convention-in-new-york-the-platform-on-gay-marriage.html>.

183. HALLIN, *supra* note 61, at 116.

184. Anti-LGBT activists did mobilize opposition around issues other than marriage; the articles themselves provided examples of countermovement organizations opposing LGBT rights in every one of the issue categories reported. Examples include: a religious investment group's opposition to Wal-Mart's LGBT antidiscrimination policy, Sarah Kershaw, *Wal-Mart Sets a New Policy That Protects Gay Workers*, N.Y. TIMES, July 2, 2003, at A1; the Traditional Values Coalition's "outcry" against public assistance to lesbian and gay partners of September 11 victims, Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. TIMES, May 30, 2002, at A1; and the Family Research Council's opposition to adoption by lesbian and gay couples, Erica Goode, *Group Wants Gays to Have Right to Adopt a Partner's Child*, N.Y. TIMES, Feb. 4, 2002, at A17. My argument here is that the overwhelming focus on marriage by conservatives—including by conservative political elites—made stories about marriage equality particularly well suited for the controversial framing that attracts news media attention.

B. Consequences of the Media Focus on Marriage

This study's findings regarding media coverage of social movement litigation are highly relevant to understanding the relationship between law and social change. From a sociolegal perspective, the symbolic message that litigation delivers is a primary mechanism that produces social change. Even when movements are victorious in litigation, formal victories do not automatically translate into social change;¹⁸⁵ what "matters" is whether the movement, through the act of litigating, has been able to convey the importance of the cause and garner support in a way that shapes behavior in everyday life.¹⁸⁶ Whether or not litigation serves this purpose, in turn, depends on how movement litigation is popularly understood—how it is constructed and interpreted in various social fields, including, but not limited to, the mainstream media.

Constructions of movement litigation in mainstream news journalism matter because that is a field that deeply influences broader patterns of meaning-making and interpretation in contemporary society. People use what they consume in the media as tools to help interpret their world—it becomes the input data that forms the basis for people's opinions and understandings about political issues.¹⁸⁷ As the media spotlights certain stories and narratives, those tools become more accessible and frequently used in political interpretation.¹⁸⁸ The importance of mainstream news in shaping popular perceptions of the world persists even in the contemporary internet news landscape, in which social media and blog reposting patterns create an echo chamber effect amplifying the reach of mainstream news.¹⁸⁹

The media's emphasis on marriage has likely contributed to dominant interpretations within the LGBT movement that marriage litigation has been the primary goal on the LGBT legal agenda since the mid-1990s.¹⁹⁰ While the recent explosion of litigation and political activity around marriage suggests that "marriage-centric" could be an accurate characterization of LGBT litigation and the broader movement today, neither my data nor the statements of LGBT litigators at the time¹⁹¹ suggest that this was the case for the pre-2006 timeframe in

185. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 355–419 (2d ed. 2008).

186. McCann, *How does Law Matter*, *supra* note 42, at 91.

187. William A. Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, *AM. J. SOC.* 1, 10 (1989).

188. *Id.*

189. Haas, *supra* note 135, at 390. *See supra* Section III.A.

190. *See supra* INTRODUCTION.

191. Davidson, *supra* note 25, at 300.

which that perception originated. This is important to acknowledge because, during the time of this study, LGBT movement groups received quite a bit of internal criticism for their focus on marriage.¹⁹² The media may have contributed to this internal strife.

Media constructions of social movement litigation may also produce a feedback effect, shaping broader movement goals and strategies and bringing movement action into line with media portrayals. On a strategic level, activists seeking visibility in the mainstream press often tailor their strategies to best attract mainstream press coverage,¹⁹³ including mobilizing around legal issues they think reporters will find newsworthy.¹⁹⁴ The media salience of marriage litigation may have therefore inspired publicity-seeking activists on both sides of the issue to mobilize around marriage as a means of attracting greater public visibility.

Media coverage may also influence movements on an even deeper level, shaping activists' perceptions of the issues reported and the movement's chances of success. Frequent media coverage of a particular topic heightens public perceptions of that topic's importance as a political imperative.¹⁹⁵ It is therefore plausible that the media's focus on marriage litigation may have promoted a sense of urgency around the issue, leading LGBT activists and their opponents to set aside other goals to prioritize marriage. Accordingly, media constructions of movement litigation may have a constitutive effect on social movements, mobilizing constituents sympathetic to media-driven issues¹⁹⁶ or demobilizing those who care less about the issues in the media spotlight. This possibility is particularly crucial to note in the LGBT movement's context, given critical arguments that marriage equality is a priority that predominantly serves white and upper-class constituents of the LGBT movement.¹⁹⁷ If media coverage of marriage equality litigation has helped to consolidate LGBT political efforts toward a focus on marriage, the effect may have been to construct a movement that is less representative of the diverse LGBT community.

This study contributes to recent efforts in the sociolegal literature to understand the role of countermovements in constructing movement

192. See *supra* INTRODUCTION.

193. See generally GITLIN, *supra* note 180.

194. Leachman, *From Protest to Perry*, *supra* note 5, at 1668.

195. Craig E. Carroll & Maxwell McCombs, *Agenda-Setting Effects of Business News on the Public's Images and Opinions About Major Corporations*, 6 CORP. REPUTATION REV. 36 (2003); McCombs & Reynolds, *supra* note 21, at 1-2.

196. See Rens Vliegenthart et al., *Media Coverage and Organizational Support in the Dutch Environmental Movement*, 10 MOBILIZATION: INT'L J. 365, 377 (2005).

197. Leachman, *Institutionalizing Essentialism*, *supra* note 32, at 660.

priorities and framing movement action.¹⁹⁸ Previous research has found that countermovements shape dominant perceptions of a social movement by publicly contradicting movement actors' statements and by offering alternative, competing interpretations of the movement's political strategies.¹⁹⁹ The findings here support the idea that countermovements play a role in constructing the movements they oppose; here, the significant attention to anti-LGBT perspectives in the coverage of same-sex marriage suggests that the countermovement may have augmented the news salience of marriage and helped construct marriage as a focus of LGBT movement litigation. However, this study also moves beyond current research, highlighting the role of the mainstream media in infusing a social movement's message with the countermovement's perspective. While countermovement forces may have been a key factor in attracting reporters' attention to same-sex marriage, it was the media's coverage of the countermovement that reinforced the framing of same-sex marriage as "controversial" and that reified marriage as a salient political issue.

This study is also highly relevant to the longstanding debate in the legal literature regarding the "backlash thesis." Proponents of this thesis argue that social movement litigation on controversial issues may undercut movement efforts by accelerating policy reforms before the public has had time to accept the movement's goals, inciting countermobilization.²⁰⁰ Whereas backlash arguments tend to fault movement lawyers for carelessly pressing their cases in the absence of public support,²⁰¹ my findings indicate that movement lawyers may be

198. See GOLDBERG-HILLER, *supra* note 168. See generally KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* (2006); Shauna Fisher, *It Takes (At Least) Two to Tango: Fighting with Words in the Conflict over Same-Sex Marriage*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 207 (Scott Barclay et al. eds., 2009); Anne W. Esacove, *Dialogic Framing: The Framing/Counterframing of "Partial-Birth" Abortion*, 74 SOC. INQUIRY 70 (2004); Tina Fetner, *Working Anita Bryant: The Impact of Christian Anti-Gay Activism on Lesbian and Gay Movement Claims*, 48 SOC. PROBS. 411 (2001); Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207 (2001); Susan M. Olson & Christina Batjer, *Competing Narratives in a Judicial Retention Election: Feminism Versus Judicial Independence*, 33 L. & SOC'Y REV. 123 (1999).

199. Fetner, *supra* note 198, at 411; Rohlinger, *supra* note 131, at 487.

200. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 464-65 (2004). For a critique of this perspective, see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1239 (2010), and Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. 151, 175 (2009).

201. See Cummings & NeJaime, *supra* note 200, at 1235 (noting that the backlash thesis portrays movement lawyers as "naively turning to the courts ahead of public opinion, ignoring more productive political alternatives, and ultimately hurting the very

proceeding more cautiously than we think. The LGBT legal organizations that litigated for marriage equality when that issue was at the peak of its controversy took an extremely limited approach; their only more cautious alternative would have been to cease all involvement in marriage equality work.

Furthermore, my findings suggest that the power of the countermovement itself may be partially determined by media framing. Just as the meaning of LGBT litigation is constructed by its media portrayal, the meaning of anti-LGBT countermovement activity—and its social importance—may be a function of how the media constructs it. In “balancing” coverage of marriage to include countermovement perspectives, the media gives credence to opposition views as a “legitimate” position to take. Media coverage may thus both reflect and reinforce the political power of countermovement groups.²⁰² By portraying the countermovement as a viable political contender, the media may have helped create that reality.

Finally, this study has important implications for the sociolegal literature on legal consciousness. Media constructions of social movement litigation influence not only public perceptions of movement issues, but also public perceptions of the judicial system more generally. Coverage that is skewed toward controversial litigation fosters a sense of the courts as a divisive social force—a “culture-war” enabler. This may explain why opponents of same-sex marriage have made the judicial system as much a target as same-sex couples, denouncing the “unelected judge[s]” who “overturn the will of the people in a democracy.”²⁰³ Understanding media bias in coverage of social movement litigation is thus crucial to understanding the formation of legal consciousness and the legitimacy of the legal system.

CONCLUSION

For decades, scholars have debated whether litigation helps social

cause they purport to advance by securing a court victory that mobilizes opponents to repeal it”).

202. Explaining conservative mobilization against same-sex marriage is beyond the scope of this Article. My points here about the possibility of media biases augmenting countermovement force reflect arguments made in previous work. See GADI WOLFSFELD, *MEDIA AND POLITICAL CONFLICT: NEWS FROM THE MIDDLE EAST* 67 (1997) (“[C]hallengers who obtain a significant amount of media coverage usually enjoy a significant rise in political status. Those who are recognized by the news media as serious political players become serious political players.”).

203. Justin Berton et al., *Public Reaction to Prop. 8 Ruling*, S.F. CHRON., Aug. 5, 2010, A11.

movements create social change. Sociolegal work has moved this debate forward significantly by examining the symbolic “messaging” effect of movement litigation, which may advance movement objectives indirectly by publicizing and legitimating movement demands.²⁰⁴ Yet the empirical work that examines these symbolic aspects of movement litigation tends to assume the message that is derived by looking at the content of the litigation itself or the concerted public education efforts by movement actors to frame that litigation in a particular way.²⁰⁵ The findings presented here, which show a significant disjuncture between actual movement litigation and the construction of that litigation in the mainstream media, underscore how popular constructions of movement litigation may be shaped by contextual factors outside the movement’s control. This Article builds on previous work by emphasizing how structural dynamics operating within major fields of public discourse may influence the meaning of movement litigation. In the mainstream media, in particular, institutionalized professional norms and routines that drive news gathering appear to elevate the salience of movement litigation that evokes cultural conflict and tension. Future research must attend to these types of institutional factors (in the media and in other fields of social meaning-making) in order to accurately theorize the consequences of litigation for the social movements that use it.²⁰⁶

204. See Catherine R. Albiston & Gwendolyn M. Leachman, *Law As an Instrument of Social Change*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 542, 545 (James D. Wright, 2d ed. 2015).

205. See Doug McAdam, *The Framing Function of Movement Tactics: Strategic Dramaturgy in the American Civil Rights Movement*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 338, 341 (Doug McAdam et al. eds., 1996).

206. While the focus of this Article has been on the mainstream media, this study provides a model for examining how institutional power influences the construction of social movement action in a variety of other social fields. This model involves examining what types of movement action are constructed as salient in a given social field and analyzing whether the framing of that movement action reveals the influence of particular (and potentially interacting) institutional forces. There are several other relevant social fields in which the dominant construction of movement litigation can significantly affect the degree of social impact that follows from that litigation. One example is in the variety of social fields that are the target of movement litigation, such as schools and employment organizations. See Elizabeth A. Armstrong & Mary Bernstein, *Culture, Power, and Institutions: A Multi-Institutional Politics Approach to Social Movements*, 26 SOC. THEORY 74 (2008). The construction of movement litigation in each of these fields can be particularly important, given that responsive action taken by participants in those fields (e.g., antidiscrimination practices that aim to support movement litigation or to avoid the perceived threat of litigation) can significantly advance or thwart movement goals. Thus, future work in this vein is of crucial importance to the sociolegal project of theorizing litigation as a mechanism of social change.
