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Framing (In)Equality for Same-Sex Couples

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ABSTRACT

This Essay shows how LGBT rights advocates successfully transformed civil unions and domestic partnerships from a sign of equality into a marker of inequality. The deployment of constitutional frames, and the articulation and resolution of those frames in court, played a significant role in this shift. Constitutional commitments provided the language through which advocates could embrace civil unions and domestic partnerships as ways to provide equality for same-sex couples and yet later reject those designations as badges of inequality. Advocates successfully transformed these nonmarital alternatives from constitutional remedies to constitutional violations. At crucial moments, courts played significant roles in this transition, providing venues for advocates to announce, hone, and resolve competing frames. Advocates, in turn, integrated courts' treatment of those frames into their discursive strategies. Ultimately, the concepts of equality and inequality and their relationship to same-sex couples gained—and changed—meaning through court-based campaigns. To chart this trajectory, this Essay attends to four crucial judicial decisions along the path from equality to inequality in the framing of civil unions and domestic partnerships: (1) the 1999 Vermont Supreme Court *Baker v. State* decision, (2) the 2003 Massachusetts Supreme Judicial Court *Goodridge v. Department of Public Health* decision, (3) the 2005 New Jersey Supreme Court *Lewis v. Harris* decision, and (4) the 2010 Northern District of California *Perry v. Schwarzenegger* decision.

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INTRODUCTION

In 1999, the Vermont Supreme Court held that denying the rights and benefits of marriage to same-sex couples violated the Vermont Constitution,[1] and the legislature enacted civil unions the next year.[2] Lesbian, gay, bisexual, and transgender (LGBT) rights advocates celebrated. The American Civil Liberties Union (ACLU) lauded Vermont as the "first state to require complete equality for same-sex relationships."[3] Matt Coles, then director of the ACLU's national Lesbian and Gay Rights Project, explained the decision's significance: "The court says that in Vermont at least, lesbian and gay couples should get the same treatment the law gives to heterosexual couples. Whether you call that same-sex marriage, domestic partnership or something else, it is *full equality*, and that is an historic first."[4] Responding to the civil union law, Kate Kendell, executive director of the National Center for Lesbian Rights (NCLR), declared, "This historic piece of legislation marks the first time a state has accorded to lesbian and gay couples the *full equality* and protection we deserve and have long been denied. This . . . hopefully mark[s] the beginning of a national effort to secure equality in the rest of the country."[5] Advocates framed civil unions, which provided same-sex couples with the state-based rights and benefits of marriage, as a measure that delivered equality.

Fast forward to 2006. The New Jersey Supreme Court followed the course set by Vermont's high court,[6] and the state legislature subsequently enacted legislation permitting civil unions.[7] This time, LGBT rights advocates protested. David Buckel, who litigated the New Jersey case for Lambda Legal, wrote that "for the government to use the label 'civil union' is a considered choice of language that assigns us a second-class status."[8] Resisting the implication that Lambda

1. Baker v. State, 744 A.2d 864 (Vt. 1999).
2. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2010).
3. Press Release, Am. Civil Liberties Union, In Stunning Civil Rights Victory, VT Court Directs State to Give Same-Sex Couples Marriage Benefits (Dec. 20, 1999), http://www.aclu.org/print/lgbt-rights_hiv-aids/stunning-civil-rights-victory-vt-court-directs-state-give-same-sex-couples-marr.
4. *Id.* (emphasis added) (internal quotation marks omitted).
5. Press Release, Nat'l Ctr. for Lesbian Rights, Vermont Legislature, Governor Approve Landmark Legislation for Gays and Lesbians (Apr. 27, 2000), http://www.nclrights.org/site/PageServer?pagename=press_vermont (emphasis added).
6. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).
7. N.J. STAT. ANN. § 37:1–28 (West Supp. 2012).
8. David Buckel, *Marriage by No Other Name*, IMPACT, Winter 2007, at 6, 7–8, *available at* http://data.lambdalegal.org/publications/downloads/impact_200702_marriage-no-other-name.pdf; *see also Civil Unions for Same-Sex Couples in New Jersey Frequently Asked Questions*, LAMBDA LEGAL 5,

Legal might "oppose[] civil unions in all instances," Buckel explained: "Whatever the calculus that defines the best strategy for an individual state, our role is not only to help get to success—big or little, now or later—but also to ensure that everyone knows it isn't over until same-sex couples can choose freely from the same range of options as different-sex couples."[9] Advocates located the civil union law as a mere stop along the way to full equality. Indeed, they framed the law as an equality violation in itself.

What changed? How had civil unions shifted from a sign of equality to a marker of inequality? In this Essay, I show how LGBT rights advocates' deployment of constitutional frames, and the articulation and resolution of those frames in court, played a significant role in this shift. The constitutionalization of relationship recognition and the turn to courts facilitated—and ultimately required—the move from equality to inequality in framing civil unions and domestic partnerships.[10] Once advocates were able to show the shortcomings of civil unions and domestic partnerships—that those regimes failed to satisfy equality mandates issued by courts—they could shift the frame from equality to inequality. By attending to these dynamics, we can see how the remedy for the

http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_civil-unions-for-ss-couples-in-nj_0.pdf (last visited Mar. 24, 2013).

9. *Id.* at 8.

10. The process I observe resonates with what social movement scholars label "frame transformation." Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 625 (2000) [hereinafter Benford & Snow, *Framing Processes*]; *see also* Mitch Berbrier, *"Half the Battle": Cultural Resonance, Framing Processes, and Ethnic Affectations in Contemporary White Separatist Rhetoric*, 45 SOC. PROBS. 431, 436–38 (1998). A frame is "an interpretive schemata that simplifies and condenses the 'world out there.'" David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 133, 137 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) [hereinafter Snow & Benford, *Master Frames*]; *see also* David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986). Law serves as a master frame within which the concepts of equality and inequality give meaning to otherwise complex and multidimensional ideas and events. *See* Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 664 (2003); Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1725 (2006); *see also* Snow & Benford, *Master Frames*, *supra*, at 138–41. Framing scholars have urged attention to "the dialectical relationship between discourse and events." Stephen Ellingson, *Understanding the Dialectic of Discourse and Collective Action: Public Debate and Rioting in Antebellum Cincinnati*, 101 AM. J. SOC. 100, 101 (1995). Events, such as litigation episodes, may alter "the content, form, and legitimacy of competing discourses" and reconstitute "the discursive field" on which movement actors operate. *Id.* at 101–02. On the framing work of lawyers from a social movement perspective, see Lynn Jones, *The Haves Come Out Ahead: How Cause Lawyers Frame the Legal System for Movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 182 (Austin Sarat & Stuart A. Scheingold eds., 2006).

Vermont Supreme Court's equality mandate eventually became the injury of inequality that other courts and legislatures have recognized.[11]

To chart this transformation, this Essay focuses on four points along the path to marriage equality:

1. The Vermont Supreme Court's 1999 decision in *Baker v. State*[12] and the subsequent passage of a civil union law in the state legislature.[13]
2. The Massachusetts Supreme Judicial Court's 2003 decision in *Goodridge v. Department of Public Health*[14] and its subsequent opinion clarifying that the state constitution required extension of the right to marry to same-sex couples.[15]
3. The New Jersey Supreme Court's 2005 decision in *Lewis v. Harris*[16] and the subsequent passage of a civil union law in the state legislature.[17]
4. The 2010 *Perry v. Schwarzenegger* trial and the subsequent district court and Ninth Circuit decisions holding California's Proposition 8 unconstitutional.[18]

Constitutional commitments provided the language through which LGBT rights advocates framed civil unions, domestic partnerships, and marriage, both in and out of court.[19] The very meaning of equality changed through social movement mobilization, movement–countermovement conflict, and state decisionmaking processes.[20] Courts played a significant role in this development,

11. For a discussion contextualizing this shift within the intramovement debate on prioritizing marriage, see Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 396–97 (2009).
12. 744 A.2d 864 (Vt. 1999).
13. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2010).
14. 798 N.E.2d 941 (Mass. 2003).
15. Ops. of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).
16. 908 A.2d 196 (N.J. 2006).
17. N.J. STAT. ANN. § 37:1–28 (West Supp. 2012).
18. 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).
19. On "constitutional framing," see Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 274 (2010). I include comprehensive domestic partnership within the concept of civil union. For work on frames in the marriage equality domain, see *id.*, 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), and Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207 (2001).
20. William Eskridge describes nonmarital recognition through the concept of "equality practice," in which society "get[s] used to equality" and gradually expands rights for minority groups. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 189 (2002). Equality practice construes domestic partnerships and civil unions as healthy developments on a path toward full marriage recognition for same-sex couples. *See id.* at 190.

furnishing locations in which advocates could announce, hone, and resolve frames[21] and attract attention to and publicity for those frames.[22] Advocates, in turn, would integrate courts' assessments of those frames—in the form of adjudicated results—into their discursive strategies.[23] Ultimately, the constitutional, court-based fight over the meaning of equality for same-sex couples both reflected and constituted the political and cultural dimensions of that fight.[24]

I. VERMONT—CIVIL UNIONS AND EQUALITY

In Vermont, in the late 1990s, LGBT rights lawyers argued that the Vermont Constitution's Common Benefits Clause required that same-sex couples receive the same rights and benefits as married different-sex couples.[25] Advocates had turned to courts instead of attempting to secure relationship recognition through the legislature. At this early point in the LGBT movement's organized campaign for marriage equality, courts provided the only state-level venues for plausibly making claims to marriage.[26] A few state legislatures grap-

21. *See* Ziegler, *supra* note 19, at 283–88.
22. *See* Gwendolyn Leachman, *Social Movements and the Journalistic Field: A Multi-institutional Approach to Tactical Dominance in the LGBT Movement* 5 (Inst. for the Study of Soc. Change, Working Paper Series 2008-2009.39, 2009), *available at* http://escholarship.org/uc/item/5j346415.
23. *See* Ziegler, *supra* note 19, at 267–68.
24. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 243 (2011). In the same-sex marriage context, see Schacter, *supra* note 11, at 396. Courts often become an essential part of the process of political and constitutional mobilization. As Emily Zackin shows, some groups "may find that political institutions other than courts are effectively unavailable as avenues for advancing their political arguments." Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts*, 42 LAW & SOC'Y REV. 367, 368 (2008). Movements, therefore, may attempt to gain traction for their constitutional visions through court-based strategies. *See* JACK M. BALKIN, LIVING ORIGINALISM 287, 292 (2011); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007). Indeed, activists may facilitate dialogue outside the courts by initially resorting to courts. *See* Zackin, *supra*, at 384.
25. The Common Benefits Clause provides in part "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." VT. CONST. ch. I, art. 7.
26. The idea that constitutional guarantees of equality and liberty required marriage for same-sex couples was well outside the mainstream of constitutional thought when couples first filed such claims in the 1970s. On the impact of earlier marriage litigation, see Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 10, at 84. The Vermont litigation constituted the first marriage lawsuit coordinated by movement leaders. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1254–55 (2010).

pled with limited relationship recognition in the 1990s, but marriage was generally not on the table.[27]

The court in *Baker v. State* decided that the provision of equivalent rights and benefits to same-sex couples could remedy the constitutional violation in the case, in spite of the plaintiffs' request that the state allow same-sex couples to marry.[28] The court stated: "While many have noted the symbolic or spiritual significance of the marital relation, it is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case."[29] This followed logically, though not inevitably, from the "common benefits" framing of the case by LGBT rights lawyers. Even though the Vermont Common Benefits Clause resembles the federal Equal Protection Clause, its unique common benefits language was particularly favorable for framing same-sex couples' claim and stressing their exclusion from a vast array of benefits granted to married different-sex couples.[30]

The plaintiffs' reliance on the common benefits framing suggested less attention to marriage's social implications. Their opening brief, for instance, focused heavily on the "broad panoply of legal, economic and social protections and supports for married couples and their families,"[31] while devoting only a single sentence to the "social value of state-recognized civil marriage."[32] Indeed, the plaintiffs disputed the state's characterization of the case as "not 'a benefits case'": "[C]ivil marriage opens the door to hundreds of legal protections, supports, and obligations, the vast majority of which are simply out of reach for Appellants because they cannot marry."[33] Of course, the plaintiffs acknowledged *Baker* was "not *just* a benefits case," because "[t]hrough civil marriage, the State confers a *status*, which plugs into a common social vocabulary and carries powerful personal and cultural weight."[34]

27. *See* Cummings & NeJaime, *supra* note 26, at 1250–60 (explaining the legislative process in Hawaii and California in the 1990s).
28. Baker v. State, 744 A.2d 864, 887 (Vt. 1999). For a comprehensive account of the litigation in Vermont, see ESKRIDGE, *supra* note 20, at 44–55.
29. *Baker*, 744 A.2d at 888–89.
30. VT. CONST. ch. I, art. 7.
31. Brief of Appellants, *Baker*, 744 A.2d 864 (No. 98-032), *reprinted in* Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 5 MICH. J. GENDER & L. 409, 415 (1999).
32. *Id.* at 417.
33. Reply Brief of Appellants, *Baker*, 744 A.2d 864 (No. 98-032), *reprinted in* Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 6 MICH. J. GENDER & L. 1, 4 n.3 (1999).
34. *Id.* (citation omitted).

The court, drawing on the common benefits framing advocates presented, focused on marriage's material rights and benefits, rather than its cultural status:

> We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature.[35]

In response, the state legislature enacted civil unions, the country's first comprehensive relationship recognition law for same-sex couples.[36] In this framing, equality was understood primarily as material equality rather than dignitary equality.

The Vermont Supreme Court credited the LGBT rights lawyers' frame in a carefully circumscribed way by focusing on tangible rights and benefits over equal respect and status. With the court's ruling, advocates had a judicially endorsed frame on which to draw. They had a choice: They could either appeal to Chief Justice Johnson's concurring and dissenting opinion, which criticized the majority for falling short of full marriage rights for same-sex couples,[37] or praise the majority opinion and frame the decision as a progressive call for equality.[38] For the most part, advocates chose the latter, adopting the majority's equality frame and using it to drive the movement in other states and on the national level.[39] There was power in claiming victory, both to mobilize constituents and to convince elites to support the movement. And embracing civil unions as a remedy could lead to similar victories in other states, including those that had statutes or constitutional amendments banning recognition of marriage for same-sex couples. For instance, soon after the Vermont legislature's move, Representative Paul Koretz introduced a civil unions bill in California.[40] While advocates and lawmakers abandoned the bill when they determined that it would be easier to build on the state's existing domestic partnership statute, the result in Vermont

35. *Baker*, 744 A.2d at 867.
36. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2010). For a description of the lengthy legislative process, see ESKRIDGE, *supra* note 20, at 57–80.
37. *See Baker*, 744 A.2d at 904 (Johnson, J., concurring in part and dissenting in part). Similar critical frames emerged during the legislative debate. *See* ESKRIDGE, *supra* note 20, at 66.
38. *See* Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. U. L. REV. 467, 484 (2012). An equality frame also surfaced during the legislative debate. *See* ESKRIDGE, *supra* note 20, at 79.
39. Eskridge documents the mixed feelings of the *Baker* lawyers and plaintiffs. ESKRIDGE, *supra* note 20, at 55–56.
40. A.B. 1338, 2001–02 Leg., Reg. Sess. (Cal. 2001).

influenced the move toward a comprehensive domestic partnership regime in California.[41]

Although LGBT rights lawyers publicly adopted the civil union equality frame,[42] they anticipated that they would later deploy the inequality frame and began to collect evidence of discrimination against same-sex couples in civil unions.[43] As the concept of marriage equality gained traction, movement advocates would begin to paint civil unions as an inadequate remedy. But with relatively low levels of public support for marriage equality, they embraced civil unions as a temporary solution.[44] In other words, advocates did not adopt the Vermont court's frame in an unthinking, wholesale fashion.

II. MASSACHUSETTS—MARRIAGE EQUALITY

A key lawyer in the Vermont litigation, Mary Bonauto of Gay & Lesbian Advocates & Defenders (GLAD), subsequently pursued marriage equality in Massachusetts. In its 2003 decision in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court held that the state constitution required that same-sex couples receive the same treatment as different-sex couples with regard to marriage.[45] Massachusetts lawmakers asked the court if the state could remedy the constitutional violation by enacting civil unions, as Vermont did.[46] This offered an opportunity for Bonauto and her colleagues to frame the Vermont experience as one that produced inequality and continued discrimination.[47] Distinguishing *Baker*'s focus on "equal access to state-conferred marital rights and responsibilities,"[48] Bonauto emphasized *Goodridge*'s attention to the "unique status" of marriage, which "legally and socially confirms and strengthens the private commitment of the couple."[49] While the abstract idea of relationship equality in Vermont was commendable, Bonauto claimed that because of the social and cultural significance of marriage and the unfamiliar status of civil unions,

41. *See* Cummings & NeJaime, *supra* note 26, at 1264.
42. Movement actors may deploy one frame in public and another, contrary frame within movement circles. *See* Timothy J. Kubal, *The Presentation of Political Self: Cultural Resonance and the Construction of Collective Action Frames*, 39 SOC. Q. 539, 543 (1998).
43. *See* LEGISLATIVE COUNCIL, REPORT OF THE VERMONT CIVIL UNION REVIEW COMMISSION 8 (2011), http://www.leg.state.vt.us/baker/cureport.htm.
44. One must view advocates' framing choices in light of the broader cultural and political context. *See* Benford & Snow, *Framing Processes*, *supra* note 10, at 628–29.
45. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).
46. Ops. of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).
47. *See* Brief of Interested Party/Amicus Curiae Gay & Lesbian Advocates & Defenders at 4–5, *Ops. of the Justices to the Senate*, 802 N.E.2d 565 (No. 09163).
48. *Id.* at 16.
49. *Id.* at 4.

a nonmarital designation could not provide equal treatment in practice. Private parties, for instance, would continue to discriminate against same-sex couples.[50] Because the Vermont resolution did not deliver the constitutional equality it guaranteed, advocates in Massachusetts painted it as an inadequate remedy.

In response to the state lawmakers' question asking whether civil unions would suffice, the Massachusetts Supreme Judicial Court answered with a resounding no, explaining that only full marriage equality would remedy the constitutional violation.[51] The decision signaled that civil unions were becoming a sign of inequality.[52] The court itself functioned as a framing agent, validating the marriage equality and civil union inequality frames and reshaping those frames going forward.[53]

Yet the court's favorable ruling did not authoritatively end the debate. Rather, the court provided resources for LGBT activists to continue to push their constitutional vision in Massachusetts and beyond.[54] The judicial decisions in Massachusetts changed the terms of the political debate in that state.[55] Advocates could now portray legislators opposed to marriage equality as attempting to eliminate recognized constitutional rights.[56] On the other side, sympathetic lawmakers could now rely on state supreme court decisions to articulate their support and, as a practical political matter, couch their position.[57] The court's intervention in *Goodridge* contributed to the framing of the marriage equality issue, rendering nonmarital recognition a second-class alternative and justifying the political ratification of marriage equality.

III. NEW JERSEY—CIVIL UNIONS AND INEQUALITY

In 2002, LGBT rights advocates led by Lambda Legal challenged same-sex couples' exclusion from marriage in New Jersey.[58] At the New Jersey Supreme Court, the lawyers portrayed civil unions and domestic partnerships as unac-

50. *See id.* at 35–36.
51. *Ops. Of the Justices to the Senate*, 802 N.E.2d at 572.
52. *See id.* at 570.
53. *See* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1347 (2010).
54. *See* Ziegler, *supra* note 38, at 488.
55. *See* Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 53 (2005).
56. *See id.*
57. *See id.*
58. *See* Amended Complaint for Injunctive and Declaratory Relief and in Lieu of Prerogative Writs, Lewis v. Harris, No. L-00-4233-02 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

ceptable alternatives.[59] Yet in its 2006 decision in *Lewis v. Harris*, the majority ruled that civil unions could remedy the constitutional violation; for its part, the dissent argued that only full inclusion in marriage would suffice.[60] In response to the court's decision, the legislature passed a civil union law.[61] Advocates recognized the material benefits produced by the court's decision and the subsequent codification of civil unions, but nonetheless attacked the result, arguing that the court and the legislature failed to provide full equality.

In the years following *Lewis*, advocates aggressively pursued the inequality framing of civil unions. Lambda Legal lawyers challenged the United Parcel Service's refusal to recognize civil unions for employee benefits purposes.[62] And they documented discrimination experienced by same-sex couples in civil unions,[63] publicizing numerous instances of third-party discrimination.[64] These examples bolstered the inequality frame now used for civil unions and discredited the equality frame that previously characterized nonmarital recognition. The efforts to document discrimination against those in civil unions, which merged considerations of symbolic or cultural equality with considerations of tangible or material equality, showed that the status-based harm inherent in a separate nonmarital designation produced material harms for same-sex couples and their families. The New Jersey Supreme Court's decision did not authoritatively settle the debate in that state. Advocates continue to push for marriage legislatively,[65] and Lambda Legal returned to the New Jersey courts in 2011, arguing that civil unions violate both state and federal equal protection guarantees.[66]

IV. CALIFORNIA—LITIGATING INEQUALITY

LGBT rights advocates eventually asserted more aggressive legal claims against civil unions and domestic partnerships. Lawyers argued that regimes once perceived as remedying constitutional violations actually constituted violations

59. *See* Reply Brief of Plaintiffs-Appellants at 21, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (No. 58,389), 2006 WL 6850898, at *21.
60. *Compare Lewis*, 908 A.2d at 221, *with id.* at 224 (Poritz, C.J., dissenting).
61. N.J. STAT. ANN. § 37:1–28 (West. Supp. 2012).
62. *Civil Unions Are Not Enough: Six Key Reasons Why*, LAMBDA LEGAL 2, http://data.lambdalegal.org/publications/downloads/fs_civil-unions-are-not-enough.pdf (last visited Mar. 24, 2013) [hereinafter *Civil Unions Are Not Enough*].
63. *See Civil Unions for Same-Sex Couples in New Jersey Frequently Asked Questions*, *supra* note 8, at 7.
64. *See Civil Unions Are Not Enough*, *supra* note 62, at 2.
65. *See* Marriage Equality and Religious Exemption Act, S. 1, 215th Leg., 2012 Sess. (N.J. 2012).
66. *See* Complaint for Declaratory and Injunctive Relief at 2, Garden State Equal. v. Dow, No. MER-L-1729-11 (N.J. Super. Ct. Law Div. Feb. 21, 2012) [hereinafter Garden State Equal. v. Dow Complaint].

themselves. In a key decision, the California Supreme Court credited this inequality frame, ruling that the domestic partnership regime failed to satisfy the demands of the state equal protection guarantee and ordering the state to open marriage to same-sex couples.[67]

The inequality frame had gained resonance during the state's move toward a comprehensive domestic partnership law, which took effect in 2005. Although this Essay has thus far focused on advocates' strategies and the relationship those strategies have to court decisions, the strategies of *opponents* of relationship recognition in California also contributed to the shift toward inequality frames. Movement–countermovement dynamics influence frames as each movement responds to and internalizes frames advanced by the other.[68] At the same time that LGBT rights advocates were pushing relationship recognition, including both marital and nonmarital regimes, Christian Right activists pressed for statutes and constitutional amendments banning marriage for same-sex couples and, in some instances, nonmarital recognition. These activists also challenged nonmarital regimes as violative of state laws prohibiting recognition of marriage for same-sex couples. In California, LGBT rights advocates defended the state's comprehensive domestic partnership law against a challenge that the law contravened Proposition 22, the voter initiative prohibiting marriage for same-sex couples. Initiative proponents argued that the domestic partnership regime was so similar to marriage that it violated the spirit of the statute, while LGBT rights lawyers underscored the differences between the two relationship statuses.[69] In this sense, the countermovement's turn to courts necessitated arguments by LGBT rights lawyers denigrating nonmarital relationship recognition and distancing it from marriage. The countermovement strategy, therefore, actually aided the LGBT rights movement's shift from equality to inequality frames around civil unions and domestic partnerships. In determining that the comprehensive domestic partnership regime did not violate Proposition 22, the California Court of Appeals deemed domestic partnership a distinct and inferior

67. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009). Like California, the Connecticut Supreme Court in 2008 ruled that the civil union law in that state failed to provide equality under the state constitution. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008). For the lawyers' perspective on the Connecticut litigation, see Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in a Civil Union State*, 41 CONN. L. REV. 1381 (2009).

68. *See* Benford & Snow, *Framing Processes*, *supra* note 10, at 626. In constitutional theory, see Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1369 (2006).

69. *See* Cummings & NeJaime, *supra* note 26, at 1271–74.

status.[70] In this way, the landmark victory in the California legislature—the passage of a comprehensive domestic partnership law—was reframed in court as a mark of inequality.

Three years after the state court resolution of the domestic partnership dispute and mere months after the California Supreme Court announced same-sex couples' right to marry under the state constitution, Proposition 8 amended the California Constitution's Equal Protection Clause to exclude same-sex couples from marriage (yet leave untouched the comprehensive domestic partnership regime). Same-sex couples filed suit in federal court in a case led by a new organization, the American Foundation for Equal Rights (AFER).[71] Indeed, the main LGBT movement organizations had warned against such litigation.[72] In *Perry v. Schwarzenegger*, AFER's lawyers, most notably Ted Olson and David Boies, argued that the state constitutional amendment violated federal equal protection guarantees and deprived lesbians and gay men of their fundamental right to marry.[73]

Judge Vaughn Walker held a trial in which the parties explored and scrutinized the distinction between comprehensive domestic partnership and marriage. The lawyers, the same-sex couple plaintiffs, and the expert witnesses pointed to both the material and the dignitary harm that domestic partnerships inflict and framed the domestic partnership regime as unequal as a constitutional matter.[74] Embracing marriage as a constitutional requirement in effect meant denigrating civil unions and domestic partnerships. The lawyers put on experts who connected the constitutional frames of equality and inequality to empirical arguments about harm.[75] Crucially, these experts carefully reframed domestic partnership as harmful by distinguishing the earlier, more equality-driven frames.

Social epidemiologist Dr. Ilan Meyer testified that the exclusion of same-sex couples from marriage and the designation of same-sex relationships as separate domestic partnerships produced emotional and psychological harm that leads to what he termed "minority stress."[76] In discussing the difference between marriage and domestic partnership—as opposed to the difference between marriage and no relationship recognition—Meyer explained that "you're actually

70. Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 699 (Ct. App. 2005).
71. For an account of this effort, see Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012).
72. *See* AM. CIVIL LIBERTIES UNION ET AL., MAKE CHANGE, NOT LAWSUITS (2009), http://www.aclu.org/pdfs/lgbt/camarriage_joint_20080609.pdf.
73. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010).
74. *Id.* at 929, 936, 939, 970–72.
75. *Id.* at 936.
76. Transcript of Record at 832, *Perry*, 704 F. Supp. 2d 921 (No. C-09-2292-VRW).

making a clearer statement of stigmatization when you have this dual system, because it is not only that you're denying them the marriage, you're also saying this marriage is highly valued and, therefore, you cannot get that part so we're giving you something that we're calling something else."[77]

Under cross-examination, Meyer negotiated the relationship between the equality and inequality frames of domestic partnership:

> Q. Do you believe that domestic partnerships stigmatize gay and lesbian individuals?
>
> . . . .
>
> A. Yes.[78]

The examining attorney then showed Meyer California's comprehensive domestic partnership law:

> Q. . . . [P]lease look at the italics . . . .
>
> . . . .
>
> "This bill is sponsored by Equality California. Other advocacy organizations that collaborated on the drafting of this bill included Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, and ACLU."
>
> . . .
>
> Q. Do you believe Equality California would sponsor legislation that stigmatizes LGB individuals?
>
> A. Do I believe that they intend to stigmatize? No. But I think that that doesn't change my answer to the question about domestic partnership. So whatever their intention was, I'm sure, to better the lives of gay and lesbian individuals in California, but, nonetheless, having a second type of an institution that is clearly not the one that is desired by most people is stigmatizing.
>
> Q. All right. And if I were to ask you the same question about the involvement of Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, and the ACLU, your answer would be the same, correct?
>
> A. Exactly.[79]

77. *Id.* at 984–85.
78. *Id.* at 966.
79. *Id.* at 966–68.

At the *Perry* trial, the expert witnesses put forward public policy arguments, grounded in empirical research, as to why and how domestic partnership harmed same-sex couples.[80] Ultimately, the trial allowed supporters of marriage for same-sex couples to construct the meanings of equality and inequality in specific and empirical terms. Doing so, however, required delicately balancing the push for marriage in California with the movement's earlier endorsement of a domestic partnership regime in that state and the continued selective endorsement of domestic partnership laws in other states.

By crediting the LGBT rights movement's frames and discrediting the countermovement's frames, the district court itself shaped the conversation around marriage for same-sex couples. Judge Walker endorsed the marriage equality frame and the domestic partnership inequality frame by relying on an array of expert and plaintiff testimony.[81] He then linked that testimony to constitutional principles of liberty and equality.[82] The court's reasoning provided a resource for movement activists moving forward and became part of the public and legislative debate over same-sex relationship recognition.

A divided Ninth Circuit panel affirmed the district court's holding but did so on narrow grounds that relied heavily on the distinction between marital and nonmarital relationship recognition for same-sex couples.[83] Lawyers at LGBT legal organizations, lawyers for the City and County of San Francisco, and prominent constitutional law scholars led by William Eskridge forcefully argued that the unique situation in California—in which same-sex couples have a domestic partnership system and had the right to marry eliminated by voters—could not withstand even rational basis review.[84] Following that logic, the Ninth Circuit panel made the domestic partnership regime central to its holding and found that "the difference between the designation of 'marriage' and the designation of

80. For a summary of these arguments, see *Perry*, 704 F. Supp. 2d at 936.

81. *See id.* (discussing expert testimony); *id.* at 938–40 (discussing plaintiffs' testimony); *id.* at 970 (finding that "[d]omestic partnerships lack the social meaning associated with marriage").

82. *See id.* at 993–96.

83. Perry v. Brown, 671 F.3d 1052, 1063–64 (9th Cir. 2012).

84. *See* Plaintiff-Intervenor-Appellee City and County of San Francisco's Response Brief at 2, *Perry*, 671 F.3d 1052 (No. 10-16696), 2010 WL 4310745, at *2; Brief of Amici Curiae ACLU Foundation of Northern California et al. at 3, 16–21, *Perry*, 671 F.3d 1052 (No. 10-16696), 2010 WL 4622576, at *3, *16–21; Brief of Amici Curiae, Professors William N. Eskridge Jr. et al. in Support of Appellees at 1–2, 22–31, *Perry*, 671 F.3d 1052 (No. 10-16696), 2010 WL 4622570, at *1–2, *22–31. For a more thorough discussion, see NeJaime, *supra* note 71, at 734–35. While plaintiffs' attorneys of course made this argument, *amici* and intervenors more vigorously and singularly highlighted this path.

'domestic partnership' is meaningful."[85] Instead of signifying equality for same-sex couples, the domestic partnership law signified the denial of the designation of marriage, which the court understood as "the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship."[86] After *Perry*, the transformation from equality to inequality for nonmarital relationship recognition, through both advocates' frames and courts' acceptance of those frames, seems nearly complete.

CONCLUSION

Now, more than ten years after Vermont resorted to nonmarital relationship recognition to provide constitutional equality to same-sex couples, LGBT rights advocates frame civil unions and domestic partnerships, both legally and politically, as unequal. And they frame marriage as the only true mark of equality. Advocates pursue these frames in courts and legislatures throughout the country,[87] drawing explicitly on constitutional frames.

The U.S. Supreme Court is poised to weigh in on marriage equality, specifically against the backdrop of a comprehensive domestic partnership law. It granted certiorari in *Perry* and may rule on whether California's domestic partnership regime meets the demands of the Equal Protection Clause of the Fourteenth Amendment or instead directly contravenes that equality mandate.[88] If the Supreme Court rules on the question of whether comprehensive nonmarital relationship recognition violates the constitutional guarantee of equality, it will have done so after many judicial decisions and years of political and cultural debate shaped by the shrewd framing efforts of LGBT rights advocates.

85. *Perry*, 671 F.3d at 1075. The court relied heavily on the fact that in California, unlike in other states, same-sex couples exercised the right to marry before having that right withdrawn by voters. *See id.* at 1076, 1079, 1081.

86. *Id.* at 1079.

87. *See* Complaint for Declaratory and Injunctive Relief, Sevcik v. Sandoval, No. 2:12-CV-00578-RCJ-PAL (D. Nev. Nov. 26, 2012), 2012 WL 1190622; Garden State Equal. v. Dow Complaint, *supra* note 66, at 2–3; Michael Levenson, *R.I. Poised to Allow Civil Unions Over Gay Marriage*, BOS. GLOBE, June 28, 2011, at 1.

88. *Perry*, 671 F.3d 1052, *cert. granted sub nom.*, Hollingsworth v. Perry, 133 S. Ct. 786 (2012).