

# Winning Through Losing

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*ABSTRACT: This Article locates the productive function of litigation loss in social movements. Departing from previous sociolegal scholarship, which largely centers on the positive possibilities of litigation process and victory, this Article identifies social movement effects rooted in the unique attributes of litigation loss. In doing so, it draws on the specific limitations of litigation identified in more pessimistic accounts of court-centered reform, but reconfigures those limitations within a multilayered, dynamic framework of law and social change. Even as my contribution fills a significant gap—the inattention to loss and its aftermath—in the legal mobilization and cause lawyering literature, I rely on key insights from this scholarship to build a theoretical framework with which to analyze judicial defeat: My analysis contextualizes court-centered strategies within broader processes of social change and situates litigation tactics within a framework of multidimensional advocacy. To show how advocates manage litigation loss in ways that speak to movement actors and constituents as well as to elites and the public, I draw on examples from the LGBT-rights and Christian Right movements. These examples demonstrate that in configuring judicial defeat for internal movement purposes, sophisticated advocates may use litigation loss (1) to construct organizational identity and (2) to mobilize constituents. In translating loss into strategies aimed at decision makers outside the movement, advocates may use litigation loss (1) to appeal to other state actors, including elected officials and judges, through reworked litigation and nonlitigation tactics and (2) to appeal to the public by stressing the need to discipline a countermajoritarian judiciary. Overall, my functional account of litigation loss demonstrates that judicial setbacks may, counterintuitively, contribute to the process of*

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*reform by producing conversations that rely on the multiple (and conflicting) ways in which we think about courts' constraints and the role of those constraints in the process of social change.*

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## I. INTRODUCTION

We live in a culture that prioritizes winning. We declare winners and losers, and we deem it fair and reasonable to distribute benefits based on that distinction: To the victor go the spoils. Perhaps nowhere is the continued articulation of the winner–loser distinction more apparent than in law. Litigation, every day, produces winners and losers—often in very public ways. Some parties prevail, and some do not. To the prevailing parties go a host of remedies, including money, injunctions, and declarations of rights. The losers, of course, submit to the winners, paying damages or ceasing some action.

In our winning-obsessed culture, it is not surprising that conventional legal analysis relies on a storyboard narrative in which a harmed party seeks and obtains judicial redress. The court, in this account, remedies the harm. Sociolegal scholars, however, have questioned whether events unfold this neatly in practice. Instead, litigation victories might be illusory. The win in court might fail to produce an adequate remedy. The remedy might never be effectively implemented or enforced, and the aggrieved party, who prevailed in court, might continue to suffer harm. Many scholars have observed favorable judicial decisions without similarly favorable outcomes on the ground.<sup>1</sup> One might win in court and still lose in life.

But, claim some of these scholars, winning is still desirable.<sup>2</sup> Even if the change promised by the court never materializes, multiple benefits—both tangible and intangible—might nonetheless accrue to the winners. To make this case, scholars studying social movements and cause lawyers<sup>3</sup> have documented numerous instances in which favorable judicial

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1. JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 19 (1978); *see, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 421 (2d ed. 2008); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10–11 (1994) [hereinafter Klarman, *Racial Change*]; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6, 19–23 (1996) [hereinafter Klarman, *Rethinking the Revolutions*].

2. *See, e.g.*, HANDLER, *supra* note 1, at 217–28; Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76, 85 (Bryant G. Garth & Austin Sarat eds., 1998).

3. Cause lawyers use court-based strategies for activist purposes, or, as Austin Sarat and Stuart Scheingold explain, to change “some aspect of the social, economic, and political status quo.” Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3–4 (Austin Sarat & Stuart Scheingold eds., 1998); *see also* Anne Bloom, *Practice Style and Successful Legal Mobilization*, *LAW & CONTEMP. PROBS.*, Spring 2008, at 1, 5 (“Cause lawyers are activist lawyers who use their legal skills to advance a cause.”); Joshua C. Wilson, *It Takes All Kinds: Observations from an Event-Centered Approach to Cause Lawyering*, 50 *STUD. LAW, POL., & SOC’Y* 169, 170 (2009) (“At its core cause lawyering is distinguished from traditional lawyering in that it is done in the service of a political or social cause that seeks to rearrange existing state or social power relations.”).

pronouncements produce favorable indirect effects. Court victories may lend legitimacy to a cause, mobilize constituents, and provide much-needed publicity. Litigation wins may also generate elite support,<sup>4</sup> pressure adversaries, and increase a social movement's bargaining power.<sup>5</sup>

These scholars often situate the indirect benefits of court-based strategies within the legal mobilization framework.<sup>6</sup> This framework contextualizes litigation within broader social conflicts and sees courts as merely one institutional setting in which the process of law and social change occurs.<sup>7</sup> In this model, law is constitutive, constructing social meaning and shaping the way that elites and the public perceive a movement's claims and demands.<sup>8</sup> Through this lens, wins in court may not directly produce the desired results but may nonetheless provide a favorable environment for the social movement's broader reform campaign. In this way, the legal culture continues to separate winners and losers and to divide

4. In this context, elites are *non-movement actors* with resources, cultural influence, and/or political power. See Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 935 (1998); Erich W. Steinman, *Legitimizing American Indian Sovereignty: Mobilizing the Constitutive Power of Law Through Institutional Entrepreneurship*, 39 LAW & SOC'Y REV. 759, 771 (2005). This captures what social movement scholars often refer to as "political elites" or "elite allies," but does not include movement lawyers or movement actors embedded in the state apparatus, both of whom may be described as elites in some contexts. See LEE ANN BANASZAK, *THE WOMEN'S MOVEMENT INSIDE AND OUTSIDE THE STATE* 3 (2010) (distinguishing outsider allies from movement insiders); Lynn C. Jones, *Exploring the Sources of Cause and Career Correspondence Among Cause Lawyers*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 203, 205 (Austin Sarat & Stuart Scheingold eds., 2005) ("[E]xtensions of social movement theory would view lawyers as elites who co-opt movement strategies and goals in line with their own interests." (citation omitted)); Wayne A. Santoro & Gail M. McGuire, *Social Movement Insiders: The Impact of Institutional Activists on Affirmative Action and Comparable Worth Policies*, 44 SOC. PROBS. 503, 503-04 (1997) (labeling political elites affiliated with a social movement "institutional activists").

5. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK* 144-45 (1994); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 7 (2009).

6. See MCCANN, *supra* note 5, at 5-12; see also Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 700 (1983) (arguing that greater access to, and use of, diversified legal forums increases political participation).

7. See, e.g., Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, *supra* note 3, at 69, 95 ("Cause lawyers seek to . . . locate the controversy in its broader social and political context."); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 156-57 (2009).

8. See Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 506, 508 (Austin Sarat ed., 2004) [hereinafter McCann, *Law and Social Movements*] ("[L]aw provides both normative principles and strategic resources for the conduct of social struggle."); see also Michael McCann, *Causal Versus Constitutive Explanations (or, on the Difficulty of Being So Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 463 (1996) [hereinafter McCann, *Causal Versus Constitutive Explanations*] (defining "constitutive" activity as activity that forms meaning in the public mind).

rights and benefits based on this distinction, but the process occurs in more nuanced and multidimensional ways.

Even as the legal mobilization approach takes a more complex view of litigation and court-centered change, it nonetheless prioritizes winning—or at least the prospect of winning. Legal mobilization scholars generally assume that positive indirect effects emanate from favorable judicial pronouncements. And when they decouple success from court decrees and point to the benefits that may derive simply from the act of litigation, they focus on litigation process before a definitive decision—i.e., litigation before losing. In doing so, their approach remains wedded to the prospect of favorable judicial intervention and to the positive possibilities of litigation.

Are we to assume, then, that the losers pack up and go home, that a negative judicial decision is debilitating, and that the benefits the winners enjoy never accrue to the losers? While scholarship on judicial impact and social movements might suggest as much, this Article argues otherwise. Our preoccupation with winning and our assumption that the winner–loser divide governs the distribution of tangible and intangible assets blind us to the function of loss.

Litigation loss may, counterintuitively, produce winners. When savvy advocates lose in court, they may nonetheless configure the loss in ways that result in productive social movement effects and lead to more effective reform strategies. Loss may yield many of the indirect effects that scholars have identified in the context of litigation victory and litigation process, but it may do so in ways that are uniquely tied to loss itself. A range of social movement tactics, aimed at a variety of audiences, may draw strength from litigation loss precisely because such loss demonstrates and documents the limitations of court-centered change.

In this Article, I seek to recast litigation loss and to understand the way that loss functions positively within the process of law and social change. I do this by situating loss within a theoretical framework informed by legal mobilization and cause lawyering scholarship. While I identify a significant gap in this literature—a failure to theorize litigation loss and its impact—I also show that legal mobilization and cause lawyering scholarship supplies a methodological approach and theoretical insights consistent with, and foundational to, a theory of litigation loss. First, my focus on litigation loss stems from an analytical approach that shifts attention away from the implementation and enforcement of judicial decrees and toward the political and constitutive potential of law. Second, my analysis of how loss travels across law-making domains focuses on how cause lawyers themselves use litigation as part of a multidimensional approach to social movement advocacy.<sup>9</sup> This analytical framework resonates with theories of democratic

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9. In our analysis of the California marriage-equality campaign, Scott Cummings and I used the term “multidimensional advocacy” to describe “advocacy across different domains

constitutionalism and demosprudence, both of which understand law and social change as a dialogical process in which social movement actors seize on judicial decisions and activate legal norms across a variety of institutional settings.<sup>10</sup>

Only by understanding courts within a multilayered, dynamic framework of social change and by situating litigation within the model of multidimensional advocacy can we begin to uncover the productive and counterintuitive effects of litigation loss. Yet while I adopt the theoretical framework and methodological approach of legal mobilization and cause lawyering scholars, I move beyond their focus on litigation's possibilities, as seen through their attention to victory and process, and instead shift toward litigation's limitations. Specifically, I argue that social movement advocates seize on some of courts' key constraints (as identified by scholars who subscribe to a more pessimistic view of litigation's potential to prompt social reform) and leverage those constraints for social movement purposes in the wake of litigation loss.

This Article proceeds in three parts. In Part II, I explain the debate in sociolegal scholarship surrounding the social-change potential of court-centered strategies. Gerald Rosenberg has made a compelling case that court-based strategies represent a "hollow hope," arguing that little evidence exists to suggest that courts directly bring about reform or that litigation victories produce indirect effects that contribute to reform.<sup>11</sup> Sociolegal scholars in the legal mobilization and cause lawyering fields have offered a counternarrative to Rosenberg's pessimistic view. These scholars have documented how litigation—including both the process of litigation and favorable decisions issued by courts—mobilizes a movement and furnishes bargaining power as the movement negotiates and interacts with private and public adversaries.<sup>12</sup>

In Part III, I build a theoretical framework with which to approach litigation loss by arguing that both the pessimistic and optimistic accounts of social-change litigation offer important insights, while at the same time under-theorizing a significant event—litigation loss. I explain how the limitations and constraints of court-centered strategies, many of which Rosenberg identifies, may function within a dynamic, multifaceted process

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(courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)." Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1242 (2010).

10. See Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Robert Post & Reva Siegel, Essay, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 139 (2007); discussion *infra* Part III.B.

11. See ROSENBERG, *supra* note 1, at 422.

12. See, e.g., HANDLER, *supra* note 1, at 218; MCCANN, *supra* note 5, at 58; STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 147 (1974); Keck, *supra* note 7, at 158; McCann, *supra* note 2, at 84.

of law and social change. In this way, my account of litigation loss takes seriously the constraints of court-centered change but locates those constraints within the legal mobilization framework. While legal mobilization and cause lawyering scholars have generally focused on the productive function of litigation strategies stemming from courts' possibilities and potential, I contend that there are productive, radiating effects of litigation loss which reflect and derive meaning from courts' constraints.<sup>13</sup> By contextualizing litigation loss within a framework of multidimensional advocacy—in which lawyers use a number of tactics aimed at a variety of audiences across multiple institutional domains at different levels of government—we begin to see how advocates themselves deploy litigation loss to shape strategies and outcomes in other settings.<sup>14</sup>

Finally, in Part IV, I provide an account of litigation loss in social movements that fits into the theoretical framework constructed in Part III.<sup>15</sup> Through a qualitative analysis of the lesbian, gay, bisexual, and transgender ("LGBT") rights movement and the Christian Right movement, I document several internal and external effects of loss, distinguishing between how lawyer-activists situate loss within the movement and outside the movement. Internally, savvy advocates may use litigation loss (1) to construct organizational identity and (2) to mobilize outraged constituents. Externally, these advocates may use litigation loss (1) to appeal to other state actors, including courts and elected officials, through reworked litigation and nonlitigation tactics and (2) to appeal to the public through images of an antimajoritarian judiciary.

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13. A handful of scholars approach losing litigation on its own terms, and I discuss their work to the extent it informs my account of litigation loss. See JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003); Steven A. Boutcher, *Mobilizing in the Shadow of the Law: Lesbian and Gay Rights in the Aftermath of Bowers v. Hardwick*, 31 RES. SOC. MOVEMENTS, CONFLICT & CHANGE (forthcoming 2011) [hereinafter Boutcher, *Mobilizing in the Shadow of the Law*]; Jules Lobel, *Courts As Forums for Protest*, 52 UCLA L. REV. 477, 490 (2004) [hereinafter Lobel, *Courts As Forums*]; Jules Lobel, *Losers, Fools & Prophets: Justice As Struggle*, 80 CORNELL L. REV. 1331, 1343 (1995) [hereinafter Lobel, *Justice As Struggle*]; Susan M. Olson, *The Political Evolution of Interest Group Litigation*, in GOVERNING THROUGH COURTS 225, 227 (Richard A.L. Gambitta, Marlynn L. May & James C. Foster eds., 1981); Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 3, at 317, 323; Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization*, AMICI (Am. Soc. Ass'n, Wash., D.C.), Fall 2005, at 8 [hereinafter Boutcher, *Making Lemonade*].

14. See Cummings & NeJaime, *supra* note 9, at 1242.

15. I use an interpretive methodology that understands law as constitutive of social relations, rather than as a distinct and exogenous determinant. See McCann, *Causal Versus Constitutive Explanations*, *supra* note 8, at 460–63. To understand social movement actors' motivations, possibilities, and constraints, I look to primary sources, such as movement literature and advocates' statements. Although this approach prevents me from making generalizable causal claims, it allows me to analyze how failed rights-claiming strategies operate in actual social movement contexts and to thereby suggest potential functions for litigation loss.

My analysis pays attention to the ways in which litigation loss functions differently than losses in other venues: Advocates seize on particular images of courts to appeal to other potential social-change agents. In this sense, the mobilization of litigation loss derives not from the possibilities of favorable judicial intervention, but from the specific limitations of court-centered strategies and the important constraints of courts themselves.

## II. THE LIMITATIONS AND POSSIBILITIES OF COURT-CENTERED STRATEGIES

For scholars concerned with litigation aimed at social change, a central question revolves around whether—and if so, how—court-centered strategies can in fact bring about such change.<sup>16</sup> This debate, which has raged for several decades, implicates the threshold question of whether courts themselves are willing and able to initiate and implement reform. But it also raises the more complicated and contested question of whether court-centered advocacy produces indirect effects that positively contribute to social change.<sup>17</sup> While many scholars agree on the limited ability of courts themselves to produce significant reform, the question of productive indirect effects splits sociolegal scholars along not just empirical, but also theoretical and methodological, lines.<sup>18</sup>

This Part sets out the two main camps in this debate. First, I focus on political scientist Gerald Rosenberg's work, which represents the most comprehensive and influential account of the limitations of court-centered change.<sup>19</sup> Rosenberg and other scholars who accept this pessimistic account of litigation argue that courts are generally powerless to directly produce significant reform. Moreover, they contend that court-centered strategies fail to yield positive indirect benefits and, worse yet, often produce harmful extra-judicial effects. Next, I explore the competing and more optimistic account offered by sociolegal scholars in the legal mobilization and cause lawyering fields. These scholars recognize courts' limited ability to directly

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16. See MCCANN, *supra* note 5, at 3 (exploring "the significance of legal norms, tactics, and institutional processes in the campaign for gender-based pay equity"); ROSENBERG, *supra* note 1, at 2 ("[U]nderstanding to what extent, and under what conditions, courts can produce political and social change is of key importance.").

17. While there are certainly scholars who situate courts as producing change in a top-down way, this view has largely been displaced by more nuanced assessments of the potential of court-centered strategies, and it is this more recent debate that is of primary importance in my analysis. See Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 730 (1992); see also Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1769 (1992) (reviewing GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); and ROSENBERG, *supra* note 1) (contrasting the work of what he terms "strong court" scholars, "court skeptics," and "court fatalists").

18. See discussion *infra* Part III.B.

19. Since Rosenberg has offered the most comprehensive account of this view and has situated his work explicitly in response to legal mobilization and cause lawyering scholarship—upon which I rely throughout this Article—I focus primarily on his account.



produce reform but redeem litigation by focusing on its productive indirect impact.

A. *CONSTRAINED COURTS AND THE EMPTY PROMISE OF LITIGATION*

Scholars who argue that litigation is an ineffective vehicle for social reform point to several constraints that courts (and strategies reliant on courts) face.<sup>20</sup> As an initial matter, even when framing claims within the accepted language of legal rights, social movement advocates push the limits of courts' willingness to depart from existing practices by asking them to recognize a new right or to extend an existing right to a new group. While advocates themselves might see the step for the court as minor and work to frame the request in that way, judges may remain hesitant to move beyond existing law and interpret precedent in an expansive—and often liberal—direction.<sup>21</sup> Judges face political pressure to stay within the mainstream; as part of a dominant legal culture with an interest in maintaining the status quo, judges understand the political and professional risks of departing from accepted norms.<sup>22</sup> More concretely, the ability of judges to break new ground is constrained by precedent and (for all but Supreme Court Justices) the prospect of reversal.<sup>23</sup>

In addition to institutional factors internal to the judiciary, Rosenberg identifies constraints on courts that derive from external pressures.<sup>24</sup> Despite popular understandings of courts as politically insulated, judges themselves appreciate the more complicated relationship they have with other governmental branches. Courts may be reluctant to contravene perceived community and legislative preferences and, accordingly, may look for adequate support from other governmental branches before ordering reform.<sup>25</sup>

Even where courts manage to overcome key constraints and order significant social reform, they often lack adequate independent power to

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20. In assessing whether courts produce significant social reform, Rosenberg explains that “[a]t the core of the debate lies those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular political persuasion; in other words, *policy change with nationwide impact*.” ROSENBERG, *supra* note 1, at 4.

21. See *id.* at 11; see also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 500 (2001) (“[Abolitionists’ legal] arguments were generally unsuccessful in court, because cautious judges either disagreed with them as a matter of law or morality or felt they had insufficient political cover for accepting them.”).

22. See ROSENBERG, *supra* note 1, at 11.

23. See *id.*

24. See *id.* at 13–15.

25. See *id.*; see also William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2067 (2002) (“Judges do not have the resources to undertake initiatives requiring administrative capacity, nor do they have the political legitimacy to engage in much activism not otherwise acceptable to the political system.”).

ensure that such reform materializes. Courts may need help from other actors, particularly ground-level administrators, to implement and enforce their decisions.<sup>26</sup> Through tactics ranging from stalling and withholding necessary funds to overt opposition and defiance, those resistant to the decision can make realization of the court's ordered reform exceedingly difficult.<sup>27</sup>

Scholars who adhere to this pessimistic view of courts point to the Supreme Court's *Brown v. Board of Education*<sup>28</sup> decision as a paradigmatic example of litigation's failed promise.<sup>29</sup> Even though this decision followed in a line of desegregation and racial-equality decisions, it met with intense resistance from both elites and ordinary citizens. Absent action by other governmental branches, implementation and enforcement surfaced as significant problems that severely limited the effectiveness of the Court's decision.<sup>30</sup> Despite the Court's impassioned rhetoric and commitment to desegregation, school integration remained elusive in the decade following *Brown*.<sup>31</sup> As legal historian Michael Klarman puts it, "*Brown* had almost no immediate direct impact on desegregation."<sup>32</sup> Accordingly, Rosenberg concludes that "*Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform."<sup>33</sup>

In addition to the claim that courts are generally incapable of directly producing significant reform, scholars in the "constrained courts" camp make the more contested and controversial claim that litigation rarely yields positive extra-judicial effects. In other words, litigation not only fails to directly produce reform, but also fails to produce indirect effects that might contribute to reform. Under this approach, the ancillary benefits supposedly generated by litigation are illusory. More specifically, these scholars argue that litigation often fails to mobilize movement constituents, positively

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26. See ROSENBERG, *supra* note 1, at 15-21.

27. See *id.* at 16; see also Eskridge, *supra* note 21, at 500-01 ("If public culture is committed to a regime whereby the minority's trait is generally considered malign and the proper basis for exclusions, the Supreme Court will be very reluctant to strike down any significant state discrimination in the short term, because the Court would fear that such an order would not be enforceable and would fear political retaliation from Congress." (footnote omitted)).

28. 347 U.S. 483 (1954).

29. See ROSENBERG, *supra* note 1, at 40. This is likely because the Supreme Court's decision in *Brown* "is usually viewed as the most famous instance of judicial activism—and more to the point, of effective judicial activism—in the modern history of the Supreme Court." See Schuck, *supra* note 17, at 1773.

30. See ROSENBERG, *supra* note 1, at 42-57.

31. See *id.* at 42-46, 49-54; see also Klarman, *Rethinking the Revolutions*, *supra* note 1, at 21.

32. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 84 (1994).

33. ROSENBERG, *supra* note 1, at 71.

influence public opinion, convince elites, or accelerate the pace of legislative change.<sup>34</sup>

Returning to *Brown*, Rosenberg and Klarman find scant evidence to suggest that the judicial pronouncement inspired activists or mobilized constituents.<sup>35</sup> Indeed, Rosenberg observes a “muted” reaction to *Brown* within the black community.<sup>36</sup> Moreover, he contends that desegregation decisions neither changed public opinion nor influenced press coverage.<sup>37</sup> Of equal significance, Rosenberg and Klarman find that *Brown* itself did not directly influence Congress or the executive branch.<sup>38</sup> Rather, they link meaningful federal intervention in civil-rights issues to direct-action tactics and cultural changes.<sup>39</sup> Rosenberg concludes that the “claim that a major contribution of the courts in civil rights was to give the issue salience, press political elites to act, prick the consciences of whites, legitimate the grievances of blacks, and fire blacks up to act is not substantiated.”<sup>40</sup>

Worse yet, the pessimistic account of court-centered change claims that litigation may actually produce negative indirect effects for a social movement by deradicalizing movement politics and inspiring political backlash.<sup>41</sup> First, focusing on courts (and litigation) diverts scarce resources away from more effective strategies and demobilizes a potentially vibrant movement.<sup>42</sup> In this view, time, energy, and money that could be spent on

34. See *id.* at 156.

35. See *id.* at 150; Klarman, *supra* note 32, at 88 (“[T]he pervasive assumption that *Brown* played a vitally significant inspirational function is troubling for several reasons.”).

36. See ROSENBERG, *supra* note 1, at 132; Klarman, *supra* note 32, at 88 (“[I]t is not clear that in 1954 a Supreme Court decision was needed to legitimize civil rights demands in the eyes of blacks.”).

37. See ROSENBERG, *supra* note 1, at 117, 131. But see Nathaniel Persily, *Introduction to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 3, 10–12 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (explaining that while in most instances court decisions do not produce an observable effect on public opinion, some court decisions, including *Brown v. Board of Education*, do lead to measurable shifts).

38. See ROSENBERG, *supra* note 1, at 121; Klarman, *supra* note 32, at 90 (“Having *Brown* on the books did not significantly improve the prospects for success in the political arena, as evidenced by the toothless civil rights legislation enacted by Congress in 1957 and 1960 and by the Kennedy administration’s abysmal pre-Birmingham civil rights record.”).

39. Although Klarman contends that civil-rights advancements would have occurred eventually, regardless of *Brown* and its violent aftermath, he provides a counterintuitive link between *Brown* and federal civil-rights legislation by arguing that the violent reaction to *Brown* in the South ultimately mobilized northern white support for federal action. See Klarman, *Racial Change*, *supra* note 1, at 10; see also Klarman, *supra* note 32, at 116.

40. ROSENBERG, *supra* note 1, at 156. In his more recent case study—the LGBT-rights movement’s marriage-equality litigation—Rosenberg argues not only that the litigation failed to yield many direct benefits, but also that it did not indirectly produce changes in press coverage, shifts in public opinion, or increased political mobilization. See *id.* at 355–416.

41. See *id.* at 423 (“[S]trategic choices have costs, and a strategy that produces little or no change and induces backlash drains resources that could be more effectively employed in other strategies.”).

42. See, e.g., *id.* at 12, 302.

mobilization, political organizing, and direct action are instead spent on attempting to convince an institution that ultimately has relatively little ability to bring about change.<sup>43</sup> For instance, in the civil-rights movement, Rosenberg argues that the NAACP and the NAACP Legal Defense and Educational Fund, Inc. used their funds and credibility to work through the courts rather than “take to the streets.”<sup>44</sup> They did so, according to this account, while direct-action tactics, like boycotts and sit-ins, did the actual work of mobilizing constituents, positively influencing public opinion, and forcing political concessions.<sup>45</sup>

Next, a court decision ordering significant social reform might depart from public opinion and accordingly inspire backlash that further complicates implementation of reform and makes additional advances unlikely.<sup>46</sup> In this view, court decisions ordering reform disrupt the natural evolution of social change, thereby provoking backlash that puts new and substantial obstacles in a social movement’s path.<sup>47</sup> Both Rosenberg and Klarman note that the *Brown* decision produced powerful backlash that manifested itself in oppositional activism and extreme violence.<sup>48</sup> Intense opposition from political elites and the general public prevented effective implementation and enforcement of desegregation.<sup>49</sup> Even courts became part of the backlash; biased federal and state judges in the South used a variety of tools at their disposal to delay and reject *Brown*’s command.<sup>50</sup> For Rosenberg and Klarman, litigation does indeed produce extra-judicial effects, but these effects are harmful to the litigating movement.<sup>51</sup> In their view, litigation is not merely unproductive; it can be counterproductive.

43. See, e.g., Torres, *supra* note 10, at 136 (“[E]xcessive belief in the efficacy of litigation leads to a misallocation of resources by social change activists.”).

44. See ROSENBERG, *supra* note 1, at 147–48.

45. See *id.* at 131–42.

46. See *id.* at 16, 21, 417.

47. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473 (2005) (arguing that court rulings cause backlash because “they alter the order in which social change would otherwise have occurred”); see also Eskridge, *supra* note 21, at 519 (“The most serious criticism of the Court would be that it has meddled so much in the political process as to have ‘corrupted’ it.”).

48. See Klarman, *Racial Change*, *supra* note 1, at 10–11; see also MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 153, 161 (2007).

49. See ROSENBERG, *supra* note 1, at 81; see also Eskridge, *supra* note 21, at 471 (“Between 1955–1961, southern states adopted almost 200 statutes defying or seeking to evade *Brown*’s mandate.”).

50. See ROSENBERG, *supra* note 1, at 91.

51. Applying their analysis in the marriage-equality context, both Rosenberg and Klarman argue that litigation in support of same-sex couples’ right to marry has produced significant backlash that has undercut the movement for marriage equality. See *id.* at 361; Klarman, *supra* note 47, at 482; Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign To Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643 (2009). Thomas Keck rebuts this claim, arguing that judicial decisions supporting marriage equality have produced important expansions of rights for lesbians and gay men in a variety of substantive domains, despite some backlash. See

## B. THE POSITIVE INDIRECT EFFECTS OF LITIGATION

Many sociolegal scholars, particularly in the legal mobilization and cause lawyering fields, offer a compelling counternarrative to the pessimistic account of court-centered change. Although they identify tangible benefits that courts often bestow on subordinated groups,<sup>52</sup> to a certain extent these scholars agree with the claim that courts themselves often fail to directly produce significant social reform.<sup>53</sup> That is, scholars who redeem the power of litigation recognize the limitations of courts and acknowledge the constraints courts face in attempting to directly bring about social change but focus on the positive indirect benefits that movements gain from court-centered strategies.

These sociolegal scholars begin from the premise that courts are constrained in their ability to directly bring about reform. *Brown* and the civil-rights movement again represent an important starting point. In his seminal work on law and social movements, Joel Handler cites implementation and enforcement issues in acknowledging school desegregation as the “classic example” of litigation’s failed promise.<sup>54</sup> Similarly, in his foundational text on the political potential of rights claims, Stuart Scheingold examines school desegregation as an illustration of the substantial limitations of court-centered change.<sup>55</sup> Generalizing these

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Keck, *supra* note 7, at 152; see also Cummings & NeJaime, *supra* note 9, at 1325–26; Dara E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg*, 17 BUFF. J. GENDER L. & SOC. POL’Y 1 (2009). Klarman recently modified his conclusions regarding the drive for marriage equality, explaining: “I still believe Goodridge caused a short-term backlash. But I now think that it very likely contributed, in the mid-term, to a dramatic acceleration in the move to gay marriage.” Michael Klarman, *Marriage Equality: Are Lawsuits the Best Way?*, HARV. L. BULL., Summer 2009, at 9. While he observes “a ferocious backlash” in response to *Goodridge*, Klarman ultimately concludes that “[i]n the long term, . . . the effect of landmark court decisions on issues of social reform is more complicated.” Michael Klarman, *The Court of Public Opinion: Growing Numbers of Americans Support Same-Sex Marriage. Will That Sway the Supreme Court?*, L.A. TIMES, Aug. 15, 2010, at A31. Klarman’s more recent position on marriage-equality litigation seems, in some ways, consistent with his assessment of *Brown*, which is more nuanced than Rosenberg’s. See *supra* note 39 and accompanying text.

52. For instance, legal mobilization scholars analyzing LGBT rights argue that litigation has, in fact, directly produced important changes and yielded significant (often self-enforcing) rights. See Keck, *supra* note 7, at 157; see also DANIEL R. PINELLO, AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE 193 (2006) (“These findings diminish the perception that courts are hollow hopes for significant social reform. With nearly all other state and national policy makers at odds with its goal, the Massachusetts Supreme Judicial Court nonetheless achieved singular success in expanding the ambit of who receives the benefits of getting married in America, in inspiring political elites elsewhere in the country to follow suit, and in mobilizing grass-roots supporters to entrench their legal victory politically.”).

53. In this sense, Rosenberg in some ways sets up a false dichotomy by oversimplifying the position of sociolegal scholars who view litigation as a powerful change agent based largely on its indirect effects. As McCann notes, “Rosenberg’s skeptical position very much flows with, rather than against, prevailing scholarly currents.” McCann, *supra* note 17, at 730.

54. HANDLER, *supra* note 1, at 19.

55. SCHEINGOLD, *supra* note 12, at 95.

insights to other social-reform settings, both Handler and Scheingold demonstrate that courts generally lack the capacity to oversee policy implementation and to remedy enforcement problems.<sup>56</sup>

Nonetheless, many sociolegal scholars, including Handler and Scheingold, depart from this pessimistic account and redeem court-centered strategies by documenting the productive indirect effects of litigation victories on social-reform projects. For instance, while *Brown* may not have produced the desired remedial action, scholars who stress the indirect benefits of litigation credit *Brown* with fueling a powerful social movement by raising consciousness, driving fundraising, legitimizing a cause, and influencing other state actors.<sup>57</sup> This competing account of *Brown* turns away from the “myth of rights,” in which lawyers naïvely rely on courts to bring about social reform, and instead turns toward what Scheingold terms the “politics of rights,” in which lawyers seize on the political nature of rights.<sup>58</sup> This approach decouples success from the implementation and enforcement of judicial orders and focuses on the discursive and political power of courts’ pronouncements.<sup>59</sup>

Following the cues of Handler and Scheingold, more recent scholarly accounts have identified a variety of important benefits that litigation—from the mere act of litigating to a favorable judicial decision—produces. I characterize these benefits as *internal* (those relating to the movement itself) and *external* (those relating to the movement’s interactions with outside

56. See HANDLER, *supra* note 1, at 24; SCHEINGOLD, *supra* note 12, at 95.

57. See Eskridge, *supra* note 21, at 446 (“*Brown* emboldened people of color to work together by increasing the likelihood that federal judges would support their campaign.”); Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 550 (2009) (“*Brown* shows judicial actors can inspire or provoke ‘mass conversation.’”); McCann, *supra* note 2, at 86 (“Court decisions . . . did not unilaterally cause, by moral inspiration, defiant black grassroots action or, by coercion, federal support for the civil rights agenda. But legal tactics pioneered by the NAACP figured prominently in elevating civil ‘rights’ claims and intensifying the initial terms of racial struggle in the South.”); Michael Murakami, *Desegregation*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 37, at 18, 38 (“[T]he power of a case like *Brown* resides in its ability to mobilize the political class, to inspire public outcry, and to trigger dramatic events.”); Schuck, *supra* note 17, at 1775 (“For the optimist, *Brown*’s real contribution was to put civil rights on the liberal political agenda, force white politicians to respond, raise public consciousness of racial injustice, and inspire civil rights organizations and the black community to take to the streets and the voting booths, thereby producing the long-deferred political gains of the 1960’s and 1970’s.”).

58. See SCHEINGOLD, *supra* note 12.

59. *Id.* at 95. This claim relies on the work of Murray Edelman, who articulated the symbolic power of law and politics. See generally MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964) (exploring how elites use politics symbolically to pacify the mass public and legitimate existing power relations despite vast inequalities). Scheingold applied Edelman’s arguments to the legal domain. See SCHEINGOLD, *supra* note 12, at 205–09 (relying on Edelman’s work); see also Patricia Ewick & Austin Sarat, Essay, *Hidden in Plain View: Murray Edelman in the Law and Society Tradition*, 29 LAW & SOC. INQUIRY 439, 444 (2004) (“Scheingold observed that law—particularly through the discourse of rights and legal procedures—furnishes politics with its most potent symbols of legitimacy.”).

actors). First, litigation internally affects movement formation by raising consciousness, mobilizing constituents, and documenting an alternative understanding of rights.<sup>60</sup> Leading legal mobilization scholar Michael McCann explains how when movement goals are framed around legal norms, the movement is able to articulate demands, provide a compelling narrative, and thereby forge a group-based identity.<sup>61</sup> Ultimately, when courts legitimate a group's claims, they speak to movement members in an affirming way.<sup>62</sup>

Next, litigation shapes the way the movement interacts externally with state actors, private elites, and ordinary citizens. Litigation may result in increased bargaining power for the subordinated group.<sup>63</sup> Such bargaining power may spring from legal rights announced by courts—litigation victory<sup>64</sup>—or from the more ancillary costs, pressures, and publicity associated with litigation—litigation process.<sup>65</sup> Furthermore, litigation, again through both positive rights pronouncements and increased publicity, may shape the opinions of elites and the public.<sup>66</sup>

60. See SCHEINGOLD, *supra* note 12, at 148; see also Keck, *supra* note 7, at 158 (explaining how the same-sex marriage victory in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), led to more participation and action by constituents and heightened the expectations of those constituents); Stuart A. Scheingold, *The Politics of Rights Revisited*, in GOVERNING THROUGH COURTS, *supra* note 13, at 193, 204 (“[I]n the short run lawyers and litigation can serve as agents of political mobilization.”).

61. McCann, *supra* note 2, at 84. William Eskridge's influential work on identity-based social movements provides a complementary analysis in legal scholarship on the relationship between law and social movement activism. See Eskridge, *supra* note 21, at 422 (“[L]egal forums and actors provided the backdrop for many of the dramatic events that helped turn a nascent reform movement into a mass social movement. Once that occurred, changes in the law were inexorable. In short, law helped define the contours of the minority group itself, gave the group both incentives and forums in which to resist their stigmas, and provided dramatic events and campaigns that helped turn a reform movement into a mass social movement.”).

62. See HANDLER, *supra* note 1, at 218.

63. See MCCANN, *supra* note 5, at 144 (noting the use of litigation to pressure an adversary and encourage bargaining).

64. See SCHEINGOLD, *supra* note 12, at 147 (“Declarations of rights by courts tend to alter political perceptions.”).

65. See MCCANN, *supra* note 5, at 58 (“[M]any social scientists [have observed] that law-reform activity is highly newsworthy and that litigation is one of the most effective ways to win publicity for a cause.”); *id.* at 145 (“[L]itigation can impose substantial transaction costs in terms of both direct expenditures and long term financial burdens.”); *id.* at 206 (explaining that litigation may weaken the resolve of an adversary).

66. See Michael W. McCann, *Social Movements and the Mobilization of Law*, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS: PEOPLE, PASSIONS, AND POWER 201, 209 (Anne N. Costain & Andrew S. McFarland eds., 1998) (“[L]egal tactics often have proved useful in forcing attention to movement demands and compelling at least some general policy concessions from state officials or other powerful actors.”); see also PAUL R. BREWER, VALUE WAR: PUBLIC OPINION AND THE POLITICS OF GAY RIGHTS 35 (2008) (“[*Brown*], which marked the culmination of a long-running legal effort by the [NAACP], pushed the debate about civil rights for African Americans to new heights of prominence on the national agenda (just as later court decisions would do for gay rights).”); Patrick J. Egan, Nathaniel Persily, & Kevin Wallsten, *Gay*

Overall, this competing account of social-change litigation offers a more optimistic picture that directly takes issue with Rosenberg's empirical claim that court-centered strategies generally fail to produce positive indirect effects. The two camps observe the same social-change campaigns and yet come away with very different assessments of what has been gained and lost through litigation. I next turn to an exploration of the basis for these starkly contrasting accounts.

### III. BUILDING A THEORETICAL FRAMEWORK FOR AN ANALYSIS OF LITIGATION LOSS

The dispute over the effects of social-change litigation is more than just an empirical one. Instead, the competing accounts reflect significant theoretical and methodological divisions. As I explain in this Part, Rosenberg isolates courts in order to observe and measure their empirically verifiable impact, and he situates courts as independent actors in competition, not conversation, with other law-making institutions. All the while, he alternately ignores and condemns social movement lawyers. Legal mobilization and cause lawyering scholars, on the other hand, take a more contextual and dynamic view of court-centered strategies. Their qualitative analyses account for the multiple radiating effects of litigation, and they pay attention to the way in which lawyers themselves cultivate such effects.<sup>67</sup>

There is, however, a way to develop the valuable insights of the constrained-courts view within the more optimistic account of litigation offered by legal mobilization and cause lawyering scholars. More specifically, we can identify ways in which the failure of courts and litigation may, within a dynamic system of law and social change, actually produce positive effects for a social movement. Instead of focusing on the potential and possibilities of litigation, as legal mobilization and cause lawyering scholars generally do,

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*Rights*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 37, at 234, 256 (“[Gay-rights litigation] produced tangible benefits for the plaintiffs involved and for those who otherwise might be subject to a subordinate legal status[,] . . . led to a favorable change in public opinion on civil unions, . . . and perhaps accelerated legal change in some states in a direction amenable to some legal recognition of gay relationships.”); Murakami, *supra* note 57, at 33 (“[T]he *Brown* decision did thrust the issue of segregation in the public schools to the fore of the national agenda. The number of articles on segregation published in the major national newspapers . . . increased dramatically in the wake of *Brown*.”); Persily, *supra* note 37, at 9 (“[C]ourt decisions . . . can elevate issues onto the national agenda through media coverage, elite discussion, and other behavior that follows in their wake. The nature of court decisions’ effects on public opinion is usually a product of the way elites react to the decision and the messages they send to the mass public concerning the issue adjudicated.”); Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187, 193 (1998) (detailing Haitian-refugee litigation that, regardless of its chance of winning, was meant to keep a spotlight on the issue).

67. Marc Galanter introduced the term “radiating” to describe this phenomenon. See Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117 (Keith O. Boyum & Lynn Mather eds., 1983).



I focus here on the limits of litigation, many of which Rosenberg identifies. In doing so, I fill a significant gap in sociolegal literature on the impact of court-centered strategies—attention to litigation loss and its aftermath. In particular, I contend that the legal mobilization and cause lawyering literature, which furnishes insights consistent with a rigorous analysis of litigation loss, prematurely falls in line with the conventional account of judicial defeat as demobilizing and unproductive.

My aim in this Part, then, is to show how even though legal mobilization and cause lawyering scholarship fails to theorize litigation loss, it supplies the foundations for such a theory. In what follows, I rely on a dynamic, multidimensional framework of law and social change—one in which litigation, from filing to resolution, shapes and is shaped by activity in other institutional domains. I claim that appreciating courts' potential and recognizing courts' limitations are both critical to understanding the ways in which litigation influences movement activity and policy formation across the full range of law-making avenues.

#### A. TURNING COURTS' CONSTRAINTS ON THEIR HEAD

Rosenberg's pessimistic account of courts would seem to have much to say to an attempt to theorize litigation loss: Judicial defeats—instances in which courts reject a social movement's claim—may highlight some of courts' key constraints. Moreover, analysis of social movement activity in the wake of litigation loss might offer a comparative account to supplement Rosenberg's empirical analysis and bolster his (somewhat veiled) normative commitments. Although framed most often as an empirical and descriptive account, the constrained-courts view derives from a normative position that prefers social change that emanates from nonjudicial institutions.<sup>68</sup> When courts fail to grant the asked-for reform, advocates may turn to other lawmaking channels, such as legislative and administrative arenas, and Rosenberg's approach would value this tactical and institutional shift.<sup>69</sup>

Yet, because Rosenberg contests the optimistic account of court-centered change offered by other sociolegal scholars, he focuses on the empty promise and negative effects of court victories and pays little attention to court defeats.<sup>70</sup> Setting out to show how wins in court (and specifically in

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68. See Jason Pierceson, *Deconstructing the Backlash: Same-Sex Marriage Litigation and Social Change in the United States and Canada*, in *SAME-SEX MARRIAGE IN THE AMERICAS: POLICY INNOVATION FOR SAME-SEX RELATIONSHIPS* 161, 174 (Jason Pierceson et al. eds., 2010) ("The approach of Rosenberg, [historian John] D'Emilio, and others is grounded in a normative commitment to grassroots, mass politics that is an engrained part of social sciences approaches to this topic.").

69. See ROSENBERG, *supra* note 1, at 427.

70. It should be noted that Rosenberg's and Klarman's attention to backlash could be conceptualized as attention to loss. Neither, however, deals specifically with scenarios in which the forces reacting against the court decisions were actually parties to the litigation. Instead, Rosenberg situates backlash as "powerful political resistance" by the public and elites, rather

the U.S. Supreme Court<sup>71</sup>) generally fail to deliver social change on the ground, Rosenberg takes as his starting point the favorable judicial decree. As he puts it, "Winning court cases is, of course, the first step toward courts producing significant social reform."<sup>72</sup> Ultimately, Rosenberg aims to show that "legal victories do not automatically or even necessarily produce the desired change."<sup>73</sup> When he observes little or no change emanating directly from a particular court order, he concludes that courts (and litigation) are generally ineffective.<sup>74</sup> On the rare occasions when he does observe change emanating from courts—when courts overcome the constraints he identifies—such change results from the litigation success he has analyzed.<sup>75</sup>

In assessing whether court decisions produce social change, Rosenberg seeks to establish a direct causal link between court decrees and changes on the ground. In this framework, court decisions are independent forces that produce unmediated impacts that can be observed and measured.<sup>76</sup> As Robert Post explains, Rosenberg's approach "asks whether one quantifiable variable (e.g., court decisions) 'causes' changes in a distinct quantifiable variable (e.g., public opinion)."<sup>77</sup> This approach forsakes the subtle

than as a social movement response in its own right. *See id.* at 417. Indeed, this point functions within his view of constrained courts (and their inability to implement ordered change) rather than in a model of lawyers translating judicial outcomes into social movement tools. Likewise, Klarman focuses on the counterproductive effects of litigation victory rather than on loss. *See* Klarman, *supra* note 47.

71. *See* ROSENBERG, *supra* note 1, at 7 (noting that his analysis "concentrate[s] on the U.S. Supreme Court").

72. *Id.* at 31. For example, in assessing the impact of litigation on the environmental movement, Rosenberg first looks at activists' win-loss rate, then explores whether issued decrees were effectively implemented. *See id.* at 275.

73. *Id.* at 421.

74. David Schultz and Stephen Gottlieb contend that because Rosenberg does not explore whether results would differ if courts did not attempt to produce reform, his pessimistic assessment of courts' effectiveness relative to other government actors and his conclusion that courts do not influence social change are unconvincing. *See* David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL. 63, 66 (1996).

75. *See, e.g.,* ROSENBERG, *supra* note 1, at 277–78.

76. *See* Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 815 (2006) [hereinafter Rosenberg, *Courting Disaster*] ("[C]ourts acting alone . . . are structurally constrained from furthering the goals of the relatively disadvantaged."); Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435, 448 (1996) [hereinafter Rosenberg, *Positivism*] (explaining that, unlike an interpretive methodology, a "positivist methodology . . . separate[s] the effects of law from the effects of other variables"). This approach has been extensively criticized. *See, e.g.,* Schuck, *supra* note 17, at 1771–72 (arguing that Rosenberg overlooks important "dynamic effects," including "the repetitive, dialogic nature of the interactions between courts, legislatures, agencies, and other social processes, as well as the political synergy that some litigation engenders"); Schultz & Gottlieb, *supra* note 74, at 66 (arguing that Rosenberg ignores "the power of courts to redefine structures and expectations").

77. *See* Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 584 (2009).

constitutive effects of law and neglects the way in which courts and litigation interact with other lawmaking avenues and social movement tactics.<sup>78</sup> In other words, in hewing to a view of law as independent, Rosenberg forsakes any consideration of law as interdependent.<sup>79</sup>

Furthermore, while Rosenberg's account seems to place blame for social movement setbacks squarely on professional cause lawyers who naïvely turn to courts, he barely mentions social movement advocates' strategic considerations and constraints.<sup>80</sup> This underdeveloped approach toward cause lawyering fails to capture the multiple ways in which social movement advocates understand and seize on the radiating effects of litigation, and neglects the diversity of strategies that characterizes contemporary public-interest law practice.<sup>81</sup>

Shifting the scholarly focus to more accurately reflect social movement advocates' on-the-ground reality demands that we assess the positive and negative effects of litigation by understanding how court-based tactics function across the range of strategies deployed by advocates. Litigation loss shapes advocates' strategies. Advocates do not simply turn away from courts and erase what happened there; instead, they cultivate the loss to advance the complex process of reform. Understanding litigation in this way is not to suggest, as Rosenberg does, that litigation is an inherently harmful or useless social-change tactic and that legislative advocacy and direct action are inherently productive and normatively desirable.<sup>82</sup> In fact, a shift from litigation to nonlitigation is both overly simplistic and empirically false.<sup>83</sup> Even in the wake of litigation loss, court-centered strategies remain an important component of advocates' tactical repertoire. Rather than abandon litigation altogether, social movement lawyers reconfigure their strategies—including their litigation strategies—in response to litigation loss.

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78. As Lani Guinier argues, "Within Professor Rosenberg's critique . . . lurks a deep disciplinary tension about the nature of causation and the primacy of uniform metrics of measurement, as well as the meaning of political participation and influence. What I value about political engagement cannot simply be reduced to what can be measured." Guinier, *supra* note 57, at 553.

79. See Post, *supra* note 77, at 585 (arguing that "Rosenberg's obsession with social science methodology leads him to misinterpret the nature of . . . arguments" that see courts as part of a political dialogue).

80. See ROSENBERG, *supra* note 1, at 147–48; see also Cummings & NeJaime, *supra* note 9, at 1238–39.

81. See Scott L. Cummings, *Access and Accountability in Public Interest Practice: Old Paradigms and New Directions*, in *LAWYERS IN PRACTICE, ETHICAL DECISION MAKING IN CONTEXT* (Leslie Levin & Lynn Mather eds., forthcoming 2011).

82. See Cummings & NeJaime, *supra* note 9, at 1318.

83. See Pierceson, *supra* note 68, at 174 ("Unfortunately, [Rosenberg's] normative bias prevents a wide-eyed look at empirical reality, particularly at the complex relationship between law, politics, and social change.").

The key point here is that Rosenberg's account can be turned on its head: His rejection of court-centered reform and his commitment to what he terms more "political" avenues may, counterintuitively, help us to understand how advocates use the limits of court-based strategies to advance their social movement agenda. Both the inherent constraints of courts and the limitations of court-based strategies may actually become part of an optimistic account of litigation for social change. Uncovering this, though, requires recognizing the important pieces of Rosenberg's descriptive account, but abandoning his theoretical perspective and methodological approach.

*B. CONTEXTUALIZING LITIGATION LOSS IN THE LEGAL MOBILIZATION FRAMEWORK*

Legal mobilization scholars criticize Rosenberg's model to the extent that it interprets litigation's effects as flowing exclusively downward from a judicial decree.<sup>84</sup> These critics instead contextualize litigation within broader social struggles.<sup>85</sup> Through this lens, litigation influences (and is influenced by) what occurs in other domains, and advocates themselves understand the dynamic relationship between litigation and other social-change strategies. Law, in this account, is constitutive: Legal norms shape how individuals understand social relations.<sup>86</sup> Courts relate to and influence frames, expectations, and policy decisions in other domains.<sup>87</sup> As McCann puts it, this approach recognizes "the many reciprocal, interdependent, and

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84. See McCann, *supra* note 17, at 731.

85. See *id.*; McCann, *supra* note 2, at 89 (arguing that because "[l]egal consciousness does not develop . . . in a vacuum," scholars should "study law as it becomes meaningful in social practice rather than simply its mechanical behavioral effects as an alien force interjected into struggle from without"). Rosenberg faults McCann for focusing on context, arguing that prioritizing "the contextual over the consistent" sacrifices "the ability to generalize." Rosenberg, *Positivism*, *supra* note 76, at 446.

86. See McCann, *Causal Versus Constitutive Explanations*, *supra* note 8, at 463 ("[S]ocial conventions and knowledges (such as legal norms) are understood as 'constitutive' . . . of citizen meaning making activity." (footnote omitted)); McCann, *Law and Social Movements*, *supra* note 8, at 507 ("[A]n understanding of law as knowledge and linguistic practice calls attention to law's power as a *constitutive* convention of social life." (citing JOHN BRIGHAM, *THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS* (1996))); see also Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745, 752 (1992) ("[T]he very fact that so many people believe the courts are so important in effecting social change . . . lends considerable plausibility to Scheingold's argument about the symbolic importance of the language of rights."); Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 719 (1997) (reviewing ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995); and URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (1995)) (arguing that "the relationship between law and culture [is] a dynamic, mutually constitutive one").

87. See McCann, *supra* note 2, at 89; see also Galanter, *supra* note 67, at 127 ("Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls.").

often cumulative impacts of different state institutional actors on processes of social change.”<sup>88</sup>

The legal mobilization approach, then, resists the impulse to single out courts (and their empirically verifiable impacts). Rather than treat the judicial ruling as the primary object of analysis, legal mobilization scholars’ interpretive approach sees law as constituting social meaning in complex and dynamic ways.<sup>89</sup> In this framework, it is impossible to quantify the impact of judicial decisions.<sup>90</sup> Attention shifts away from implementation and enforcement and toward the deployment of judicially articulated norms in broader contexts.<sup>91</sup>

Courts are one of many relevant institutional settings for the process of social change.<sup>92</sup> Accordingly, while a judicial decision favorable to a social movement may provoke responsive action by an opposing movement, a favorable decision in any venue would prompt such action.<sup>93</sup> In this sense, the counterproductive backlash to judicial decisions that Rosenberg and Klarman identify is simply part of a larger brand of political backlash that regularly occurs in movement-countermovement struggles.<sup>94</sup> Indeed, this push-and-pull is common within our decentralized, federal system of government, in which authority is divided both horizontally and vertically across different governmental branches.<sup>95</sup> In response to movement

88. MCCANN, *supra* note 5, at 291; *see also* SCHEINGOLD, *supra* note 12, at 145 (“[L]aw can hardly transcend the conflicts of the political system in which it is embedded.”).

89. *See* Galanter, *supra* note 67, at 123–24 (“[T]he effects of a court . . . cannot be equated with the dispositions in the cases that come before it. There are a host of other effects that flow from the activity of a court . . .”). In significant ways, the legal mobilization framework shares common ground with the legal consciousness approach, which understands “law as forms of knowledge that saturate intersubjective social life in various ways and degrees” such that legal knowledge becomes a “cultural repertoire or ‘toolkit’ through which citizen subjects understand and negotiate their social activity.” Michael McCann, *On Legal Rights Consciousness: A Challenging Analytical Tradition*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* ix, xii (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006).

90. *See* Eskridge, *supra* note 21, at 517 (“Because there are so many interlinked variables, it is hard to tell exactly what effects any Supreme Court decision has had on the operation of American politics; because of the counterfactual nature of the inquiry, it is impossible to figure out what would have happened if the Court had taken a different path.”).

91. *See* Galanter, *supra* note 67, at 126 (“A single judicial action may radiate different messages to different audiences.”); *id.* at 123 (“The relation of courts (official forums) to disputes is multidimensional.”).

92. *See* Cummings & NeJaime, *supra* note 9, at 1319.

93. *See* David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1636 (1996) (“Issues rarely become ‘closed’ with a single outcome such as new legislation, the recommendation of a government agency, or a court ruling.”).

94. *See* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1158 (2009) (“[B]acklash against courts is best understood within the larger category of political backlash rather than as being *sui generis*.”).

95. *See* Meyer & Staggenborg, *supra* note 93, at 1637. This model is consistent with the work of state constitutional scholars, who situate state courts as part of a conversation about

setbacks or opposing-movement advances in one venue, advocates may look to more favorable venues and to different levels of government.<sup>96</sup>

Yet even with this more nuanced and multifaceted account of courts and court-centered strategies, legal mobilization and cause lawyering scholars generally ignore courts' constraints—or at least the potentially constructive function of such constraints—when building their more optimistic account of social-change litigation. Instead, their analysis of court-centered strategies focuses on the possibilities of litigation—the way in which litigation holds the promise of court-based change.<sup>97</sup> This promise in turn shapes the way disputes play out in other, nonjudicial settings. Paying scant attention to instances in which courts actually reject the social movement's claim, these sociolegal scholars respond to the pessimistic account of social-change litigation by observing the positive indirect effects of court victories and the litigation process. They remain focused on the possibilities of courts and litigation, rather than on their limitations.

First, judicial affirmation is central to the argument that litigation can legitimate a movement's claims and empower its constituents. Legal mobilization and cause lawyering scholars generally tie the productive political effects of litigation to favorable legal pronouncements.<sup>98</sup> As Handler explains, "When appellate courts, legislatures, or administrative agencies, but especially the Supreme Court, agree that the demands of a social-reform group are within one of [the] basic, fundamental constitutional principles, then the goals and values of the group have

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general constitutional principles, rather than as isolated bodies with individualized constitutional cultures. See, e.g., Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993) ("The diversity of state courts is best understood as a diversity of interpretive bodies, not as a multiplicity of representatives of distinct sovereigns. The common object of state interpretive efforts is American constitutionalism.").

96. See Meyer & Staggenborg, *supra* note 93, at 1645. This observation is consistent with Robert Schapiro's theory of interactive federalism, in which "state and national power [operates] not in isolation, but in interconnection." Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248 (2005); see also ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 8 (2009) ("[R]ights are often best protected not through confining state and federal power in different areas, but by promoting the dynamic interaction of state and federal governments.").

97. See McCann, *supra* note 2, at 91 (explaining how activists can achieve concessions from adversaries based on "(legally sensible) rights claims"); see also MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, & THE POLITICS OF RIGHTS 21 (2002) ("Legal tactics are used to achieve placement on the public agenda by forcing attention to demands and compelling at least some policy concessions from state officials."); HANDLER, *supra* note 1, at 216 (explaining that "lawsuits, especially if they are large ones seeking huge changes, with dramatic allegations in the complaint, serve" important publicity and fundraising purposes).

98. See, e.g., MCCANN, *supra* note 5, at 89 ("[J]udicial victories transformed the tactical landscape in ways favorable to demands for specific new rights claims by potential constituents already concerned about gender justice at work."); Abel, *supra* note 7, at 95 ("[E]ven paper victories have value because of the substantial political cost to the state of disregarding or nullifying them.").

received the important symbols of legitimacy.”<sup>99</sup> Furthermore, when Handler argues that “[t]he judicial decision not only recognizes the demands but converts them into legal entitlements,” he clearly envisions a positive judicial decision.<sup>100</sup> Such positive judicial decisions provide the authoritative validation that allows a movement to alter the status quo.<sup>101</sup>

Conversely, at the same time that they focus on litigation victory, legal mobilization and cause lawyering scholars often assume that a litigation loss has a demobilizing effect. That is, they concede the negative effects of failed litigation. This concession is generally implicit in work that focuses on whether litigation itself can produce positive social change.<sup>102</sup> Other times, the concession is explicit, as scholars contrast the subject of their analysis—positive judicial decisions—with demobilizing events—negative judicial decisions. For instance, McCann notes that “eventual defeat in court can sap movement morale, undercut movement bargaining power, and exhaust movement resources.”<sup>103</sup> In this sense, litigation loss, rather than litigation victory, is the point at which sociolegal scholars find common ground with those more generally convinced of litigation’s harmful effects. As McCann puts it, “While judicial support hardly assures movement advances, hostility from the courts surely can, and often does, contain reformers on many fronts.”<sup>104</sup>

Next, when legal mobilization and cause lawyering scholars move away from litigation results and focus on the impact of litigation process, they generally address the positive possibilities of litigation.<sup>105</sup> For example, McCann notes that litigation frequently produces settlements because the mere prospect of judicial intervention provides bargaining power to the

99. HANDLER, *supra* note 1, at 217–18.

100. *Id.* at 219.

101. *Id.*; see also McCann, *supra* note 2, at 85 (“Judicial victories (or other legal actions) do not reveal injustice so much as improve the chances that such injustices might be effectively challenged by movement action in and out of courts.” (citation omitted)).

102. McCann, for example, argues that “political struggles may advance more quickly, cheaply, and effectively when conducted in the shadow of favorable legal norms and threats of judicial intervention.” McCann, *supra* note 2, at 91; see also DUPUIS, *supra* note 97, at 164 (cataloguing the series of wins and losses in marriage-equality cases, then focusing on the productive impact of those decisions that recognized relationship rights for same-sex couples); HANDLER, *supra* note 1, at 25 (analyzing the effects of the type of judicial remedy on the probabilities of success of social-reform groups); Keck, *supra* note 7, at 157 (responding to the pessimistic account of litigation by exploring the positive direct and indirect effects of court decisions recognizing same-sex relationships).

103. McCann, *supra* note 2, at 91; see also MCCANN, *supra* note 5, at 168; McCann, *supra* note 17, at 739 n.50. Of course, I am not arguing that loss in court is necessarily mobilizing. Instead, I am showing that in some cases litigation loss can have surprisingly productive effects on a social movement.

104. McCann, *supra* note 2, at 94.

105. See, e.g., DUPUIS, *supra* note 97, at 21 (“Victory in court is not even necessary for political leveraging because the indirect effects of litigation, usually resulting from a rights discourse, can exert significant pressure on the targeted party.”).

plaintiff.<sup>106</sup> In other words, “[L]egal leveraging is most successful when it works as an unfulfilled threat . . . .”<sup>107</sup> The benefits derived from the process are rooted in the possibilities and uncertainty of litigation and must be weighed against the “risks of total defeat.”<sup>108</sup> These benefits, then, remain tethered to the possibilities and potential of litigation, and not its failed promise.

Even when these scholars approach losing litigation more directly, they generally focus not on losing per se but rather on the act of litigation (regardless of outcome) in a way that supplements an account of the indirect effects of the litigation process.<sup>109</sup> Susan Olson concludes that “[i]f litigation and out-of-court pressure and negotiating occur simultaneously, it is even possible for the plaintiffs to win a satisfactory settlement and still actually lose the lawsuit.”<sup>110</sup> Approaching losing litigation in a more wholesale fashion in their analysis of 1970s marriage-equality litigation in Washington state, Scott Barclay and Shauna Fisher contend that early failed litigation “was a necessary predecessor” of later, successful court decisions.<sup>111</sup> Their argument, however, rests on the notion that filing and litigating the claim—not rejection of the claim—transformed the idea of same-sex marriage “from the ridiculous to the possible.”<sup>112</sup> Accordingly,

106. See MCCANN, *supra* note 5, at 168, 178.

107. McCann, *Law and Social Movements*, *supra* note 8, at 514.

108. See McCann, *supra* note 17, at 734 (pointing to the “ambiguous and indeterminate” nature of judicially constructed law to show that social movement lawyers enjoy room to construct “competing assessments, predictions, and hence tactical threats”). *But see* MCCANN, *supra* note 5, at 85 (noting that judicial defeats might have helped the pay-equity movement “by dramatizing social injustices”).

109. See Lobel, *Courts As Forums*, *supra* note 13, at 480 (“[L]itigation can serve a variety of roles: to articulate a constitutional theory supporting the aspirations of the political movement, to expose the conflict between the aspirations of law and its grim reality, to draw public attention to the issue and mobilize an oppressed community, or to put public pressure on a recalcitrant government or private institution to take a popular movement’s grievances seriously.”).

110. See Olson, *supra* note 13, at 232. Like McCann, Olson provides a detailed case study to argue that the indirect effects of litigation derive from litigation itself rather than from positive judicial declarations. Focusing on the disability-rights movement, Olson documents how litigation, regardless of its outcome, helped to frame the movement’s claims, bring it much-needed publicity, and increased its bargaining power. *See id.* at 227. Transportation litigation by disability-rights advocates achieved the movement’s goals without actual court victories, due in part to the political pressure brought about by the litigation. *See id.* at 244.

111. See Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 84, 89 (Austin Sarat & Stuart A. Scheingold eds., 2006). For Barclay and Fisher’s specific example of early failed litigation, see *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974).

112. Barclay & Fisher, *supra* note 111, at 91. The recent cases succeeded in the lower courts before being rejected by a divided state supreme court. *See Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *rev’d*, 138 P.3d 963 (Wash. 2006); *Andersen v. King County*, No. 04-2-04964-4, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev’d*, 138 P.3d 963.



when they point out that litigation ultimately resulting in judicial defeat can nonetheless have positive effects on mobilization and organization, they attach meaning to the mere act of litigation, before any definitive determination by the court.

None of this work directly moves toward a theory of losing *qua* losing since it disregards effects that loss itself may produce.<sup>113</sup> The possibilities of litigation, rather than its limitations, remain central; litigation loss is, at best, beside the point. The indirect benefits of litigation may outlive a case, despite (not because of) an unfavorable judicial pronouncement. This model, then, says nothing about the potentially productive effects of the judicial defeat itself.

By failing to address litigation loss on its own terms, legal mobilization and cause lawyering scholarship furnishes a premature concession to those convinced of litigation's ineffectiveness. Crucially, this concession produces an incomplete picture of law and social change, missing the way in which litigation loss, in addition to litigation victory and process, contributes productively to the process of reform.

Nonetheless, this scholarship provides the theoretical foundation for an analysis of litigation loss. By making litigation victory less central to an account of litigation's power and by focusing on law's constitutive effects, the legal mobilization model opens space to theorize judicial defeat.<sup>114</sup> Moreover, legal mobilization and cause lawyering scholars situate litigation and courts as pieces of a broader process of social change in a way that suggests the need for attention to the radiating effects of both successful and failed litigation.

This framework is, in significant ways, consistent with influential accounts of constitutional culture. Reva Siegel and Robert Post's theory of democratic constitutionalism and Lani Guinier and Gerald Torres's theory of demosprudence conceptualize law and social change as a complex, interactive process in which social movements influence, and are influenced by, constitutional interpretations.<sup>115</sup> Both theories carve out roles for

113. Focusing on private litigants (rather than public lawyers), Barclay also documents the indirect dignitary benefits of litigation in the absence of victory. See Scott Barclay, *Appealing (but Not Necessarily Winning) To Improve Your Social Status*, 21 LAW & POL'Y 427 (1999).

114. See McCann, *supra* note 17, at 731 ("[L]egal action begins with the framing of legal demands . . . rather than with official court decisions.").

115. See Guinier, *supra* note 10, at 57–58 (arguing that while demosprudence shares with democratic constitutionalism the premise that the Supreme Court and the citizenry engage in an "ongoing conversation" about constitutional meaning, it envisions "a much more active and self-conscious role for judges (and other legal professionals) in creating space for citizens (not just judges) to advance alternative interpretations of the law"); Post & Siegel, *supra* note 10 (arguing that citizens and elites share the power to give meaning to constitutional principles); see also Torres, *supra* note 10, at 136 ("The study of demosprudence is the study of the lawmaking and democracy enhancing effects of social movements as they influence and are disciplined by democratic practice."); Gerald Torres, *Social Movements and the Ethical Construction*

ordinary citizens and courts in constitutional meaning-making. As citizens, often through social movements, offer competing interpretations of constitutional principles, courts respond as part of the dialogue.<sup>116</sup>

Democratic constitutionalism and demosprudence share important theoretical assumptions with the legal mobilization framework. These models understand law and social reform as a dynamic, multilayered process in which courts and other social change actors have a “dialogic relationship.”<sup>117</sup> Rather than isolate courts and analyze the operation of judicial orders as straightforward and unidirectional, they conceptualize “lawmaking [as] a collaborative enterprise between formal elites—whether judges, legislators or lawyers—and ordinary people.”<sup>118</sup> In fact, Guinier relies on McCann’s legal mobilization work to situate “social change along a multifaceted trajectory that consists of competing yet interdependent stories, resources and means of exercising power.”<sup>119</sup>

*of Law*, 37 CAP. U. L. REV. 535, 582 (2009) (“[T]he people ultimately say what the law means, but the processes producing that meaning is neither fixed nor clean.”).

116. In this way, democratic constitutionalism and demosprudence depart from popular constitutionalism, which posits that constitutional meaning should return to the people and be largely removed from the courts. See Post & Siegel, *supra* note 10, at 379 (“Unlike popular constitutionalism, democratic constitutionalism does not seek to take the Constitution away from the courts. Democratic constitutionalism recognizes the essential role of judicially enforced constitutional rights in the American polity.”); see also Post, *supra* note 77, at 582 (“Judicial review does not foreclose political dialogue but advances it.”). Indeed, to the extent the institutional move advanced by popular constitutionalists is motivated by a fear of backlash to countermajoritarian judicial decisions, it finds some common ground with Rosenberg’s account. See Mark S. Kende, *Foreword*, 54 DRAKE L. REV. 791, 792 (2006). For accounts of popular constitutionalism, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999), and Jeremy Waldron, *Essay, The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

117. Guinier, *supra* note 57, at 551; see also Eskridge, *supra* note 25, at 2065–66 (arguing that social movements “transformed the normative context in which . . . cases were decided, either by linking . . . new cases with established norms or by persuading society and its judges to change the normative context in which social traits were evaluated”).

118. Guinier, *supra* note 57, at 545.

119. See *id.* at 557. Tellingly, Rosenberg has recently targeted Guinier’s work on demosprudence, subjecting her theory to the same criticisms he levels against legal mobilization scholars. See generally Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563 (2009) (criticizing the assumptions of the demosprudence model). In response, Guinier points out that Rosenberg “dismisses the possibility of an ongoing and recursive conversation between law and politics that may produce changes in the law.” Guinier, *supra* note 57, at 547. Moreover, she argues that Rosenberg “orients his entire critique around polling data and other social science research to trivialize the relationship of narrative to culture, to exaggerate the predictive capacity of a data-driven approach to quantify causation and to preempt other useful analytic approaches.” *Id.* at 548. In addition, Post defends the methodological and theoretical foundations of demosprudence and democratic constitutionalism against Rosenberg’s attack. He explains that these theories involve “understanding the dialogue between politics and law in ways that transcend the reach of quantifiable variables and that require the use of qualitative concepts.” Post, *supra* note 77, at 587.

Yet democratic constitutionalism and demosprudence suggest the potential function and significance of judicial defeat in a way that pushes beyond legal mobilization and cause lawyering work.<sup>120</sup> Post and Siegel situate “interpretive disagreement,” which implies the resonance of both winning and losing in contests over constitutional meaning, “as a normal condition for the development of constitutional law.”<sup>121</sup> Indeed, they argue that “resistance to judicial interpretation can enhance the Constitution’s democratic legitimacy.”<sup>122</sup> Even more to the point, Guinier’s attention to the demosprudential potential of dissents—instantiations of loss—uncovers the mobilizing potential of loss in a way that is consistent with my account.<sup>123</sup> Whereas legal mobilization scholarship largely overlooks the function of litigation loss within the process of law and social change, democratic constitutionalism and demosprudence integrate court decisions—both wins and losses—within a broader conversation among the judiciary, other lawmaking bodies, and social movements. Rather than constituting endpoints in social-change campaigns, court decisions are merely points along the ongoing process of constitutional meaning-making.<sup>124</sup>

Key to this dialogical framework of law making, in which both wins and losses shape constitutional culture, is an understanding of social movement actors as intermediaries directly engaged in the dynamic, multidimensional

120. See Guinier, *supra* note 10, at 59 (“That there is a healthy dialectic between an oppositional constitutional culture and the ‘legal constitution’ is the organizing idea behind demosprudence through dissent.”). It must be noted that demosprudential theory has a significant normative—or, as Guinier puts it, “aspirational”—component, whereas both democratic constitutionalism and legal mobilization theory offer more comprehensive descriptive and interpretive accounts. See Guinier, *supra* note 57, at 559.

121. Post & Siegel, *supra* note 10, at 374; see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1329 (2006) (“Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution.”).

122. Post & Siegel, *supra* note 10, at 375.

123. See *id.*; see also Robert Post & Reva Siegel, *Originalism As a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 568 (2006) (“Scalia’s *Lawrence* dissent . . . mobilized conservative constituencies to bring political pressure to bear on the development of constitutional law.”).

124. This more nuanced understanding of law and social change overlaps in some ways with Heather Gerken’s theory of “dissenting by deciding,” in which “would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decisionmaking body and can thus dictate the outcome.” Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005). Applied to my analysis of litigation loss, decisionmakers at subnational levels of government may respond to federal-court decisions with which they disagree by making policy, often based on independent state-law grounds, that not only registers disagreement with, but also implements policy opposed to, the earlier judicial decision.

process through which social change occurs.<sup>125</sup> As Gerald Torres argues, “[S]ocial movement activism is as much a source of law as are statutes and judicial decisions.”<sup>126</sup> Here again, theories of demosprudence and democratic constitutionalism find common ground with key insights of legal mobilization and cause lawyering scholarship. Cause lawyers, part of the broader category of social movement activists whom Guinier describes as “role-literate participants,”<sup>127</sup> seize on court decisions and use those decisions to speak to elites, movement constituents, and ordinary citizens.<sup>128</sup>

Social movement lawyers recognize the process of law and social change as complex, dynamic, and interactive.<sup>129</sup> Accordingly, they function within what Scott Cummings and I have termed “multidimensional advocacy”—advocacy that relies on a variety of tactics deployed in multiple institutional domains across all levels of government.<sup>130</sup> Operating across a range of institutional settings, social movement lawyers deploy litigation as merely one of several available tactics. Contrary to a court-centric characterization of activist lawyers,<sup>131</sup> contemporary social movement lawyers do not trust

125. Rosenberg takes the public's lack of knowledge of court decisions as evidence that courts do not have much influence. See Rosenberg, *supra* note 119, at 564. But introducing the concept of social movement intermediaries suggests that certain court decisions might be given meaning through various forms of social movement activism. See MCCANN, *supra* note 5, at 91 (“[C]ourt decisions and legal norms are not self-generating forces of defiant action. Rather, they constitute only potential resources that may or may not be mobilized in practical action.”); see also Galanter, *supra* note 67, at 136 (“[T]he messages disseminated by courts do not carry endowments or produce effects except as they are received, interpreted, and used by (potential) actors.”).

126. Torres, *supra* note 10, at 136.

127. Guinier, *supra* note 57, at 554; Guinier, *supra* note 10, at 62–63.

128. Ever since Stuart Scheingold identified the “politics of rights,” in which advocates capitalize on the less formal and more political function of rights, legal mobilization and cause lawyering scholars have built on his insights to demonstrate how social movement lawyers often cultivate the indirect benefits of litigation, regardless of its ultimate outcome, and exploit litigation for political power rather than for judicial victories. In fact, cause lawyers themselves might assess litigation's effectiveness by examining the results achieved for their clients, rather than by looking for a court's pronouncement of favorable law. See, e.g., MCCANN, *supra* note 5; SCHEINGOLD, *supra* note 12, at 95; Barclay & Fisher, *supra* note 111; Ann Southworth, *Lawyers and the “Myth of Rights” in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 473 (1999).

129. Indeed, as Sandra Levitsky has shown, one can hold the opinion—as Rosenberg and Klarman do—that litigation has outpaced political will and therefore poses significant dangers to reform, yet still understand cause lawyers as generally sophisticated and strategic. See Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 111, at 145, 147, 158.

130. See Cummings & Nejaime, *supra* note 9, at 1242, 1312, 1329–30; see also Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1612 (2006) (documenting increases in “research, education, and outreach” among contemporary public-interest law organizations).

131. See ROSENBERG, *supra* note 1, at 427 (arguing that “courts act as ‘fly-paper’ for social reformers who succumb to the ‘lure of litigation’”).

that courts, on their own, will bring about reform.<sup>132</sup> They understand courts' limitations and constraints and appreciate the importance of policy formation emanating from nonjudicial channels.<sup>133</sup> These advocates cultivate the political potential of rights-claiming tactics by seizing on moments across the full spectrum of litigation—from filing to process to outcome, including both victory and defeat.

The multidimensional-advocacy framework is central to an appreciation of the function of litigation loss. Rather than invest all hope and resources in litigation, social movement advocates treat litigation loss as a routine part of their social-change campaigns. They plan for wins and losses and use losses to shape strategies in other venues. Significantly, as I show below, loss in court does not prompt advocates to abandon litigation; rather, they continue to view litigation as an essential, but partial, strategy.

#### IV. THE PRODUCTIVE POTENTIAL OF LITIGATION LOSS

In this Part, I specify the productive effects that judicial defeat may yield for social movements. I show that losing is a relatively routine feature of social movements that advocates have learned to manage and to cultivate for change. Moreover, I relate advocates' framing of litigation loss to the specific limitations of court-centered change.

First, I explore two *internal* movement effects of litigation loss: (1) Loss may help a specific organization stake out an identity in a competitive social movement by committing itself to a meaningful issue susceptible to judicial rejection; and (2) loss may contribute to mobilization and fundraising by inspiring outrage and signaling the need for continued activism in light of courts' failure to act. Next, I illustrate two *external* effects of litigation loss: (1) Loss may prompt advocates to shift more attention and resources to other law-making institutions, but it may do so in a way that allows advocates to carve out a specific need for action by other state actors; and (2) advocates may use loss to appeal to the public by encouraging citizens to rein in an "activist," countermajoritarian judiciary. While many of these indirect effects resonate with those identified by legal mobilization and

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132. See MCCANN, *supra* note 5, at 11 ("[A] useful theory of legal mobilization should give considerable attention to the interaction and interdependence among . . . various tactical dimensions of movement activity."); see also Cummings & NeJaime, *supra* note 9, at 1317 ("Accordingly, [LGBT-rights lawyers in California] did not look to courts as saviors, but rather saw them as just one of many players . . ."); Keck, *supra* note 7, at 181; Nielsen & Albiston, *supra* note 130, at 1612 ("Our research suggests that [public-interest law organizations] have moved beyond litigation as the sole focus of social change.").

133. See Cummings & NeJaime, *supra* note 9, at 1238, 1317–18; McCann, *supra* note 17, at 729; see also Mary L. Bonauto, Essay, Goodridge in Context, 40 HARV. C.R.-C.L. L. REV. 1, 30–31 (2005) ("Goodridge would not have occurred but for litigation and legislative activity working in tandem with public education for many years."); Keck, *supra* note 7, at 175 ("Legal mobilization scholars have long observed that it is difficult to find any actual litigators who have succumbed to the myth that legal rights are magic recipes for instant change . . .").

cause lawyering scholars, I show how these effects derive meaning from the unique attributes of litigation loss, rather than merely the act of litigation.

I use examples primarily from the LGBT-rights movement and the Christian Right movement.<sup>134</sup> Taking cues from legal mobilization scholars' interpretive approach, which relies heavily on content analysis and case studies, I pay significant attention to the actions and statements of social movement lawyers themselves.<sup>135</sup> Furthermore, instead of merely viewing social movements in relation to the state,<sup>136</sup> I devote special attention to the importance of movement-counter movement relationships.<sup>137</sup> My analysis of opposing-movement interactions shows that social movement advocates, who

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134. Social movement scholars David Meyer and Suzanne Staggenborg conceptualize movements and countermovements as opposing movements, rather than merely an original movement and a reactionary movement. See Meyer & Staggenborg, *supra* note 93, at 1632–33. Both movements have overlapping areas of concern and make competing claims on the state, see *id.* at 1632, and “each side affects the forms, development, claims, and efficacy of its opponent.” *Id.* at 1654. This is a useful lens for thinking about the LGBT-rights and Christian Right movements and is crucial to exploring and appreciating the power of litigation loss in social movements. See *id.* at 1638; see also Wilson, *supra* note 3, at 172 (explaining that his analysis “looks at lawyers from opposing sides of . . . conflicts, providing an immediate contrast that is not seen in the existing literature”).

135. See McCann, *Causal Versus Constitutive Explanations*, *supra* note 8, at 464–66, 472–79 (defending the interpretive and constitutive approach). While I use quantitative analysis in one instance, I rely largely on qualitative analysis, including content analysis and case studies. See McCann, *supra* note 17, at 741–42 (explaining that scholars of the decentered approach “tend to build from intensive case studies of targeted population groups or institutional venues” and therefore “emphasize in-depth interviews with subjects, dense contextual mapping, and integrated narrative accounts as well as quantitative data”); Meyer & Staggenborg, *supra* note 93, at 1656 (“Content analyses of the documents generated by opposing movements can reveal the centrality of particular issues and alliances, the articulated strategies, and activists’ perceptions of their own opportunities.”).

136. See Meyer & Staggenborg, *supra* note 93, at 1629 (“[M]ovement and countermovement engage in sustained interaction with one another and not just the state. Because most empirical and theoretical work on social movements focuses on movement challenges to the state, the phenomenon of ongoing interactions between opposing movements demands a revision and extension of our theories of social movements and social change.”). While one movement’s litigation victory may be another movement’s figurative loss, it is important to note that my analysis includes only instances in which the social movement literally loses. That is, in the cases I explore, movement organizations are parties to the litigation, which allows movement advocates to argue directly to the courts and to function as actual winners and losers.

137. See Eskridge, *supra* note 21, at 423 (“The phenomenon by which social groups have presented their goals in constitutional terms has had a *channeling* effect on both the [identity-based social movements] and their inevitable countermovements.”); Siegel, *supra* note 121, at 1329 (arguing that movement-counter movement dynamics play “a crucial part in constitutional development”). A social movement consists of “collective challenges by people with common purposes and solidarity in sustained interaction with elites, opponents, and authorities.” SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS* 3–4 (1994). “A ‘countermovement’ is a movement that makes contrary claims simultaneously to those of the original movement.” Meyer & Staggenborg, *supra* note 93, at 1631.

operate within a framework of multidimensional advocacy, do not view defeat in one venue as the end of the story; rather, they engage other venues and alter their messaging based on their loss.<sup>138</sup>

It is important to note that I address the mobilization of loss as a strategy of necessity. Advocates may take cases they suspect they might lose, but they nonetheless hope (and attempt) to win. These advocates then react to the loss by reconfiguring the result in productive ways and by drawing lessons from the failed litigation. In this sense, strategies developed in the wake of loss operate as second-best alternatives—as responses to the failure of the initial tactic. My analysis suggests that in some circumstances the turn to the second-best alternatives might actually produce a more effective and robust movement in the long term; in this sense, the turn to other tactics in the wake of litigation loss may not merely produce the result sought through litigation, but might also yield important movement benefits beyond that result. Nonetheless, this project focuses on situations in which advocates must make the best of results they hoped to avoid.

Of course, there might be cases in which advocates *intend* to lose and affirmatively choose to mobilize loss. This set of cases might feature the most striking and sweeping benefits of loss since advocates themselves have made the calculation that there is more to be gained from losing the litigation than from pursuing the litigation with the goal of winning or, for plaintiffs, from foregoing litigation in the first place. While this category of cases is worthy of exploration, it is beyond the scope of this Article. In this regard, a complementary body of sociolegal scholarship shows how powerful, well-resourced parties may *choose* to concede cases, in the form of settlements, in order to accumulate precedential rulings in more favorable cases. Marc Galanter shows how repeat players, such as large firms and government entities, may actually win favorable long-term outcomes by conceding loss in cases that tend to be stronger for the plaintiff.<sup>139</sup> Catherine Albiston draws on Galanter's work to show the way in which a strict accounting of wins and losses may hide a strategy toward favorable statutory interpretation in which

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138. See Eskridge, *supra* note 25, at 2195 (“[A]nti-discrimination laws enacted in response to [identity-based social movement] demands for remediation fall or are limited in the face of countermovement constitutional attack, which stimulates the [identity-based social movement] to fight back on other fronts.”).

139. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 101–03 (1974). The individual plaintiff, largely concerned with a remedy for her immediate complaint, will accept a settlement; the repeat player avoids an unfavorable precedential ruling while continuing to litigate other plaintiffs’ weaker cases and thereby accumulating more favorable case law. In this sense, repeat players control the trajectory of legal interpretation by controlling the cases on which courts actually rule; deliberate loss allows powerful parties to enjoy a favorable selection effect in judicial decisions. See *id.* at 101 (“We would then expect [repeat players] to ‘settle’ cases where they expected unfavorable rule outcomes.”); see also Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC’Y REV. 347, 361 (1975) (“A calculating settlement policy reflects [organizations’] skill as litigants . . .”).

powerful parties affirmatively decide to concede weak cases rather than litigate to a result.<sup>140</sup>

While Galanter and Albiston focus on deliberate loss through settlement, my project addresses unwanted loss in the form of judicial decisions; in other words, loss is an affirmative strategy of advancement in their framework, but part of a strategy of necessity in my account.<sup>141</sup> Moreover, whereas Galanter and Albiston show the way in which powerful parties sweep loss under the rug (through confidential settlements), my project interrogates the overt recognition and deployment of loss. Nonetheless, their work identifies how loss may prove productive for a losing party and suggests that savvy advocates—lawyers for private organizational clients and government entities—may cultivate loss for long-term goals.<sup>142</sup>

#### A. INTERNAL EFFECTS

##### 1. Constructing Organizational Identity

The first aspect of litigation loss that I highlight has an organization-specific component and depends on the social movement organization's relationship to other organizations and constituents within the larger movement. Here I contend that litigation loss may be constitutive of organizational identity and may, counterintuitively, contribute to an

140. Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 877 (1999) ("[R]epeat player employers may . . . settle cases they expect to lose and litigate those they expect to win, ensuring that judicial interpretations of the statute occur in cases with the odds in their favor."). In a careful case study of the litigation process surrounding the Family and Medical Leave Act, Albiston demonstrates how repeat defendants seize on the rule-making potential of published judicial decisions while one-time plaintiffs are more likely to prevail at trial or to accept a settlement, neither of which generally yields precedential authority. *See id.* at 883–84, 901–02. In this sense, powerful clients and sophisticated lawyers understand that the significance of wins and losses may depend on their procedural posture, such that choosing to concede in some cases—what Albiston calls "strategic settlement"—may benefit the losing party. *See id.* at 873.

141. Additionally, while Galanter and Albiston focus on the development of legal doctrine within a judicial setting, I examine the development of a social movement and advancement of that movement's agenda in legal and nonlegal venues. Interestingly, Rosenberg characterizes Galanter's work as focusing on the factors that contribute to the outcomes of cases rather than on the effects of judicial decisions. *See* ROSENBERG, *supra* note 1, at 9.

142. Albiston also points out other examples of losing by winning: Under Supreme Court precedent, a public-interest organization may secure a favorable result for its client and yet sacrifice legal fees that are essential to the organization's survival. *See* Albiston, *supra* note 140, at 876 ("[R]epeat players can defeat the social change objectives of the public interest organization by offering the plaintiff a substantial sum for his or her damages while refusing to pay legal fees."); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1091 (2007) (explaining that *Buckhannon Bd. Care & Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), in which the Supreme Court held that serving as a "catalyst" for the defendant's voluntary change in behavior is not sufficient to support a fee award under federal fee-shifting statutes, facilitates "strategic capitulation").



organization's stature and longevity within a movement. To make this claim, I distinguish a social movement's loss from a loss experienced by an organization within a social movement. Of course, I do not mean to imply that consistent loss over the long term may not harm an organization and contribute to its decline; I merely argue that organizational representatives may use loss, at least in the early years of the organization's life, to stake out a position in a competitive social movement.

My emphasis on organizational standing relies on a nonhierarchical view of litigation that situates lower federal courts, state courts, and even unpublished decisions as significant. Rather than focus on the U.S. Supreme Court, my analysis accounts for the way in which technology allows movement leaders to communicate quickly with constituents on a broad array of topics and disseminate information about cases as they wish. Judicial decisions that garner only minor interest on a more general level or from mainstream media may enjoy substantial publicity within more specialized press targeted at movement members; in addition, social movement organizations handling the litigation may highlight the decisions in their own outreach.<sup>143</sup>

I take as my primary example the Thomas More Law Center ("TMLC"), a Christian public-interest law firm headquartered in Ann Arbor, Michigan. I focus on TMLC because it is a relatively new organization intervening in a competitive social movement environment populated by many established, better-resourced, and more connected firms.<sup>144</sup>

#### *a. Contextualizing Organizational Identity*

First, focusing on important characteristics of the Christian Right movement facilitates an understanding of how TMLC in particular is well-suited to capitalize on losing. Many public-interest law firms in contemporary social movements pride themselves on their winning records, and together these firms provide a comprehensive, unified picture of their respective movement. For instance, the LGBT-rights movement is fairly coherent and well-organized; a relatively small number of impact-litigation organizations—Lambda Legal, Gay & Lesbian Advocates & Defenders ("GLAD"), the National Center for Lesbian Rights ("NCLR"), and the American Civil Liberties Union ("ACLU") LGBT Project—coordinate litigation strategies and go to great lengths to avoid unfavorable precedent. Lawyers at these lead organizations meet frequently, including at an annual

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143. See Guinier, *supra* note 57, at 555 ("The technology of dissemination . . . is certainly relevant to who hears the story and who understands it.").

144. Compared to TMLC, other Christian Right legal organizations, such as the American Center for Law and Justice ("ACLJ"), the Alliance Defense Fund ("ADF"), and Liberty Counsel, boast larger budgets and/or closer ties to the political leadership of the movement. See Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 323 (2009).

litigators' roundtable, to develop and implement strategy.<sup>145</sup> Regional turf is established and respected, and the firms generally cooperate when multiple groups have a geographical or substantive connection to a case.<sup>146</sup> Individual organizations construct their identities based partly on their successes. Claiming that it has enjoyed "enormous success," GLAD notes that its "legal victories have changed the landscape of the law."<sup>147</sup> Similarly, Lambda Legal focuses on litigation wins when recounting its history, concluding that "[n]othing illustrates our success more than *Lawrence v. Texas*,<sup>[148]</sup> our groundbreaking U.S. Supreme Court victory . . . ."<sup>149</sup>

Not all social movements are so carefully orchestrated or harmonious. Indeed, the main countermovement to the LGBT-rights movement—the Christian Right—is more diffuse and competitive.<sup>150</sup> A concerted Christian Right litigation campaign emerged from the larger political and cultural movement in the 1990s.<sup>151</sup> At least nine Christian Right legal organizations formed in that decade,<sup>152</sup> including current movement leaders the American Center for Law & Justice ("ACLJ") in 1990<sup>153</sup> and the Alliance Defense Fund ("ADF") in 1994.<sup>154</sup> As Christian Right legal organizations

145. See, e.g., ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 121 (2005) (noting that the "Litigators' Roundtable was successor to the Ad-Hoc Task Force"); Boutcher, *Making Lemonade*, *supra* note 13, at 11 (describing the National Lesbian and Gay Civil Rights Roundtable, headed by Lambda Legal in the wake of *Bowers*, which allowed advocates "to coordinate litigation strategies among a variety of different issues"); see also Cummings & NeJaime, *supra* note 9, at 1269–70 (discussing the California Marriage Litigation Roundtable, which met to discuss the possibility of marriage litigation in California).

146. For instance, GLAD handles litigation in New England, including the marriage cases in Vermont, Massachusetts, and Connecticut. In the California marriage litigation, NCLR, ACLU, and Lambda Legal all served as counsel; all three firms cooperated in the litigation to present a coherent, unified front.

147. About GLAD, GAY & LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/about/> (last visited Jan. 12, 2011).

148. 539 U.S. 558 (2003).

149. *Making the Case for Equality*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us/history.html> (last visited Jan. 12, 2011).

150. Cf. ANN SOUTHWORTH, LAWYERS FOR THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 2 (2008) (documenting the competing ideologies and priorities that characterize the conservative legal movement, which includes libertarians, business interests, and social and religious conservatives).

151. During this time, the president of ADF announced that "[w]hile we can bring about quick fixes in the voting booth, it is in the courts that we will bring about the type of change that transcends all generations." Alliance Defense Fund, *Winning Precedent-Setting Cases for You and Your Family*, ADF BRIEFING, May 1996, at 4.

152. See Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law"*, 52 UCLA L. REV. 1223, 1245 (2005).

153. See *History of ACLJ*, AM. CTR. FOR LAW & JUSTICE, <http://www.aclj.org/About/Default.aspx?Section=10> (last visited Jan. 12, 2011).

154. See *About the Alliance Defense Fund*, ALLIANCE DEF. FUND, <http://www.alliancedefensefund.org/About> (last visited Jan. 12, 2011).

continue to proliferate and compete for constituents, a handful of organizations, including ACLJ and ADF, command the bulk of the financial resources, lead the most high-profile litigation, and pride themselves on their courtroom victories.<sup>155</sup> ACLJ boasts that its chief counsel has successfully argued “[s]everal landmark cases . . . before the U.S. Supreme Court,”<sup>156</sup> and ADF points to thirty-three separate Supreme Court decisions in its “History of Success.”<sup>157</sup>

Many smaller legal organizations are still staking out their identities in this broader movement. TMLC, founded in 1999, is a prime example.<sup>158</sup> TMLC finds itself somewhat of a theological and geographical outsider in the Christian Right movement. The organization was founded by a Catholic donor, Tom Monaghan, whereas most other prominent Christian Right legal organizations have been directed by evangelical Protestant groups. And with its base in Ann Arbor, Michigan, TMLC finds itself removed geographically from traditional (coastal) centers of power and without the Washington, D.C., location that more prominent Christian Right legal organizations boast.<sup>159</sup> But, rather than shy away from its non-mainstream markers, TMLC has attempted to stake out a unique identity geared to particular issue areas and strategies. TMLC’s willingness to take on hot-button issues that go to the core of constituents’ worldviews, and to do so despite relatively slim odds of success, has been key to forming its identity.

#### *b. Loss in Court*

TMLC loses at a higher rate than other significant Christian Right legal organizations and demonstrates a willingness to address and embrace litigation loss, rather than to sweep it under the rug and move on. To chart this out more systematically, I collected every judicial opinion available on Westlaw that involved TMLC from the firm’s founding in 1999 through the end of 2009. I also collected every Westlaw opinion for three comparison organizations from their respective founding dates through the end of 2009: the Becket Fund, Liberty Counsel, and ACLJ. Becket Fund and Liberty Counsel were chosen because they have budgets similar to TMLC’s.<sup>160</sup> But

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155. See NeJaime, *supra* note 144, at 323.

156. *About Chief Counsel*, AM. CTR. FOR LAW & JUSTICE, <http://www.aclj.org/About/default.aspx?Section=11> (last visited Jan. 12, 2011).

157. *About the Alliance Defense Fund*, *supra* note 154 (“A History of Success” timeline).

158. See *History*, THOMAS MORE LAW CTR., <http://www.thomasmore.org/qry/page.taf?id=24> (last visited Jan. 12, 2011).

159. *Contact Us*, THOMAS MORE LAW CTR., <http://www.thomasmore.org/qry/page.taf?id=29> (last visited Jan. 12, 2011).

160. See Thomas More Law Ctr., Return of Organization Exempt from Income Tax (Form 990) 1 (Nov. 17, 2008), available at [http://dynamodata.fdncenter.org/990\\_pdf\\_archive/383/383448297/383448297\\_200712\\_990.pdf](http://dynamodata.fdncenter.org/990_pdf_archive/383/383448297/383448297_200712_990.pdf) (revenue of approximately \$1.8 million); Liberty Counsel, Return of Organization Exempt from Income Tax (Form 990) 1 (Nov. 12, 2007), available at [http://dynamodata.fdncenter.org/990\\_pdf\\_archive/592/592986294/592986294\\_](http://dynamodata.fdncenter.org/990_pdf_archive/592/592986294/592986294_)

whereas Becket Fund has a Catholic orientation, Liberty Counsel is tied to Jerry Falwell's Liberty University, giving it significant evangelical roots that make it a prominent, mainstream Christian Right organization, despite its smaller operating budget.<sup>161</sup> ACLJ, which boasts substantial evangelical ties by virtue of its affiliation with Pat Robertson,<sup>162</sup> has a budget that dwarfs those of the other three firms.<sup>163</sup>

The judicial decisions available on Westlaw were catalogued by subject matter, the firm's role, and the outcome.<sup>164</sup> Those decisions that yielded a clearly favorable legal result for one side were included in a final tally of wins and losses. Some cases had more than one judicial opinion, all of which were counted. Of course, these firms take many cases that result in unpublished decisions or settle before any judicial resolution. While my method captures some unpublished decisions, it obviously fails to capture many court decisions that are neither published nor included on comprehensive electronic databases.<sup>165</sup> Nonetheless, a general pattern emerges from the judicial opinions included on Westlaw.

As shown in Figure 1, TMLC's overall success rate was 36%.<sup>166</sup> After removing the cases in which TMLC acted only in an amicus capacity, TMLC had a success rate of 35%. Of the forty-three decisions in which there was a clear prevailing party, TMLC prevailed in fifteen of the decisions and lost in twenty-eight. These success rates contrast, in some cases rather dramatically, with the results of the three comparison organizations. TMLC's overall success rate was the lowest of the four firms; Becket Fund's overall success rate was 59%, compared to 44% for Liberty Counsel and 47% for ACLJ.<sup>167</sup>

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200706\_990.pdf (revenue of approximately \$1.4 million); The Becket Fund, Return of Organization Exempt From Income Tax (Form 990) 1 (Aug. 15, 2008), available at [http://dynamodata.fdncenter.org/990\\_pdf\\_archive/521/521858532/521858532-200709\\_990.pdf](http://dynamodata.fdncenter.org/990_pdf_archive/521/521858532/521858532-200709_990.pdf) (revenue of approximately \$1.8 million).

161. See HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION 62-64 (2005).

162. See *id.* at 22.

163. See Am. Ctr. for Law & Justice, Return of Organization Exempt from Income Tax (Form 990) 4 (Nov. 13, 2007), available at [http://dynamodata.fdncenter.org/990\\_pdf\\_archive/611/611190087/611190087-200612\\_990.pdf](http://dynamodata.fdncenter.org/990_pdf_archive/611/611190087/611190087-200612_990.pdf) (revenue of approximately \$10 million).

164. I am indebted to Liz Treckler for her careful work on this project. Gary Gates, the Williams Distinguished Scholar at the Williams Institute at UCLA School of Law, provided essential advice on the methodology employed here.

165. In this sense, I recognize that I rely on a simplistic assessment of winning and losing that fails to account for the premeditated, strategic deployment of loss documented by Galanter and Albiston. See, e.g., Albiston, *supra* note 140, at 901 ("Studies addressing who wins often treat 'winning' as victory in published judicial opinions.").

166. TMLC recorded eighteen wins and thirty-two losses.

167. Overall, Becket Fund recorded fifty-eight wins and forty losses, Liberty Counsel recorded sixty-four wins and eighty-one losses, and ACLJ recorded fifty-four wins and sixty-two losses. Of course, these firms, which have a greater number of total cases than TMLC, record more losses, but the loss rate is the relevant measure here. Although my analysis suggests otherwise, Liberty Counsel publicly claims a 92% success rate since 2004. *About Us*, LIBERTY

TMLC's success rate in litigation in which it acted as counsel, rather than merely in an amicus capacity, was also the lowest; Becket Fund prevailed in 52% of decisions for its non-amicus cases, compared to 43% for both Liberty Counsel and ACLJ.<sup>168</sup>

While TMLC certainly hopes and attempts to win, it has a tendency to take on relatively weak cases that other firms might decline. This has implications for both the substantive areas the firm engages and the constituents it represents. For instance, TMLC has staked out a specialization in school-programming litigation, in which the landscape can be summed up rather simply: Courts routinely reject parental-rights and free-exercise challenges to curriculum (usually secular and/or progressive programming), but they often accept Establishment Clause challenges to curriculum (usually science programming).<sup>169</sup> In representing conservative Christian parents in the school-programming domain, TMLC most often challenges school districts that implement progressive programming relating to sex, sexuality, sexual orientation, gender identity, and non-Western religions.<sup>170</sup> In representing school districts, TMLC often defends implementation of science programming that challenges the primacy of evolution.<sup>171</sup> Given the relatively settled legal principles governing both sets of cases, it becomes clear that TMLC represents parties (whether parents or school districts) in disputes where those parties have a relatively minor chance of success. But with these cases, TMLC has staked out a specialty among Christian Right legal organizations, and it has done so on a hot-button issue—school programming—that strikes at the core of movement constituents' beliefs and concerns.<sup>172</sup>

In its non-amicus cases involving school programming, TMLC received favorable decisions on only two out of nine occasions.<sup>173</sup> School-programming litigation constituted a greater share of TMLC's caseload than at the comparison organizations, representing 23% of TMLC's non-amicus caseload, compared to only 14% of Liberty Counsel's and 12% of ACLJ's

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COUNSEL, <http://www.lc.org/index.cfm?pid=14096> (last visited Dec. 24, 2010). While Liberty Counsel does not reveal the basis for its calculation, it appears that the organization dramatically inflates its success rate for purposes of public messaging.

168. In non-amicus cases, Becket Fund recorded twenty-three wins and twenty-one losses, Liberty Counsel recorded forty-five wins and sixty losses, and ACLJ recorded thirty-one wins and forty-one losses.

169. See NeJaime, *supra* note 144, at 347–48.

170. See *id.* at 337–38.

171. See *id.* at 338.

172. See *id.* at 327–28, 333–34.

173. Here I included a case in which TMLC successfully represented a parent and student challenging what was arguably *student-run* programming. See *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 782–83, 815 (E.D. Mich. 2003).

non-amicus caseloads, and none of Becket Fund's non-amicus caseload.<sup>174</sup> And as Figure 1 shows, TMLC's success rate was again the lowest among the organizations in school-programming litigation: TMLC won 22% of decisions in its non-amicus cases, compared to 31% for Liberty Counsel and 40% for ACLJ; Becket Fund served as counsel in no reported cases on school programming and had a 50% success rate when it served in an amicus capacity.<sup>175</sup> Overall, TMLC loses more than it wins (36% overall and 35% non-amicus success rates), and it loses at an even higher rate in school-programming litigation (22% success rate), an area which accounts for a relatively large portion (23%) of its caseload.

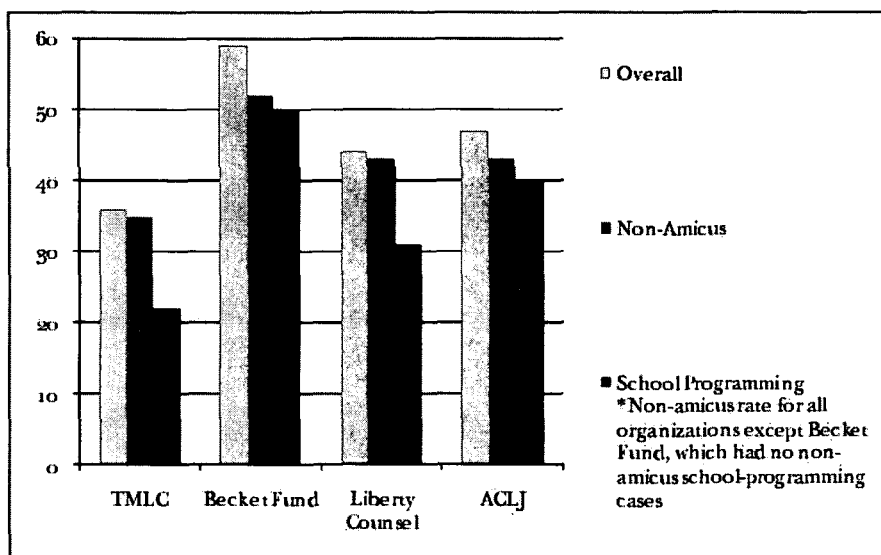


Figure 1: Rates of Success

*c. Litigation Loss and Organizational Identity*

TMLC's dedication to litigation challenging the primacy of evolution and insisting instead on alternative, religiously informed science curriculum facilitates a close examination of TMLC's management of litigation loss in its

174. Because I am interested in school-programming litigation as a percentage of total cases, here I separate out individual cases rather than rely on the total number of judicial decisions. Of a non-amicus caseload of thirty-one cases, TMLC took on seven school-programming cases. Of a non-amicus caseload of seventy-one cases, Liberty Counsel took on ten school-programming cases. Of a non-amicus caseload of fifty-nine cases, ACLJ took on seven school-programming cases. Becket Fund did not pursue any school-programming cases in a non-amicus capacity.

175. TMLC recorded two wins and seven losses, Liberty Counsel recorded five wins and eleven losses, and ACLJ recorded four wins and six losses. Becket Fund participated in an amicus capacity only in school-programming litigation, and in those cases recorded two wins and two losses.

preferred issue area of school programming. TMLC represented Pennsylvania's Dover County School District in a challenge to the district's instruction of intelligent design. TMLC deliberately decided to construct and litigate an intelligent-design test case.<sup>176</sup> To that end, the firm searched for a school district willing to adopt an alternative curriculum, knowing it would lead to litigation.<sup>177</sup> After the ACLU and Americans United for Separation of Church and State sued the school district on behalf of parents, TMLC defended the district.<sup>178</sup>

Rather than work within the broader movement strategy, TMLC's intelligent-design litigation departed from the mainstream Christian Right's tactical calculations. Other Christian Right organizations neither joined nor endorsed TMLC's campaign. In fact, the actions of TMLC and the Dover School Board upset other groups within the larger movement. John West, of the Discovery Institute, a leading intelligent-design organization, told the *New York Times*:

"The school district never consulted us and did the exact opposite of what we suggested. Frankly I don't even know if school board members know what intelligent design is. They and their supporters are trying to hijack intelligent design for their own purposes. They think they're sending signals in the culture wars."<sup>179</sup>

Predictably, TMLC lost the case on Establishment Clause grounds.<sup>180</sup> But the litigation gave TMLC a national platform and established the organization's identity as a group willing to put religious principles above legal rules. TMLC's head, Richard Thompson, touted the intelligent-design case because of its "national impact,"<sup>181</sup> and the case landed the firm in high-profile press outlets like the *New York Times*. Commentators described TMLC being "thrust into the limelight with the nationally watched [Dover] case."<sup>182</sup> Consistent with other legal mobilization accounts, the litigation

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176. Although curriculum, including creationism, has been rejected under Establishment Clause principles, Christian Right advocates have looked to intelligent design as a new way to bring a religiously informed view into the science classroom by presenting this view as a competing scientific account. See David K. DeWolf, Stephen C. Meyer & Mark Edward DeForrest, *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 79-80.

177. Laurie Goodstein, *In Intelligent Design Case, a Cause in Search of a Lawsuit*, N.Y. TIMES, Nov. 4, 2005, at A16.

178. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

179. Goodstein, *supra* note 177.

180. See *Kitzmiller*, 400 F. Supp. 2d at 765 (finding that intelligent design "cannot uncouple itself from its creationist, and thus religious, antecedents" and concluding that the school board's intelligent-design policy violates the Establishment Clause).

181. Goodstein, *supra* note 177.

182. Kim Kozlowski, *Law Center Fights Battles of Faith*, DETROIT NEWS, Dec. 4, 2005, 2005 WLNR 26932896.

process produced important indirect effects for TMLC. The mere act of litigating brought public attention to the organization and allowed TMLC to claim the issue area as part of its primary work.

But the loss itself also produced important effects for TMLC. Its court defeat became part of a broader historical narrative, as TMLC leaders tapped into a tradition akin to what constitutional law scholar Jules Lobel has labeled “prophetic litigation.”<sup>183</sup> By expressing the community’s call for change and by documenting the judiciary’s rejection of that call, TMLC lawyers articulated “a vision of justice unachievable in the present” at the same time that they “record[ed] history by creating a narrative of oppression and resistance.”<sup>184</sup> But whereas Lobel’s model of “prophetic litigation” situates losing litigation along a (progressive) historical trajectory, TMLC constructed a historical narrative to serve its immediate organizational needs.<sup>185</sup> That is, TMLC’s Thompson positioned his organization’s litigation loss within a grand narrative of “oppression and resistance” to appeal directly to constituents for immediate organizational purposes.

In a TMLC press release, Thompson turned the court’s language critical of TMLC into a positive appeal for change, thus offering constituents an important counternarrative to the account featured in the mainstream press:

In his opinion the judge bemoaned that the school district “deserved better than to be dragged into this legal maelstrom, with its resulting utter waste of monetary and personal resources.” In this respect, he was correct. This case should have never made it into a federal courthouse. The Founders of this country would be astonished at the thought that this simple curriculum change “established religion” in violation of the Constitution that they drafted.<sup>186</sup>

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183. See generally LOBEL, *supra* note 13 (describing “prophetic litigation” as what occurs when oppressed communities are committed to a legal view that courts do not accept); Lobel, *Justice As Struggle*, *supra* note 13 (explaining that “prophetic litigation” offers new meanings to conventional legal principles as part of a group’s struggle against subordination). As one of the few legal scholars to directly address the implications of judicial defeat, Lobel argues that “losing litigation becomes a part of the community’s understanding of its view of the law and a reflection of the community’s commitment to struggle for its view.” LOBEL, *supra* note 13, at 118. Lobel devotes attention primarily to the social-justice aspirations of subordinated minority groups and focuses on claims that eventually prevail—thus the label “prophetic litigation.” *Id.* at 115, 118.

184. LOBEL, *supra* note 13, at 123.

185. Lobel explicitly resists an argument that losing litigation necessarily has “a positive effect in its era.” Lobel, *Justice As Struggle*, *supra* note 13, at 1356.

186. Press Release, Thomas More Law Ctr., Court Issues Troubling Decision in Dover Intelligent Design Case, (Dec. 21, 2005), [http://www.thomasmore.org/qry/page.taf?id=19&function=detail&sbtlct\\_uid1=80](http://www.thomasmore.org/qry/page.taf?id=19&function=detail&sbtlct_uid1=80).



Thompson linked TMLC's doctrinal interpretation to the historical place of religion in America and positioned the federal judge as blind to that important history. He contextualized the court's decision historically by situating the values animating TMLC's challenge within the nation's founding principles and suggesting that, by continuing to fight, TMLC would ultimately vindicate such values.

Thompson's account relates TMLC's litigation failure to a key constraint of courts—their inability or unwillingness to bring about sweeping cultural reform.<sup>187</sup> In seeking a return to what they see as the original values of the country, America as a “Christian nation,” Thompson and his organization asked the court to do too much. TMLC's cultural vision is not cognizable within the contemporary language of rights or existing precedent and, moreover, is inconsistent with the liberal, secular ideology of the American judiciary.<sup>188</sup> But TMLC advocates created a historical record of the courts' dismissive treatment of their competing vision, and they did so for the purpose of establishing, legitimizing, and funding their social movement organization.

In soliciting donations for his organization, Thompson situated TMLC's litigation efforts within broader cultural struggles. His fundraising pitch at the end of 2008 depicted Christians at war with “non-believers” (both secularists and Muslims). This war, he claimed, requires dedication, commitment, and money:

[H]ere at home, now prowl adversaries who in many respects are more dangerous to America than any military opponent we have faced. These adversaries seek to destroy our religion and morality, which George Washington proclaimed were the very foundation of our political prosperity.

Militant atheists in alliance with those at the ACLU are well on the way to achieving their ultimate goal—to de-Christianize America. And at the same time, radical Islamic groups are working to destroy America by terrorist acts of violence and internal subversion.

Their agendas are supported by the cultural elite, Hollywood, the television industry, the mainstream news media, academia, public schools, the legal community, and a significant portion of the judiciary.

You, here at home, have been doing your part so that the sacrifices of American patriots from the birth of our Nation to the

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187. See discussion *supra* Part II.A.

188. See NeJaime, *supra* note 144, at 368 (“[C]ourts turn down the claims of religious parents by adhering to a liberal, pluralist vision that calls for exposure to difference and to a normative view of education that prioritizes critical, rational deliberation when faced with competing conceptions of the good life.”).

present time will not be in vain. That's why, despite these hard economic times, I'm asking that, you make a special year-end donation to the Thomas More Law Center so that we are able to continue to fight the .internal [sic] enemy arrayed against America.<sup>189</sup>

To conclude his appeal, Thompson urged potential donors to "[j]oin us on the front lines of the Culture War."<sup>190</sup>

For Thompson, the "Culture War" not only pits TMLC constituents against "public schools," but also against "a significant portion of the judiciary," leaving no wonder in constituents' minds as to why TMLC continues to lose in school-programming disputes. Thompson relies on an image of the judiciary as an elitist and politically unaccountable institution out of touch with mainstream American values.

Yet he paints continued litigation as necessary, even if it does not produce social change in the near future.<sup>191</sup> Litigation responds to the enemies in the "culture war," meeting their suspect, secular tactics head-on.<sup>192</sup> In the wake of defeat, the "Culture War" symbolism allows TMLC advocates to proclaim, heroically, "We are up against a powerful enemy!"<sup>193</sup> In this sense, TMLC lawyers are central and necessary players.<sup>194</sup> They give voice to their constituents' competing vision of the good even in the face of judicial resistance and rejection.<sup>195</sup> In taking on school-curriculum

189. Richard Thompson, *A Special End of the Year Update from Richard Thompson: There's Still Time*, THOMAS MORE LAW CTR., (Dec. 30, 2008), [http://www.thomasmore.org/qry/page.taf?id=19&\\_function=print&sbtlclt\\_uid1=566&month=12&year=2008](http://www.thomasmore.org/qry/page.taf?id=19&_function=print&sbtlclt_uid1=566&month=12&year=2008).

190. *Id.*

191. See David S. Meyer & Steven A. Boucher, *Signals and Spillover: Brown v. Board of Education and Other Social Movements*, 5 PERSP. ON POL. 81, 90 (2007) ("Continued litigation fills a distinct organizational niche within a social movement, and makes use of well-established organizational expertise; even in the absence of social change, it is an organizational survival strategy.").

192. See *id.* ("[A]dvocates of social change continue to litigate at least partly because their opponents do. When an opposing group seeks to pursue its interests through the courts, it virtually forces its opponent to do the same—or risk leaving a potentially important front in the political battle undefended.").

193. See Kevin R. den Dulk, *Purpose-Driven Lawyers: Evangelical Cause Lawyering and the Culture War*, in THE CULTURAL LIVES OF CAUSE LAWYERS 56, 76 (Austin Sarat & Stuart Scheingold eds., 2008).

194. See Thompson, *supra* note 189 (noting that TMLC lawyers will continue "to fight the . . . enemy").

195. As Austin Sarat argues in an influential cause lawyering piece on death-penalty litigators—one of the only cause lawyering treatments of losing litigation—"the lawyer for a losing cause serves as a witness testifying against [present] injustices" and "ensure[s] that, even when no one (including judges) seems willing to listen, the voices of the 'oppressed' will not be silenced." Sarat, *supra* note 13, at 323. As part of a robust vision of constitutional meaning-making, Sarat situates lawyers for losing causes within a tradition in which "lawyers refuse to recognize the violence of the present moment as the defining totality of law." *Id.* at 322. In doing so, he relies on Robert Cover's idea of "redemptive constitutionalism." See Robert M.

challenges, and often losing, TMLC lawyers portray themselves as the lone defenders of religious parents—warriors committed to a long-term battle.

And battling a powerful enemy requires resources. While public-interest law firms often depend on recovering attorneys' fees in successful litigation to fund their work, such firms also rely heavily on private donors. In fact, while TMLC founder Monaghan initially funded the group with \$500,000, the firm claims that it is now funded exclusively by private individuals, including 50,000 individuals who make annual membership donations.<sup>196</sup> Donors may very well feel that TMLC needs funds to continue fighting. Whereas other firms frequently succeed in court (and create well-settled, favorable law in other substantive domains), TMLC's work is far from done. Of course at some point, donors may refuse to fund an organization that continues to lose. This tension, though, only underscores the need for more careful, contextual analysis of litigation loss to unpack the positive and negative effects of judicial defeat and to understand how those effects interact for social movement purposes.

## 2. Mobilizing Constituents, Building Resolve, and Fundraising

I now move from organization-specific effects of litigation loss to movement-wide effects—from the mobilization of organizational constituents to the mobilization of movement constituents more generally. I argue that loss may produce for a movement some of the positive indirect effects of litigation that legal mobilization scholars have identified in the context of litigation victory and process. Litigation loss may raise consciousness, mobilize constituents, build resolve, and raise funds. It does so, however, in ways rooted uniquely in loss.

The indirect effects associated with litigation loss depart from the possibilities and potential of litigation already identified in the legal mobilization literature and instead relate to the constraints on courts and the limitations of litigation in the more pessimistic account of court-centered strategies. Litigation strategies might stall in the face of judges' bias, their reluctance to extend rights to subordinated groups, or their unwillingness to undermine perceived legislative and community preferences. Yet they might do so in ways that allow advocates to speak effectively to constituents, elites, and the public based specifically on courts' failures.

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Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 34 (1983). Yet, like Lobel, Sarat focuses on a historical trajectory rather than present-day implications. He faults the narrow, immediate focus of most cause lawyering scholarship, arguing, "The ability of cause lawyers to speak to the future and memorialize the present . . . has been ignored by those who have worried too much about the impact of cause lawyering on the political possibilities of the present." Sarat, *supra* note 13, at 324.

196. See Kozlowski, *supra* note 182.

When a court validates a claim, the group's claim enjoys the legitimacy that comes with the state's approval. When a court rejects the group's claim, however, the demand that the legal claim embodies might be made more pressing and the deprivation more acute. That is, denial of the claim might serve to highlight more intensely the injustice suffered by the group. While victory might signal that continued or increased activism is no longer necessary, loss might incentivize more aggressive organization and advocacy.<sup>197</sup> In this way, loss creates a distinct threat and provides a sense of urgency for a movement.<sup>198</sup>

This is the flip side of Rosenberg's critique of court-centered strategies as demobilizing. Whereas legal victory might lull movement members into a false sense of security, legal defeat might encourage new, more vibrant mobilization and direct action by bringing awareness to courts' ineffectiveness and explicitly demonstrating the failed promise of litigation. Scholars have shown how in the wake of *Roe v. Wade*, the abortion-rights movement's activism declined, while the activity of opponents increased dramatically.<sup>199</sup> Losing movements might experience a new (or renewed) motivation, while winning movements might relax, believing judicial victory has secured the desired change.<sup>200</sup> Movement advocates, therefore, have an interest in highlighting legal defeat.<sup>201</sup> Indeed, they may even frame ambiguous outcomes as defeats in order to create a new threat against which to rally.<sup>202</sup>

197. See Meyer & Staggenborg, *supra* note 93, at 1646 (explaining that the Supreme Court's decision in *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989), which allowed some limitations on abortion services, "led to an unprecedented growth in the abortion rights movement as supporters feared that abortion would once again be made illegal").

198. See Post & Siegel, *supra* note 10, at 432 (predicting that an antiabortion decision "will provoke abortion rights advocates to renewed mobilization"); cf. Meyer & Staggenborg, *supra* note 93, at 1647 ("Losses generate support by creating alarm, but eventually they have a demobilizing effect as supporters give up hope in the absence of progress toward their goals.").

199. See, e.g., ROSENBERG, *supra* note 1, at 425; Eskridge, *supra* note 21, at 465 ("[T]here was a fall-off of intensity in the pro-choice movement after *Roe*"). Many scholars have documented the explosive mobilization of the antiabortion-pro-life movement in the wake of the Supreme Court's *Roe* decision. See, e.g., GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 12 (2005); SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* (1991); Post & Siegel, *supra* note 10.

200. See ROSENBERG, *supra* note 1, at 425 ("Successful litigation for significant social reform runs the risk of instigating countermobilization.").

201. See Boutcher, *Making Lemonade*, *supra* note 13, at 9 (describing legal defeats as threats to social movements).

202. Meyer and Staggenborg, for instance, explain how after the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), in which the Court affirmed the right to abortion but permitted various restrictions so long as they did not create an "undue burden" on the underlying right, both sides framed the decision as a loss. Meyer & Staggenborg, *supra* note 93, at 1646 ("Both abortion rights and antiabortion groups,

Thus, litigation loss may raise consciousness and mobilize constituents,<sup>203</sup> but it may do so most effectively by inspiring outrage, strengthening resolve, and building a more fervent feeling of entitlement in ways that mere litigation process (and certainly litigation victory) cannot.<sup>204</sup> Steven Boutcher's case study of the gay-rights movement following its 1986 U.S. Supreme Court loss in *Bowers v. Hardwick*<sup>205</sup> makes significant insights in this regard and represents an important exception to the avoidance of litigation loss in sociolegal scholarship.<sup>206</sup> Relying on social movement literature on political opportunities and threats, Boutcher draws attention to the productive function of loss.<sup>207</sup> He shows that the *Bowers* defeat increased grassroots mobilization, fundraising, and organizational founding, all of which proved vital to a stronger LGBT-rights movement.<sup>208</sup>

Boutcher adds an important new perspective to law and social movements literature, and the piece of my theoretical account set out in this Subpart takes cues from his work. Nonetheless, by approaching litigation loss from a cause lawyering perspective and within a legal mobilization framework, rather than through social movement theory more generally, I use a different (though related and complementary) theoretical lens. My analysis specifically distinguishes litigation loss from nonlegal defeats by showing effects that rely on the unique characteristics of courts and litigation. And rather than focus on the U.S. Supreme Court, my account includes within its scope state-court and low-level federal-court losses.

Still, Boutcher's analysis convincingly demonstrates the ways in which courts' constraints resonate with movement constituents and provide important resources for movement leaders. After *Bowers*, the Supreme Court

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recognizing the value of threatening outcomes, claimed the ruling was in fact a victory for the other side.").

203. Meyer & Staggenborg, *supra* note 93, at 1644 (arguing that "it was easier for antiabortion forces to mobilize after the abortion rights victory" in *Roe*); cf. Nicholas Pedriana, *Help Wanted NOW: Legal Resources, the Women's Movement, and the Battle over Sex-Segregated Job Advertisements*, 51 SOC. PROBS. 182, 191-93 (2004) (showing how the women's-rights movement, and specifically NOW, mobilized in the face of unfavorable EEOC interpretations relating to sex-segregated job advertisements).

204. See Post & Siegel, *supra* note 10, at 390 ("[C]ontroversy provoked by judicial decisionmaking might even have positive benefits for the American constitutional order. Citizens who oppose court decisions are politically active.").

205. 478 U.S. 186 (1986) (upholding the constitutionality of Georgia's anti-sodomy statute).

206. See Boutcher, *Making Lemonade*, *supra* note 13; Boutcher, *Mobilizing in the Shadow of the Law*, *supra* note 13. Indeed, Boutcher is correct to point out that "[t]he literature is relatively silent on the effect of legal defeats." Boutcher, *Mobilizing in the Shadow of the Law*, *supra* note 13, at 7.

207. See Boutcher, *Mobilizing in the Shadow of the Law*, *supra* note 13, at 8-11.

208. See Boutcher, *Making Lemonade*, *supra* note 13, at 10-11. In her analysis of the gay-rights movement's litigation strategies, Ellen Ann Andersen uses social movement theory to make a similar claim. See ANDERSEN, *supra* note 145, at 217 (arguing that *Bowers* demonstrates that "litigation losses can be used to advance political ends").

became a symbol and symptom of discrimination and prejudice, rather than a countermajoritarian remedy to abuses against minority groups.<sup>209</sup> Activists “framed the defeat as an appalling example of increasing discrimination against lesbians and gay men that needed to be challenged” and as an instance of state-sponsored, state-endorsed homophobia.<sup>210</sup> In response, large protests around the country channeled constituents’ outrage.<sup>211</sup> Advocates capitalized by making targeted fundraising pitches.<sup>212</sup> Boutcher documents a substantial increase in funding for LGBT organizations, including legal organizations, following the defeat in *Bowers*.<sup>213</sup>

More recently, this phenomenon emerged in the wake of marriage-equality losses in state supreme courts. For example, after the Washington Supreme Court overturned two lower-court decisions recognizing same-sex couples’ right to marry, Lambda Legal lawyers framed the defeat in a way that contextualized it historically to both reassure and motivate constituents. Jennifer Pizer, now Director of Lambda Legal’s Marriage Project, explained that her firm was “disappointed but not discouraged” and declared that “time is on our side.”<sup>214</sup> Relying on a model of “prophetic litigation,” Pizer announced that “[h]istory has shown that in cases of this magnitude the opinions of the dissenting justices later become the law of the land.”<sup>215</sup>

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209. See DUPUIS, *supra* note 97, at 162–63 (explaining that judges share the public’s biases and therefore cannot be expected to promote social change that runs counter to public sentiment); William B. Rubenstein, Essay, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89, 105 (1991) (“Yet in the end judges . . . share all of the biases and limitations of the public itself.”).

210. Boutcher, *Making Lemonade*, *supra* note 13, at 10; see also ANDERSEN, *supra* note 145, at 94–95 (describing Lambda Legal’s post-*Bowers* fundraising pitch: “There is no doubt that the Supreme Court’s decision last week will add new vigor to hate campaigns against us, including calls to enforce energetically the sodomy laws already on the books and efforts to reintroduce sodomy laws in the 25 states that are free from them at present.”).

211. See Boutcher, *Making Lemonade*, *supra* note 13, at 10; see also ANDERSEN, *supra* note 145, at 44 (“Lesbians and gay men were clearly angered by the Court’s ruling. Within hours of its announcement, small protests erupted in several cities across the nation.”); DUPUIS, *supra* note 97, at 24 (“The *Hardwick* case generated days of protests across the country mobilizing the gay and lesbian community.”).

212. See Boutcher, *Making Lemonade*, *supra* note 13, at 11 (describing a targeted fundraising campaign by the National Gay and Lesbian Task Force); see also ANDERSEN, *supra* note 145, at 45–46 (“Although there is no way to know for certain how much additional funding Lambda was able to leverage out of *Hardwick*, the threefold increase in individual contributions in 1986 compared to 1985 suggests that Lambda was reasonably successful in using a litigation defeat to mobilize support.”).

213. See Boutcher, *Making Lemonade*, *supra* note 13, at 11.

214. Press Release, Lambda Legal, Washington State Supreme Court Rules Against Marriage for Same-Sex Couples (July 26, 2006), [http://www.lambdalegal.org/news/pr/wa\\_20060726\\_wa-supreme-court-rules-against-marriage-for-same-sex-couples.html](http://www.lambdalegal.org/news/pr/wa_20060726_wa-supreme-court-rules-against-marriage-for-same-sex-couples.html).

215. *Id.*

Loss, rather than the litigation itself, crystallizes the deprivation of rights and the unequal treatment that the movement is fighting.<sup>216</sup> While later I discuss the image of courts as antimajoritarian, here the judicial pronouncement is portrayed as merely another instance of discriminatory and unfair treatment. Courts are not free of majoritarian biases, and often in LGBT-rights cases, courts explicitly rely on such biases to validate discriminatory treatment.<sup>217</sup> Pizer, for instance, characterized the dissent and the majority opinions in the Washington Supreme Court decision as illustrating “the struggle between fairness and discrimination,” respectively.<sup>218</sup> Indeed, in using the dissenting opinion to inspire and mobilize marriage-equality supporters, Pizer acts—in Guinier’s model of demosprudence-by-dissent—as a role-literate participant.<sup>219</sup>

Pizer ultimately struck at the more immediate consequences of the litigation loss by highlighting the continued work necessary to achieve change. She contextualized the decision within an analogy to the civil-rights movement, noting that when the California Supreme Court struck down the state’s anti-miscegenation law in 1948,<sup>220</sup> “lawsuits challenging such laws in 14 states had been unsuccessful . . .”<sup>221</sup> But, as Pizer explained, “[d]espite those setbacks, people whose rights were trampled did not give up. They pressed on to change public opinion, to secure legislative repeal of those laws to win in California and ultimately, 19 years later, to win before the U.S. Supreme Court.”<sup>222</sup> In this way, Pizer reassures her constituents that their cause will ultimately prevail, but she also urges them to continue to fight in the present day even in the face of unfair and unjust judicial decisions.

Moreover, she sends the clear message, consistent with a narrative of “prophetic litigation,” that the present injustice will be remedied by a later, more enlightened court. Tapping into this narrative serves an immediate movement-wide and organization-specific purpose as well: If lawyers will

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216. Although Meyer and Staggenborg do not distinguish between legal and political loss, they note that “[d]efeats, provided they are not completely devastating, also mobilize supporters by creating outrage or a sense of threat, while conclusive victories have a demobilizing effect.” Meyer & Staggenborg, *supra* note 93, at 1644–45.

217. See generally Clifford Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009) (documenting this biased treatment—with stereotypes specific to lesbians, on the one hand, and gay men, on the other—in the family-law domain); Eskridge, *supra* note 25, at 2195 n.653 (explaining the difficult process of convincing judges with the same prejudices against which the social movement is fighting). A high-profile example emerges from *Bowers*, which situated gay men as mere sex actors akin to other sex criminals. See *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986). A more recent example comes from Justice Scalia’s dissent in *Romer v. Evans*, 517 U.S. 620, 644–46 (1996) (Scalia, J., dissenting).

218. Press Release, Lambda Legal, *supra* note 214.

219. See Guinier, *supra* note 57, at 554; Guinier, *supra* note 10, at 62–63.

220. See *Perez v. Sharp*, 198 P.2d 17, 29 (Cal. 1948).

221. Press Release, Lambda Legal, *supra* note 214.

222. *Id.*

eventually be the ones to ensure that this injustice is remedied—as they did with the anti-miscegenation statutes Pizer recalls—lawyers from the movement need resources and support to continue to press for change.

In sum, movement leaders may use an official, published, and publicized instantiation of unfair treatment to raise consciousness and mobilize constituents. The loss (even if partial) sends a message that cannot be sent by litigation itself, and certainly not by litigation victory. Defeat announces that the fight must go on, that more resources are necessary, more citizens are required, and more time is needed. Advocates tap into a historical narrative of “prophetic litigation,” but they do so for immediate social movement purposes.

### B. EXTERNAL EFFECTS

In this Subpart, I shift the analysis from the effects of litigation loss within a movement to the effects advocates cultivate in relation to non-movement actors, including both state actors and the general public. Of course, internal and external movement effects are related.<sup>223</sup> Litigation loss might prompt a critical rethinking of movement strategy while simultaneously facilitating a more compelling message to the targets of that new strategy. For clarity, though, I separate internal from external effects.

First, I address how advocates might translate litigation loss into a revamped strategy aimed at new state players. Social movement lawyers do not, as Rosenberg might hope, simply turn away from courts. Instead, they turn to other lawmaking institutions, including other courts, and they appeal to these institutions by focusing on the demonstrated limits of court-centered change. Next, I examine how advocates use judicial defeat to appeal to the public. Here, they rely on courts’ countermajoritarian function and seize on the idea that this function runs afoul of appropriate processes of social change and undermines democratic legitimacy. Together these effects rely on a complex, dynamic framework of law and social change in which advocates operate in multiple lawmaking domains and use activity in one institutional setting to shape activity in others. The strategies deployed by advocates resonate with a model of multidimensional advocacy, in which social movement lawyers appreciate and seize on the multiple levers of power that populate a federal system of government.

#### 1. Appealing to Other State Actors

In the wake of a litigation loss, advocates might shift venues at the same time that they use the loss to render more compelling the appeal to decision makers in these new venues. This Subpart addresses two significant shifts: (1) shifts across levels of government, e.g., from federal to state-based

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223. McCann, for instance, explains that the “leveraging role to some degree represents the flip side of law’s role as a catalyst to movement building.” MCCANN, *supra* note 5, at 138.



activism and (2) shifts across branches of government, e.g., from courts to legislative and executive officials.

*a. Shifts Across Levels of Government*

Loss in the U.S. Supreme Court, or more generally in the federal courts, might prompt a reworked strategy that focuses on state-based venues. In this sense, litigation loss might lead to a critical rethinking of tactics that may ultimately yield a more robust and effective movement. More significantly, though, advocates may use the federal litigation loss to encourage players at the state level to act.<sup>224</sup> The loss itself may specifically aid the appeal to the targets of the new tactics. Furthermore, consistent with theories of state constitutionalism and interactive federalism, state constitutional interpretations that contravene analogous federal interpretations may contribute to eventual shifts in federal jurisprudence.<sup>225</sup> In this sense, a two-way street exists between the federal and state levels of government. The LGBT-rights movement again provides relevant examples.

After the Supreme Court loss in *Bowers*, LGBT-rights advocates were essentially shut out of federal court; it would be difficult to bring successful claims under the federal Constitution so long as it remained constitutional to criminalize the conduct that largely defined the group.<sup>226</sup> With little reason for optimism at the federal level, advocates reworked their strategy to focus on state-level actors.<sup>227</sup>

First, new state-based LGBT organizations emerged to develop novel strategies for overturning anti-sodomy laws.<sup>228</sup> Between the *Bowers* and

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224. I document this phenomenon in the LGBT-rights context, but examples exist across social-change campaigns. See, e.g., Justin R. Long, Essay, *Demosprudence, Interactive Federalism, and Twenty Years of Sheff v. O'Neill*, 42 CONN. L. REV. 585, 601–03 (2009) (describing the shift by civil-rights lawyers from federal- to state-constitutional litigation over educational rights).

225. See *id.* at 588 (“State constitutionalism . . . can and should function as a legal space for contesting the dominant federal interpretation of national norms.”); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000) (“[I]n acknowledging the value of dialogue, a state court not only honors the authority of its institutional role within the federal scheme, it also engages the U.S. Supreme Court in discourse about the interpretive possibilities inherent in [contested] constitutional provisions . . .”); Kahn, *supra* note 95, at 1166 (arguing that when a “state court interpret[s] American constitutionalism,” it fills a function that “accords with a longstanding justification of federalism under which state governments provide a forum for discussion, disagreement, and opposition to actions of the national government”).

226. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (“If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.”). But see *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

227. Douglas Reed argues that a more competitive and participatory, and less judge-centric, process of constitutional interpretation occurs at the state level as compared to the federal level. See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 875 (1999).

228. See Boutcher, *Making Lemonade*, *supra* note 13, at 10.

*Lawrence* decisions, at least twenty-one state advocacy organizations formed.<sup>229</sup> Some achieved legislative victories, convincing state lawmakers to repeal sodomy prohibitions.<sup>230</sup> These same organizations ultimately evolved into the massive Equality Federation, which today spearheads much of the state-based legislative advocacy on LGBT parenting rights and relationship recognition.<sup>231</sup>

Rosenberg's pessimistic account of litigation would endorse this institutional shift from federal courts to state legislatures.<sup>232</sup> Yet in pushing beyond courts in my analysis of law and social change, I do not want to suggest, as Rosenberg does, that litigation is "bad" and legislative advocacy is "good." Instead, my focus on litigation loss shows that sophisticated social movement lawyers engage in multidimensional advocacy that moves beyond, but not without, litigation.<sup>233</sup> Indeed, within a federal system of government, opportunities to achieve court-based reform exist on more than one scale. Advocates can achieve meaningful reform through litigation at the state level when, and often because, litigation has failed at the federal level. While federal, state, and local levels of government form a hierarchy in which constraints from above limit state and local action, state courts can at times shield their decisions from federal review, and LGBT-rights advocates have encouraged them to do so on significant issues.<sup>234</sup>

In the wake of the devastating loss in *Bowers*, a substantial amount of LGBT activism occurred in state courts.<sup>235</sup> Advocates were able to urge state

229. These include Equality California, Love Makes a Family (Connecticut), Equality Florida, Equality Illinois, Indiana Equality, Kentucky Fairness Alliance, Forum for Equality (Louisiana), Equality Maryland, Triangle Foundation (Michigan), Michigan Equality, Outfront Minnesota, New Jersey Lesbian & Gay Coalition, Equality New Mexico, Empire State Pride Agenda (New York), Equality North Carolina, Basic Rights Oregon, Equality Advocates Pennsylvania, Equality Utah, Outright Vermont, Equality Virginia, and Fair Wisconsin.

230. See Boutcher, *Making Lemonade*, *supra* note 13, at 12.

231. *Who We Are*, EQUALITY FED'N, <http://www.equalityfederation.org/template.aspx?id=3> (last visited Dec. 25, 2010).

232. See discussion *supra* Part III.A.

233. See Cummings & NeJaime, *supra* note 9, at 1317.

234. This move is consistent with the claims of state-constitutional scholars who see state courts as important parts of a national dialogue about American constitutional principles. See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 20 (2005) (explaining that state courts have "the authority to depart from federal precedent and to construe state constitutional rights provisions more broadly than the Supreme Court construes equivalent provisions of the federal Constitution"); Long, *supra* note 224, at 595 ("Given their capacity to insulate state constitutional holdings from U.S. Supreme Court review, state high courts enjoy a special power to resist the Supreme Court's tendency to shrink the national constitutional imagination."); Schapiro, *supra* note 96, at 249 ("[A] proper understanding of federalism and of the role of the dual judicial system in implementing federalism reveals important, untapped resources for the protection of individual rights.").

235. This includes litigation aimed at sodomy reform, parental rights, and relationship recognition. See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487, 488–92 (Ky. 1992) (sodomy

courts to protect lesbians and gay men since the U.S. Supreme Court was unwilling to do so, and the lower federal courts were constrained by this precedent. By focusing on independent state-law claims, LGBT-rights lawyers insulated positive decisions and secured significant reform for many constituents.<sup>236</sup>

In *Gryczan v. State*,<sup>237</sup> for example, lesbian and gay plaintiffs, with the help of Lambda Legal and the ACLU, sought to invalidate Montana's anti-sodomy statute.<sup>238</sup> The Montana Supreme Court ruled the statute unconstitutional based on state privacy grounds.<sup>239</sup> The *Bowers* decision made the court's intervention necessary, yet also provided a frame of reference with which to approach the claim. First, the reasoning by the *Bowers* majority furnished ways for the Montana court to view the case before it in a different light. The court distinguished the implicit privacy protection under the federal Constitution from the express provision in the Montana Constitution, and the court relied on the ability of the state's constitution to provide greater protection to its citizens than what was available under the U.S. Constitution.<sup>240</sup> As the majority opinion explained, "Regardless of whether *Bowers* was correctly decided, we have long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution."<sup>241</sup> State constitutional rights and state-court

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litigation); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995) (second-parent adoption litigation); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (relationship-recognition litigation).

236. See GARDNER, *supra* note 234, at 20 ("[U]nder the structure of our federal system, state constitutional law is jurisprudentially independent of federal constitutional law and need not follow or even acknowledge it."); SCHAPIRO, *supra* note 96, at 130 (explaining how after the U.S. Supreme Court found Georgia's anti-sodomy law constitutional in *Bowers* under the federal Constitution, the Georgia Supreme Court held that the same law violated Georgia's Due Process Clause); Eskridge, *supra* note 21, at 518 (arguing that *Bowers*' "damage is ameliorated by the aggressive review of sodomy laws by state courts under state constitutions"). Furthermore, the shift to state courts, which by definition are more locally oriented venues, might help overcome a key constraint faced by courts. Given judges' responsiveness to legislative and community preferences, this shift might see judicial decisions more protective of LGBT rights where elite and popular support for such rights exists *at the state level*. Cf. Gerken, *supra* note 124, at 1782-91 (exploring the relationship between federalism and the power of "dissenting by deciding"). In other words, a judicial decision by the Connecticut Supreme Court declaring same-sex couples' right to marry under the Connecticut Constitution would meet with less resistance than a U.S. Supreme Court decision declaring same-sex couples' nationwide right to marry under the federal Constitution. Compare the relatively smooth implementation of the Connecticut Supreme Court's decision in *Kerrigan v. Department of Public Health*, 957 A.2d 407 (Conn. 2008), with the serious concerns surrounding the countermobilization that a favorable Supreme Court decision in the pending *Perry v. Schwarzenegger* litigation would yield. See, e.g., Douglas NeJaime, *Gay Rights: The Ups and Downs of Going Mainstream*, JURIST (July 14, 2009), <http://jurist.law.pitt.edu/forumy/2009/07/gay-rights-ups-and-downs-of-going.php>.

237. 942 P.2d 112 (Mont. 1997).

238. See *id.* at 115.

239. See *id.* at 125-26.

240. See *id.* at 121-22.

241. *Id.* at 121.

precedent (insulated from federal review) made space for a pro-gay decision that governing federal law rendered impossible in the federal courts. Next, Justice Blackmun's dissent in *Bowers* furnished the Montana Supreme Court with an important counterpoint to legitimize its contrary decision. The court endorsed Justice Blackmun's view that "*Bowers* was not about the right to engage in homosexual sodomy, but rather it was about 'the right to be let alone.'"<sup>242</sup>

Of the eleven states that decriminalized sodomy after *Bowers*, eight, including Montana, did so through the courts.<sup>243</sup> Not only did state-court activism result in on-the-ground victories, but it also laid the groundwork for *Lawrence v. Texas*, in which the U.S. Supreme Court ultimately overruled *Bowers* and held anti-sodomy statutes unconstitutional under the federal Constitution.<sup>244</sup> In *Lawrence*, Justice Kennedy, writing for the majority, noted the emerging consensus against sodomy restrictions among the states.<sup>245</sup> Even though state-court decisions overturning sodomy restrictions relied on state constitutional guarantees, they expressed disagreement with *Bowers* and provided a pro-gay reading of equal-protection and due-process principles that, at least indirectly, commented on the appropriate understanding of federal constitutional protections.<sup>246</sup> In the end, the significant shifts at the state level affected the later framing of the issue and the outcome of eventual litigation at the federal level.<sup>247</sup>

More generally, shifting attention to state courts and state constitutions allowed LGBT-rights advocates to secure advances while also laying

<sup>242</sup>. *Id.*

<sup>243</sup>. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001); see also ANDERSEN, *supra* note 145, at 100-01 (noting the "utility of a state-by-state approach to eradicating sodomy laws" in the wake of *Bowers*). Even the Georgia Supreme Court struck down the same anti-sodomy law upheld in *Bowers*. See *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (holding that the state constitutional guarantee of privacy prohibits criminalization of private, consensual, noncommercial sex).

<sup>244</sup>. See *Boutcher, Making Lemonade*, *supra* note 13, at 12.

<sup>245</sup>. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) ("In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct."); see also ANDERSEN, *supra* note 145, at 140-41 ("By turning to state constitutional claims, Lambda and its colleagues were able to continue chipping away at state sodomy laws. The reduction in the number of states with sodomy laws in turn undermined the 'majoritarian morality' claim that served as a basis for the ruling in *Bowers*.").

<sup>246</sup>. This federal-state interaction is consistent with state-constitutional scholars' claims that "state constitutional jurisprudence can usefully function as a site of resistance to federal constitutional interpretations." Long, *supra* note 224, at 588.

<sup>247</sup>. See Post & Siegel, *supra* note 10, at 382 ("Although [state court decisions on marriage equality] are, as a matter of legal doctrine, irrelevant to the interpretation of the federal Constitution, state court opinions about state law are venues within which national values are continually contested and reshaped.").

groundwork for future state-law issues. Two movement priorities—relationship recognition and parenting rights—are largely state-law questions. The shift that occurred in the wake of the loss in *Bowers* was crucial to future successes at the state level in these emerging policy areas, as courts became more familiar with the multiple forms of discrimination faced by lesbians and gay men and built case law on which to base favorable decisions.

For example, the Montana state court's rejection of the state's anti-sodomy law established an important foundation for a future relationship-recognition case. In *Snetsinger v. Montana University System*, university employees and their same-sex partners, again with the help of Lambda Legal and the ACLU, sued for domestic-partner health-insurance coverage.<sup>248</sup> The state supreme court ruled unconstitutional the university system's policy allowing different-sex couples in "common law" marriages to access insurance benefits while denying those same benefits to same-sex couples.<sup>249</sup> In doing so, the court again distinguished federal and state constitutional protections, noting that the Montana Constitution "provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution."<sup>250</sup>

Moreover, the court relied significantly on the former Chief Justice's reasoning in *Gryczan*, in which he explained that he would have invalidated the anti-sodomy law on equal-protection grounds because it distinguished between same-sex and different-sex sexual activity.<sup>251</sup> Turning to that concurring opinion, the court reasoned:

As former Chief Justice Turnage recognized in his concurrence in [*Gryczan*], when the State criminalizes sexual acts between persons of the same-sex [sic] and decriminalizes the same sexual conduct engaged in by opposite-sex couples, it is "[c]learly . . . a denial of the constitutional guarantee of equal protection of the law in violation of . . . Article II, Section 4 of the Montana Constitution." Similarly, the University System's policy of denying health benefits to unmarried same-sex couples while granting the benefits to unmarried opposite-sex couples results in a denial of equal protection.<sup>252</sup>

Perhaps encouraged by Justice Nelson's concurring opinion in *Snetsinger*, in which he relied extensively on *Gryczan* to argue that lesbians and gay men deserve far more protection under the Montana Constitution

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248. See 2004 MT 390, ¶ 1, 325 Mont. 148, 104 P.3d 445.

249. See *id.* ¶ 31.

250. *Id.* ¶ 15.

251. See *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997) (Turnage, C.J., concurring in judgment).

252. *Snetsinger*, ¶ 27.

than they currently receive,<sup>253</sup> the ACLU recently returned to the Montana state courts in pursuit of state-based domestic-partner benefits for same-sex couples.<sup>254</sup> In their complaint, the lawyers drew on pro-gay application of state constitutional principles by the Montana Supreme Court, including the favorable sodomy, relationship, and parenting decisions issued in the years after *Bowers*.<sup>255</sup> In a variation on the dynamic I have explored in this Subpart, the lawyers argued that legislative failure—the Montana legislature’s repeated rejection of relationship-recognition bills—highlights the need for judicial action.<sup>256</sup>

In significant ways, the state sodomy challenge in *Gryczan* familiarized the state courts with discrimination faced by lesbians and gay men and provided state-law precedent on which to base *Snetsinger*’s more protective holding. Together, these cases have created a favorable environment for the ACLU’s pending relationship-recognition litigation. This precise chain of events would not have occurred in the absence of the movement’s loss in *Bowers*, which prompted social movement advocates to seize on the *Bowers* Court’s failure in framing their demands to the Montana state courts.<sup>257</sup>

The decades-long fight against Florida’s blanket ban on adoption by lesbians and gay men<sup>258</sup> provides a more recent illustration of the shift from federal to state venues and the use of federal litigation loss to advocate in these new venues. In the early 1990s, LGBT-rights advocates pursued state litigation aimed at invalidating the Florida law. While they experienced mixed results at the trial-court level, the Florida Supreme Court ultimately refused to overturn the ban.<sup>259</sup> But after the larger movement’s success in

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253. See *id.* ¶¶ 96–100 (Nelson, J., concurring).

254. See Complaint, *Donaldson v. Montana*, No. BDV-2010-702 (Mont. Dist. Ct. filed July 22, 2010), available at <http://www.aclu.org/files/assets/2010-7-22-DonaldsonvMontana-Complaint.pdf>.

255. See *id.* at 13, 16–19.

256. See *id.* at 12, 13.

257. Even beyond anti-sodomy litigation, the turn to state courts proved important to gradual progress on a number of state-law fronts. A decision on one question favorable to the gay-rights cause would build a foundation upon which to construct future cases. See, e.g., Patricia J. Woods & Scott W. Barclay, *Cause Lawyers As Legal Innovators with and Against the State: Symbiosis or Opposition?*, 45 *STUD. L. POL. & SOC’Y* 203, 219 (2008) (explaining how involvement in an earlier parenting case familiarized cause lawyers in the Vermont marriage litigation with the state supreme court, giving them the ability to gauge the proper time to bring the case). For instance, in *Lewis v. Harris*, the New Jersey Supreme Court found that the exclusion of same-sex couples from the rights and benefits of marriage violated the state constitution, and in doing so, the court relied on earlier state-court decisions recognizing the parental rights of lesbians and gay men. 908 A.2d 196, 213 (N.J. 2006). Indeed, the court concluded that “[t]here is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children . . . and yet denying those children the financial and social benefits and privileges available to children in heterosexual households.” *Id.* at 218.

258. FLA. STAT. § 63.042 (2003).

259. See *Cox v. Fla. Dep’t of Health & Rehabilitative Servs.*, 656 So. 2d 902 (Fla. 1995) (affirming the appellate court’s holding that the adoption ban did not violate constitutional

*Lawrence*, Florida advocates had new and compelling federal case law on which to build a federal challenge to the ban. To these advocates' dismay, the Eleventh Circuit Court of Appeals, in *Lofton v. Secretary of the Department of Children & Family Services*,<sup>260</sup> rejected the challenge and held that the ban was rationally related to legitimate governmental interests.<sup>261</sup> The U.S. Supreme Court denied certiorari.<sup>262</sup> Advocates then faced the prospect of returning to state venues in an attempt to overturn the law.

During the *Lofton* litigation, advocates did not pursue state legislative efforts to repeal the adoption ban. Lawyers leading the federal-court challenge advised against such activism, instead seeking to preserve their argument that the ban represented a 1970s-era law that garnered little modern support.<sup>263</sup> In this sense, advocates sought to deliberately isolate courts based on their understanding of courts' relationship to other lawmaking institutions and, more specifically, courts' reluctance to contravene expressed legislative preferences. After the loss in *Lofton*, however, advocates had exhausted federal-court avenues and had to refocus on state-based legal and political channels.

While the *Lofton* opinion evidenced bias toward lesbian and gay parents, the court framed its decision as an act of deference to the legislature. Applying a standard of review that was extremely deferential to legislative decision making,<sup>264</sup> the court concluded that "any argument that the Florida legislature was misguided in its decision is one of legislative policy, not constitutional law."<sup>265</sup> With this sentiment, the court demonstrated a key constraint identified by Rosenberg—judicial resistance to undermining legislative preferences and to interpreting constitutional rights (and precedent) in an expansive way.<sup>266</sup> But movement advocates seized on this constraint to demand legislative reform. In the wake of *Lofton*, Equality Florida, a state-based LGBT-rights legislative-advocacy organization, urged

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guarantees of privacy and was not unconstitutionally vague, but remanding the case for further proceedings to determine whether the law could withstand rational-basis review for equal-protection purposes); see also Leslie Cooper, *Victory for Florida Family First Step to Ending Adoption Ban, Annual Update*, AM. C.L. UNION (July 17, 2009), [http://www.aclu.org/hiv-aids\\_lgbt-rights/annual-update-2009-parenting](http://www.aclu.org/hiv-aids_lgbt-rights/annual-update-2009-parenting).

260. 358 F.3d 804 (11th Cir. 2004).

261. See *id.* at 818–20.

262. *Lofton v. Sec., Fla. Dept. of Children & Family Servs.*, 543 U.S. 1081 (2005).

263. Telephone Interview with Nadine Smith, Exec. Dir., Equality Fla. (Apr. 7, 2009) (notes on file with author). The precursor organization to Equality Florida was founded in 1987 in the aftermath of the Washington, D.C. gay-rights march that was itself a response to the *Bowers* loss. The original Tampa-based local group eventually grew into a state-wide organization and became Equality Florida in 1997. *Id.*

264. See *Lofton*, 358 F.3d at 818.

265. *Id.* at 827.

266. See ROSENBERG, *supra* note 1, at 10–15.

legislators to act and eventually obtained its first legislative hearing on repealing the adoption ban.<sup>267</sup>

The loss in *Lofton* provided a particularly compelling case in the state legislative arena and in the domain of public opinion. The case portrayed loving, close-knit families and unselfish parents who provided a stable home life for children with pressing medical and emotional needs.<sup>268</sup> While the litigation process facilitated this depiction, the litigation loss itself provided a powerful new dimension by threatening the destruction of these loving, stable families. By upholding the general ban, denying permanency to these families, and leaving them vulnerable to dissolution, the court helped to create an image of an unforgiving, unfair, and illogical law that, while seeking to help the state's most vulnerable children, actually undermined those children's well-being. The loss, rather than the mere act of litigation, highlighted the gravity of this injustice.<sup>269</sup> The judicial decision threatened the physical break-up of the plaintiff families and put the state's coercive power behind the statute.

Post-*Lofton*, advocates were able to frame legislative demands based on emotional pleas for *particular children's* best interests.<sup>270</sup> The *Lofton* court made the law concrete by enforcing it against specific children—special-needs children with loving, committed caretakers seeking to adopt them. Nadine Smith, Executive Director of Equality Florida, explains that legislators who support the ban are unable to defend the law when confronted with the prospect of removing a specific, vulnerable, dependent child from that child's long-term foster parents or legal guardians.<sup>271</sup> In other words, legislators supportive of the ban remain uncomfortable doing what the *Lofton* court essentially ordered and have a more difficult time making their case when confronted with the facts and all-too-real ramifications of the decision.

While legislative work failed to achieve repeal of the adoption ban, activism in the state courts continued to work in conjunction with state legislative efforts. Just as LGBT-rights lawyers took their state-law claims to state courts in the wake of *Bowers*, LGBT-rights lawyers in Florida turned to state-court judges, urging them to use state-law grounds, some of which the

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267. See Telephone Interview with Nadine Smith, *supra* note 263.

268. See *Lofton*, 358 F.3d at 807–08.

269. Telephone Interview with Nadine Smith, *supra* note 263.

270. See *Gay Adoption Update*, AM. C.L. UNION OF FLA., [http://www.aclufl.org/news\\_events/alert\\_archive/index.cfm?action=viewRelease&emailAlertID=1668](http://www.aclufl.org/news_events/alert_archive/index.cfm?action=viewRelease&emailAlertID=1668) (last visited Jan. 12, 2011) (describing testimony to the Florida Senate committee considering the bill to allow adoption by lesbians and gay men: “Franke Alexander, 18, forced to leave his home, his brothers and sisters, and his foster fathers who had raised him since he was only a few months old, led the press conference and the committee meeting. He put a face on the message the coalition was trying to convey: This is a bill about children.”).

271. Telephone Interview with Nadine Smith, *supra* note 263.



Florida Supreme Court had not considered,<sup>272</sup> to remedy the injustice perpetrated by *Lofton*.<sup>273</sup>

In 2008, two trial-court judges invalidated the ban,<sup>274</sup> and the Florida Court of Appeal recently affirmed one of those decisions.<sup>275</sup> At the trial-court level, Judge Cindy Lederman relied on novel state-law grounds, finding that the law violated children's right to permanency as expressed in Florida's statutory regulations on adoption.<sup>276</sup> Then, in accepting the equal-protection claim, Judge Lederman situated *Lofton* as out of date, given the volume of intervening studies on the effects of sexual orientation on parenting.<sup>277</sup> Rather than view *Lofton* as controlling on the equal-protection analysis, Judge Lederman explained that the issue of whether Florida's adoption ban violates equal-protection guarantees, whether under the state or federal constitution, "is again ripe for consideration."<sup>278</sup> The state court staked out an independent role, at the urging of social movement lawyers, in the ongoing interpretation and articulation of general constitutional guarantees, and offered a compelling counternarrative to the federal court's earlier reasoning.<sup>279</sup>

In affirming Judge Lederman's ruling, the Florida District Court of Appeal relied exclusively on state equal-protection grounds.<sup>280</sup> After explaining that the Florida Supreme Court left open the equal-protection issue in its 1995 decision, the court found no rational basis for the discriminatory treatment of lesbians and gay men in the adoption context.<sup>281</sup> Florida Governor Charlie Crist responded to the appellate court ruling by announcing that the state would stop enforcing the discriminatory law,<sup>282</sup> and the Florida Department of Children and Families made clear that it would not appeal the ruling.<sup>283</sup> In response, Attorney General Bill McCollum, a supporter of the ban, announced that he would not ask the

272. See *Cox v. Fla. Dep't of Health and Rehabilitative Servs.*, 656 So. 2d 902 (Fla. 1995).

273. See Cooper, *supra* note 259 ("There were still some claims under the Florida Constitution that had not been decided by the Florida Supreme Court . . .").

274. See *In re Adoption of John Doe & James Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008); *In re Adoption of John Doe*, 2008 WL 5070056 (Fla. Cir. Ct. Aug. 29, 2008).

275. See *In re Adoption of X.X.G. & N.R.G.*, Case No. 3D08-3044, 2010 WL 3655782, at \*11 (Fla. Dist. Ct. App. Sept. 22, 2010).

276. See *In re Adoption of John Doe & James Doe*, 2008 WL 5006172, at \*25.

277. See *id.* at \*20.

278. *Id.*

279. See Long, *supra* note 224, at 595 ("[S]tate high courts can and do serve as sites of contestation over deep national values.").

280. See *In re Adoption of X.X.G. & N.R.G.*, 2010 WL 3655782, at \*17.

281. See *id.* at \*9-10, \*17.

282. See Carol Marbin Miller, *Ruling To Change Family Dynamic*, MIAMI HERALD, Sept. 23, 2010, at A1.

283. See Mary Ellen Klas & Mimi Whitefield, *State Won't Appeal Ruling*, MIAMI HERALD, Oct. 23, 2010, at B3.

state supreme court to consider the case.<sup>284</sup> While McCollum left open the possibility of future litigation by insisting that “a more suitable case will give the [Florida] Supreme Court the opportunity to uphold the constitutionality of this law,” LGBT-rights advocates hailed the end of the adoption ban.<sup>285</sup>

*b. Shifts Across Branches of Government*

In addition to shifts across levels of government, advocates use litigation loss to shape shifts across branches of government. Indeed, the move from courts to legislatures features prominently in the accounts of post-*Bowers* and post-*Lofton* advocacy detailed above. While the shifts across levels and branches of government are in many ways inseparable, both working together within a model of multidimensional advocacy, in this Subpart I focus primarily on the move across institutional branches. I detail the way in which litigation loss, whether at the federal or state level, may prompt a shift to a more legislative or administrative strategy while also providing a useful way to communicate the need for action in these venues.

By demonstrating the unwillingness of courts to bring about change, litigation loss highlights the importance of action by elected officials and thereby brings a new sense of urgency to what Rosenberg sees as more “political” efforts.<sup>286</sup> But unlike Rosenberg, I do not suggest that strategies aimed at nonjudicial actors are preferable to litigation tactics. Instead, I argue that such strategies work in conjunction with litigation and often derive meaning from failed litigation.

This understanding of litigation loss fits within a dynamic view of law and social change in which lawmaking institutions assume varying degrees of responsibility for reform, depending on what they expect from other governmental branches. Political-science scholarship has shown that elected officials often do not act on controversial issues when they hope that courts will address them.<sup>287</sup> But once the courts refuse to order change (and often recast the issue as one for the legislature, as in *Lofton*), advocates may shift pressure to act back to elected officials. By exposing and focusing on the constraints of courts and the limits of litigation strategies, advocates may provide a more compelling plea for action by nonjudicial actors. In this way,

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<sup>284.</sup> See *id.*

<sup>285.</sup> *Id.*

<sup>286.</sup> See ROSENBERG, *supra* note 1, at 427 (arguing that court-based strategies “limit change by deflecting claims from substantive political battles, where success is possible, to harmless legal ones where it is not”).

<sup>287.</sup> See Scott Barclay, *In Search of Judicial Activism in the Same-Sex Marriage Cases: Sorting the Evidence from Courts, Legislatures, Initiatives and Amendments*, 8 PERSP. ON POL. 111, 116 (2010); see also BURNS, *supra* note 199, at 12 (explaining how legislatures have stepped aside for courts on abortion issues); GEORGE LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 9 (2003) (discussing how legislators will empower judges when the legislators have conflicting demands).

actions in one lawmaking domain consistently shape, and are shaped by, actions in another.

The women's-rights movement, in which legal defeats have spurred legislative reform, provides a useful starting point. Elizabeth Schneider shows how after women's-rights advocates failed to convince the Supreme Court to treat pregnancy discrimination as a sex-equality issue, Congress passed the Pregnancy Discrimination Act, which adopted the exact legal arguments advocates had made in court.<sup>288</sup> In her work on demosprudence, Guinier documents the pay-equity issue as a more recent example from the women's-rights movement. After *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>289</sup> in which the Supreme Court rejected an equal-pay claim under Title VII based on a constrained reading of filing deadlines, Congress and the President acted quickly to remedy the issue.<sup>290</sup> Movement advocates successfully demonstrated that the Court's failure to recognize the employment-based injustice necessitated legislative and executive action.<sup>291</sup> Justice Ginsburg's dissent, upon which advocates seized, articulated the discrimination experienced by women (and legitimized by the majority) and emphasized the need for a legislative response.<sup>292</sup> While in both of these instances advocates would have preferred to prevail in court, they were able to positively use the litigation losses to achieve the movement's goals by other means.

The LGBT-rights movement provides another useful contemporary example. In states where courts have rejected marriage-equality claims, movement advocates pressure state legislative and executive branches as the only avenues for necessary reform. The fight for marriage equality in New York demonstrates the way in which a litigation loss—this time at the state-

288. See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 641 (1986).

289. 550 U.S. 618 (2007) (holding that a female employee did not meet the filing deadline for her Title VII claim because the 180-day period started when she first received her paycheck, even though she was unaware of the discrimination at the time).

290. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. The law was the first act of Congress signed by President Obama after his inauguration. See *Remarks by the President upon Signing the Lilly Ledbetter Bill*, WHITE HOUSE (Jan. 29, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-upon-signing-lilly-ledbetter-bill>.

291. See, e.g., Press Release, ACLU, ACLU Pushes for Passage of Ledbetter Fair Pay Act (Jan. 14, 2009), <http://www.aclu.org/womensrights/employ/38331prs20090114.html> ("The legislation, S. 181, the Lilly Ledbetter Fair Pay Act, would restore rights taken away by a 2007 Supreme Court case, *Ledbetter v. Goodyear*, which in most instances denies workers remedies for ongoing wage discrimination. 'The Ledbetter case virtually immunized employers from wage discrimination,' said Caroline Fredrickson, director of the ACLU Washington Legislative Office. 'This case ignores the realities of the workplace.'").

292. See Guinier, *supra* note 57, at 542; see also Timothy R. Johnson, Ryan C. Black & Eve M. Ringmuth, *Hear Me Roar: What Provokes Supreme Court Justices To Dissent from the Bench?*, 93 MINN. L. REV. 1560, 1581 (2009) (finding that Justices "use their dissents to signal litigants and other actors . . . that the decision is a bad one and someone must act to change it").

court level in *Hernandez v. Robles*<sup>293</sup>—leads to a reworked litigation strategy and a more robust legislative and administrative effort. After losing a high-profile marriage challenge in New York, Lambda Legal lawyers carefully framed the defeat:

The high court's decision puts the responsibility to grant marriage equality in New York squarely in the hands of the state legislature and the court of public opinion. Lambda Legal's marriage case helped move public opinion forward significantly by showing the hardships couples face when they are denied the rights, responsibilities and protections of marriage. This is important groundwork as we enter the next stage of the battle.<sup>294</sup>

The public-opinion effects sprung mostly from the litigation process, rather than from the litigation loss. In this sense, they replicate the effects observed by other legal mobilization scholars. The shift in responsibility from courts to the legislature, however, grew out of the loss itself.

When then-Governor Eliot Spitzer introduced a marriage-equality bill in 2007, Lambda Legal attorneys linked the legislative action to the lawsuit:

We expect the Legislature to give the marriage bill the full attention and serious deliberation it deserves. Over the course of our lawsuit on behalf of same-sex couples in New York who sought to marry, we met heterosexual New Yorkers throughout the state who were moved by our clients' experiences and came to see that it is only fair that loving, committed same-sex couples have the same opportunity to marry as others enjoy. . . . It is high time that New York value all families who choose to call New York home by passing this bill.<sup>295</sup>

Again, the lawsuit highlighted the discrimination faced by New York families, but the loss in court made legislative action and political appeals necessary. While the litigation laid important groundwork for activism in other venues, the loss itself defined the terms of the plea to other state actors.

The reconceptualization of the marriage strategy in New York has led to a strong multipronged initiative by Lambda Legal and other legal and nonlegal organizations. Together, advocates have created a compelling movement toward marriage equality by working with friendly executive and administrative officials willing to recognize marriages entered in states that

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293. 855 N.E.2d 1 (N.Y. 2006).

294. *Hernandez v. Robles*, LAMBDA LEGAL (Mar. 5, 2004), <http://www.lambdalegal.org/our-work/in-court/cases/hernandez-v-robles.html>.

295. Press Release, Lambda Legal, Lambda Legal Lauds Governor Spitzer's Bill Opening Marriage to Same-Sex Couples in New York (Apr. 27, 2007), <http://www.lambdalegal.org/news/pr/lambda-legal-lauds-governor.html> (quoting Susan Sommer, Lambda Legal's Senior Counsel).

allow same-sex couples to marry.<sup>296</sup> Lower courts have upheld such recognition, and the state's highest court has refused to disturb the lower courts' decisions.<sup>297</sup> These decisions place additional pressure on the legislature to adopt marriage-equality legislation.<sup>298</sup>

Interestingly, the loss in *Hernandez* might actually have moved LGBT-rights advocates closer to a model endorsed by Rosenberg. The loss largely shifted the battle out of court and into electoral politics and public opinion. The loss itself might have resulted in resource reallocation and coalition-building that would, in Rosenberg's view, create a more effective long-term strategy.<sup>299</sup> Indeed, this is an indirect effect of litigation unique to litigation loss and important to a social movement's trajectory.<sup>300</sup> Yet litigation remains an important, but partial, strategy. Advocates did not reject litigation. Instead, in the wake of their loss in court, advocates reconfigured their marriage-equality strategy such that litigation played a more peripheral, yet still significant, role and continued to shape tactical choices and movement demands made in other venues.

From the LGBT-rights perspective in the marriage-equality context, the use of litigation loss to shift responsibility for social change to elected

296. *Marriage Recognition for Same-Sex Couples in New York: Advances Outside of the Courtroom*, LAMBDA LEGAL, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/new-york-marriage-recognition-outside-courtroom.html> (last visited Dec. 26, 2010) ("In addition to its litigation, Lambda Legal has been working in a coalition of groups since 2003, when Canada began marrying same-sex couples from New York, to win respect for those couples' marriages in the public and private sector.").

297. See *Godfrey v. Spano*, 920 N.E.2d 328 (N.Y. 2009); *Marriage Recognition for Same-Sex Couples in New York: Advances in Court*, LAMBDA LEGAL, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/update-marriage-recognition-ny.html> (last updated Feb. 3, 2009) ("On May 14, 2008, the governor's office directed counsel for all state agencies to comply with the court decisions requiring respect for out-of-state marriages of same-sex couples. That directive sought enforcement of the law that had been clarified in three cases, including two Lambda Legal victories. When the directive was attacked in court, Lambda Legal intervened, and the court upheld the directive in *Golden v. Paterson*.").

298. Most recently, then-Governor David Paterson introduced a marriage-equality bill in the state legislature, but the state Senate rejected the bill in a bitter and divisive vote. See Jeremy W. Peters, *Governor To Submit Bill Legalizing Gay Marriage*, N.Y. TIMES, April 15, 2009, at A20; Jeremy W. Peters, *New York Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1.

299. See Meyer & Staggenborg, *supra* note 93, at 1645 (explaining that "when abortion rights forces won in the courts, antiabortionists shifted the battle to Congress . . . and to state and local governments," and also "took the battle to the realm of public relations . . . and later to the streets"); see also ANDERSEN, *supra* note 145, at 174 ("[L]egal and political opportunity do not always operate in tandem with respect to a given movement claim and . . . disadvantages in one system do not necessarily translate into disadvantages in the other."); Pedriana, *supra* note 203, at 196 ("[U]nfavorable legal decisions may reduce the likelihood that challengers will turn to courts and administrative agencies to achieve movement goals.").

300. See Meyer & Staggenborg, *supra* note 93, at 1648 ("The availability of additional institutional venues for action encourages movements suffering defeats to shift targets and arenas to sustain themselves.").

officials depends on an image of courts—consistent with Rosenberg's account—as, for the most part, conservative and committed to the status quo.<sup>301</sup> Courts, in this vision, are out-of-touch, backward-looking bodies, unnecessarily bound by anachronistic precedent, unable to catch up with new social realities, and unwilling to fulfill an important role in the process of policy formation.<sup>302</sup> Elected officials are asked to remedy the courts' failures by making policy changes in line with contemporary reality and changing social norms. This contrasts sharply with another useful depiction of courts' limitations—one in which courts are seen as “activist,” antimajoritarian, and too eager to disrupt the natural evolution of policy formation. I now turn to this competing depiction.

## 2. Appealing to the Public

Just as litigation victory may help a movement sell its cause to the public, litigation loss may ironically have a similar effect. This may depend on whether movement advocates are able to frame the judicial defeat as a contravention of majoritarian beliefs. If so, activists might mobilize popular support by constructing courts as countermajoritarian, elitist, and out of touch with mainstream society. Indeed, when courts fill an important role—protecting minorities from unfavorable treatment by the majority<sup>303</sup>—they might also produce opportunities for mobilization by opposing movement forces. This effect is consistent with Rosenberg's analysis of backlash to court decisions. Rosenberg notes that “those judicial opinions that seem most effective in mobilizing citizens are those that anger and outrage segments of the population who mobilize to prevent their implementation and overturn them.”<sup>304</sup>

Yet rather than situate backlash to court decisions as unique—i.e., as an institutionally specific response that demonstrates the ineffectiveness of litigation in comparison to legislative advocacy and direct action—I situate backlash to judicial decisions as just one form of countermobilization that

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301. See Rosenberg, *supra* note 119, at 578 (“[T]hose on the political left also have forgotten the historic role of the judiciary as a defender of the status quo and unequal distributions of power, wealth, and privilege.”); see also Rosenberg, *Courting Disaster*, *supra* note 76, at 795–96 (discussing how the courts have been both forces of progressive change and defenders of privilege).

302. See Eskridge, *supra* note 21, at 501 (arguing that if the Supreme Court does not “become part of the clean-up process” once a formerly stigmatized trait is deemed neutral or benign, and instead “were to uphold category discriminations the country was ashamed of, the Court would face strong criticism and short-or-medium-term political pressure to conform”).

303. See, e.g., HANDLER, *supra* note 1, at 22 (“It is because social-reform groups lack the power to seek their demands through the normal political processes or through direct action that they turn to the legal system for help.”).

304. Rosenberg, *supra* note 119, at 575.

occurs in the wake of movement advances.<sup>305</sup> Christian Right advocates have used the ballot-initiative process to turn back LGBT gains deriving from all branches of government.<sup>306</sup> Indeed, LGBT-rights lawyers themselves understand backlash to judicial decisions as part of this broader movement-countermovement phenomenon.<sup>307</sup>

Here again, I rely on a key constraint of courts that Rosenberg identifies, but I do not take this constraint as evidence of the ineffectiveness of court-centered strategies as compared to other tactics. Rather, I argue that this constraint has cultural currency in a way that allows social movement advocates to seize on it as part of an attempt to mobilize popular support. In the wake of a litigation loss in which the court's decision can be effectively (even if not accurately) characterized as countermajoritarian, social movement advocates may use that loss to demonstrate the need for action through other lawmaking channels. This tactic has been especially effective when advocates urge the public to use the initiative process to overturn a judicial decision. A prime example emerges from Christian Right advocates' successful campaign to amend the California Constitution to prohibit marriage for same-sex couples.

In 2004, in the wake of the Massachusetts Supreme Judicial Court decision opening marriage to same-sex couples and President Bush's response calling for a federal marriage amendment, San Francisco Mayor Gavin Newsom ordered clerks to issue marriage licenses to same-sex couples in his city.<sup>308</sup> The California Attorney General and two social-conservative organizations—the Proposition 22 Legal Defense and Education Fund and the Campaign for California Families—sought an injunction against Mayor Newsom in state court.<sup>309</sup> Advocates on both sides sought constitutional

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305. See Schacter, *supra* note 94, at 1158; see also Eskridge, *supra* note 21, at 520 (arguing that *Roe* is not responsible for the pro-life movement since "any substantial success on the part of the pro-choice movement would have triggered a strong countermovement"); Guinier, *supra* note 10, at 130–31 ("[B]acklash is seen as a predictable or at least unsurprising dynamic in the ongoing conversation between the Court and the people."); Long, *supra* note 224, at 591–92 (explaining that a less court-centric view of law situates backlash to Supreme Court decisions as illustrative of "the mutually influential relationship between grassroots politics and Court decisions"); Post & Siegel, *supra* note 10, at 382–83 ("[B]acklash can be understood as one of many practices of norm contestation through which the public seeks to influence the content of constitutional law.").

306. Keck, *supra* note 7, at 179, 180; see also Donald P. Haider-Markel, Alana Querze & Kara Lindaman, *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304 (2007) (showing that minority groups are more likely to lose in the process of "direct democracy").

307. See Bonauto, *supra* note 133, at 65.

308. For a detailed summary of Mayor Newsom's actions, see Sylvia A. Law, *Who Gets To Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 5–7 (2007).

309. See Proposition 22 Legal Def. & Educ. Fund v. City of S.F., No. 503943 (Cal. Super. Ct. 2004); Thomasson v. Newsom, No. 428794 (Cal. Super. Ct. 2004); Lockyer v. City of S.F., No. S122923, 2004 WL 473257 (Cal. Mar. 11, 2004).

resolution of the question of marriage for same-sex couples.<sup>310</sup> In 2005, the California Supreme Court enjoined Mayor Newsom and ruled invalid the marriages licensed up to that point.<sup>311</sup>

The court, however, did not decide the constitutional question,<sup>312</sup> prompting LGBT-rights organizations, Christian Right organizations, and state- and local-government entities to litigate the issue up the appellate chain in consolidated cases.<sup>313</sup> In these cases, two prominent Christian Right legal organizations, ADF and Liberty Counsel, represented the Proposition 22 Legal Defense and Education Fund and the Campaign for California Families, respectively.<sup>314</sup> In May 2008, the California Supreme Court ruled the statutory prohibition on marriage for same-sex couples unconstitutional.<sup>315</sup>

Proposition 8, which proposed to amend the California Constitution to prohibit marriage for same-sex couples, appeared on the November 2008 ballot.<sup>316</sup> Yet the campaign to amend the state constitution actually started in 2003, long before the California Supreme Court decided the issue.<sup>317</sup> Nonetheless, Christian Right advocates, fueled by the court loss, were able to frame Proposition 8 as a necessary and immediate response to a countermajoritarian judiciary. The litigation defeat raised the salience of the issue and lent the campaign a new sense of urgency and legitimacy, helping advocates raise more than \$40 million to fund the Proposition 8 effort.<sup>318</sup>

But while the litigation loss resonates with many of the internal movement effects addressed in Part IV.A.2., for purposes of this discussion I am concerned primarily with the way in which advocates framed the loss to the public—those outside their organized movement—and thereby helped

310. Brief of Appellant at 2, *Proposition 22 Legal Def. & Educ. Fund v. City of S.F.*, No. 503-943 (Cal. Ct. App. Oct. 25, 2005), available at <http://www.nclrights.org/site/DocServer/20051024Prop22Prop22OpeningBriefAppeal.pdf?docID=1851>; Cross-Complaint for Declaratory Relief for Appellee at 5, *Proposition 22 Legal Def. & Educ. Fund*, No. 503-943.

311. See *Lockyer v. City of S.F.*, 95 P.3d 459 (Cal. 2004).

312. See *id.* at 464.

313. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

314. See *id.* at 388–89.

315. See *id.* at 402.

316. Voters approved Proposition 8 by a 52% to 48% margin and thereby amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5. For a discussion of the events surrounding Proposition 8, see Cummings & NeJaime, *supra* note 9, at 1293–303.

317. Jesse McKinley, *California Ruling on Same-Sex Marriage Fuels a Battle, Rather Than Ending It*, N.Y. TIMES, May 18, 2008, at A18.

318. *Campaign Finance: ProtectMarriage.com—Yes on 8, A Project of California Renewal*, CAL. SEC’y OF STATE, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007> (last visited Jan. 12, 2011). Legal advocates assumed primary roles in using the decision for fundraising appeals. Mere hours after the court issued its ruling, Liberty Counsel’s Matthew Staver had already begun personally fundraising in an effort to overturn the decision. McKinley, *supra* note 317.



to secure Proposition 8's relatively narrow passage. It is important to keep in mind that both lawyer and nonlawyer activists used the litigation loss for political messaging. While nonlawyers spearheaded the Proposition 8 effort, Christian Right lawyers worked to frame the court's decision and actively participated in the campaign. This is consistent with a model of multidimensional advocacy, in which cause lawyers work closely with nonlawyer advocates to construct and implement a coherent strategy across a number of institutional fronts.<sup>319</sup>

First, advocates wasted no time in framing the court's decision as "judicial activism," with all of the negative connotations that term has come to carry.<sup>320</sup> Jay Sekulow, the head of ACLJ, which participated in the litigation, announced that "the California marriage decision underscores the growing problem of an activist judiciary."<sup>321</sup> Using more colorful language, Gary Bauer, the president of American Values, referred to the justices in the majority as "unelected robed radicals" and characterized the decision as "an egregious exercise in judicial activism—of judges wielding raw political power to redefine our most basic values."<sup>322</sup> Similarly, former chief counsel for Concerned Women of America, Jan LaRue, referred to the justices in the majority as "black-robed despots."<sup>323</sup>

By striking down Proposition 22—an initiative approved by voters in 2000 that had provided an additional statutory basis for the state's marriage restriction—the justices in the majority became symbols of an elite, secular class ruling without regard for popular will. In a press release, ADF Senior Counsel Glen Lavy explained that the court "ignore[d] the will of the people of California who . . . realize that defining marriage as one man and one woman is important."<sup>324</sup> Putting it more strongly, Barrett Duke of the Southern Baptist Convention declared, "These judges may think they know more about marriage than the rest of us, but I am confident they don't know more about marriage than God."<sup>325</sup> Movement leaders attempted to

319. See Cummings & NeJaime, *supra* note 9, at 1265–66 (describing the cooperation among LGBT-rights lawyers, legislative advocates, and legislators in drafting and passing domestic-partnership legislation in California).

320. See, e.g., ROSENBERG, *supra* note 1, at 425 ("[I]n contrast to legislative acts, it is easy to characterize a judicial decision as the result of a few 'activist' judges who don't share the public's beliefs and attitudes.").

321. Jay Sekulow, *Same-Sex Marriage in CA by 'Judicial Fiat'*, AM. CTR. FOR LAW & JUSTICE (May 16, 2008), <http://www.aclj.org/news/read.aspx?ID=2970>.

322. E-mail from Gary Bauer, American Values, to Friends & Supporters (May 16, 2008, 4:43:13 PM), available at <http://media.pfaw.org/Right/bauer-051608.htm>.

323. Jan LaRue, *Will Californians Submit?*, ONENEWSNOW (May 16, 2008, 9:45:00 AM), <http://www.onenewsnw.com/Perspectives/Default.aspx?id=118508>.

324. *Marriage Jeopardized After Calif. High Court Decision Unless Voters Approve Amendment*, ALLIANCE DEF. FUND [hereinafter ADF, *Marriage Jeopardized*], <http://www.alliancedefensefund.org/news/story.aspx?cid=4516> (last visited Jan. 12, 2011).

325. Michael Foust, *California Supreme Court Legalizes 'Gay Marriage'*, BAPTIST PRESS (May 15, 2008), <http://www.bpnews.net/BPnews.asp?ID=28057>.

cultivate outrage in segments of the population by depicting unaccountable judges rejecting many citizens' deeply felt moral and religious beliefs.<sup>326</sup>

Furthermore, advocates painted the court and the LGBT-rights movement as undemocratic and therefore un-American—a move that relies on the idea, articulated by Rosenberg and Klarman, that countermajoritarian court decisions disrupt the natural and appropriate process of social change.<sup>327</sup> For example, Bauer proclaimed that same-sex marriage advocates use “the most undemocratic methods possible”—relying “on political activists cloaked in black who answer to no one”—because they “cannot achieve [their] goals through the democratic process via the elected legislatures.”<sup>328</sup> Similarly, Lavy announced that the court, by refusing to stay its decision pending the Proposition 8 vote, allowed LGBT activists “to manipulate the democratic process.”<sup>329</sup> Proposition 8 advocates also highlighted this theme in the official ballot materials, which stated: “CALIFORNIANS HAVE NEVER VOTED FOR SAME-SEX MARRIAGE. If gay activists want to legalize gay marriage, they should put it on the ballot. Instead, they have gone behind the backs of voters and convinced four activist judges in San Francisco to redefine marriage for the rest of society.”<sup>330</sup> Proposition 8 proponents depicted judges and LGBT-rights advocates as both underhanded and elitist, seeking to reorder California society without popular support.<sup>331</sup>

Next, advocates positioned Proposition 8 as the remedy to the court's overreaching. The court's decision became the public impetus for the proposed amendment, even though the effort predated the legal ruling. As Lavy proclaimed, “The court's decision clearly demonstrates that marriage is not ultimately safe from tampering by activists and others in government until the voters have amended the constitution.”<sup>332</sup> The Proposition 8 vote would make clear, according to Lavy, that “[t]he courts report to the people, not the other way around.”<sup>333</sup>

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326. See ROSENBERG, *supra* note 1, at 426 (“To be told by an electorally unaccountable judge that deeply-held principles are wrong may outrage those who hold competing principles.”).

327. See *id.* at 425–26; Klarman, *Racial Change*, *supra* note 1, at 9.

328. E-mail from Gary Bauer to Friends & Supporters, *supra* note 322.

329. ADF: 4-to-3 Decision in Calif. a Vote for Nationwide Legal Chaos, ALLIANCE DEF. FUND (June 4, 2008) [hereinafter ADF, *Nationwide Legal Chaos*], <http://www.alliancedefensefund.org/news/story.aspx?cid=4547>.

330. *Proposition 8 Arguments*, CALIF. SEC'Y OF STATE 56 (Nov. 4, 2008), <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/pdf/prop8-a-and-r.pdf>.

331. See ROSENBERG, *supra* note 1, at 426 (“When judges make unpopular decisions, people may feel that their lives are being reordered without their input.”); see also Eskridge, *supra* note 21, at 520 (explaining that in the wake of *Roe*, “people objected that the issue had been taken away from the democratic process”).

332. ADF, *Marriage Jeopardized*, *supra* note 324.

333. ADF, *Nationwide Legal Chaos*, *supra* note 329.

In an insightful analysis, Melissa Murray details the “Yes on Prop 8” advertising campaign, explaining how one particularly powerful television advertisement juxtaposed Mayor Newsom with images of the four California Supreme Court justices in the majority to construct the countermajoritarian state.<sup>334</sup> As Murray puts it:

Now the rogue mayor has been joined by four rogue justices who willfully dismissed the wishes of four million California voters [who had voted for Proposition 22] and imposed same-sex marriage on an unwilling polity. The heavy-handed image of a banging gavel—literally the arm of the state—brings it all together in a striking visual tableau. The will of the people, the ad suggests, has been crushed by the state.<sup>335</sup>

While Murray focuses on the state as a more monolithic actor, the image of the justices is especially powerful in itself and comes to signify the countermajoritarian judiciary as presiding over the state’s entire population. Mayor Newsom, portrayed as a rogue official governing one city characterized as a liberal, out-of-touch enclave, is not nearly as threatening as the judicial body that announces the law for the entire state. By juxtaposing images of the court with Mayor Newsom, Proposition 8 proponents stressed the way in which the usurpation of voter intent that occurred in San Francisco (where the court sits) exemplified San Francisco politics. Indeed, the voter-information guide bolsters this connection between the court and its location in San Francisco.<sup>336</sup> But while the court stopped Mayor Newsom’s renegade marriages in 2004, only the voters could stop the court, and they could do so only through a constitutional amendment. The court, through this lens, became the epitome of an antimajoritarian institution unaccountable to the people it governs; at least Mayor Newsom had conducted marriages only in a city in which he was duly elected (and reelected after the marriages) by its residents.

The voter-information guide repeatedly and directly invoked the image of antimajoritarian judges representing an out-of-touch cultural elite. In the official ballot materials given to voters, proponents listed the following arguments in favor of Proposition 8:

- “Because four activist judges in San Francisco wrongly overturned the people’s vote, we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman.”<sup>337</sup>

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334. See Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357 (2010).

335. *Id.* at 370 (footnote omitted).

336. See *Proposition 8 Arguments*, *supra* note 330, at 56.

337. *Id.*

- Proposition 8 “overturns the outrageous decision of four activist Supreme Court judges who ignored the will of the people.”<sup>338</sup>
- Proposition 8 “overturns the flawed legal reasoning of four judges in San Francisco who wrongly disregarded the people’s vote.”<sup>339</sup>

The litigation loss allowed proponents to make the measure as much about reining in the courts as about substantive objections to marriage for same-sex couples.

While the Proposition 8 campaign appealed to the “activist judiciary” trope, it focused more heavily on the claim that legalization of same-sex marriage would lead to public schools teaching about same-sex relationships.<sup>340</sup> To make this claim, Christian Right advocates tied largely unrelated, out-of-state litigation defeats to California’s fight over marriage.<sup>341</sup> The litigation over free-exercise and parental-rights issues in Massachusetts became a centerpiece of the Proposition 8 campaign in a way that highlights the function of multiple (even low-level) litigation losses.

In *Parker v. Hurley*, the First Circuit held that gay-inclusive curriculum at the elementary school level did not violate federal constitutional protections of parental rights and religious freedom.<sup>342</sup> Christian Right advocates painted the *Parker* loss as further evidence of the need for a constitutional amendment against same-sex marriage in California. For instance, in defending the pro-Proposition 8 position, ADF Senior Counsel Jordan Lorence focused not on marriage itself, but on parental-rights and religious-

338. *Id.*

339. *Id.* at 57.

340. The television ads aired by the Proposition 8 campaign focused more heavily on the implications of same-sex marriage for schools than on the “activist court” theme. While the first and last ads of the campaign included both messages, the three others focused exclusively on the schools theme. Compare *Whether You Like It or Not* (ProtectMarriage.com television advertisement Sept. 29, 2008), available at <http://www.protectmarriage.com/video/view/2> (First “Yes on 8” television ad), and *Have You Thought About It* (ProtectMarriage.com television advertisement Oct. 29, 2008), available at <http://www.protectmarriage.com/video/view/9>, with *It’s Already Happened* (ProtectMarriage.com television advertisement Oct. 8, 2008), available at <http://www.protectmarriage.com/video/view/5>, *Everything to Do with Schools* (ProtectMarriage.com television advertisement Oct. 24, 2008), available at <http://www.protectmarriage.com/video/view/7>, and *Finally the Truth* (ProtectMarriage.com television advertisement Oct. 28, 2008), available at <http://www.protectmarriage.com/video/view/8>. For a more extensive discussion of the Proposition 8 ad campaign and its implications for the role of courts, see Cummings & NeJaime, *supra* note 9, at 1321–24.

341. One Proposition 8 television ad featured Robb and Robin Wirthlin, plaintiffs in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), in which they unsuccessfully challenged gay-inclusive school curriculum in Lexington, Massachusetts. See *Everything to Do with Schools*, *supra* note 340. Another Proposition 8 television ad explicitly cited *Parker* for the proposition that “parents have no right to object” to instruction on same-sex marriage. See *It’s Already Happened*, *supra* note 340.

342. 514 F.3d 87.

freedom issues, including public-school curriculum.<sup>343</sup> Because Massachusetts had marriage equality, and a school district in Massachusetts subsequently decided to teach children about families headed by same-sex couples, and since the courts were unwilling to guard against such instruction, the argument went, Californians must stop a similar chain of events from occurring in their state.<sup>344</sup> Similarly, the Family Research Council—citing *Parker*—warned that California’s ruling in favor of marriage for same-sex couples threatened school curriculum: “Public schools will teach the fully equal status of homosexual and heterosexual conduct,” and “[t]hose who object may find themselves on the wrong side of the law.”<sup>345</sup> The Proposition 8 campaign featured this theme in its ballot materials: “We should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay. That is an issue for parents to discuss with their children according to their own values and beliefs. *It shouldn’t be forced on us against our will.*”<sup>346</sup> Voting for Proposition 8 served not only as a way to reject the California Supreme Court’s decision in the marriage litigation, but it also became a way to reject a federal-court decision in Massachusetts regarding local school curriculum.

Massachusetts parents, and the books to which they objected, quickly became front-and-center in Proposition 8 materials and television advertisements.<sup>347</sup> The parents who challenged the curriculum in *Parker* served as symbols against marriage equality in California precisely because they lost their court battle in Massachusetts. The appeal to parental rights and free exercise only had currency because the court in *Parker* had rejected the parents’ claims: If the parents had prevailed, the fear would have no

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343. Press Release, Alliance Def. Fund, ADF Attorney To Debate Same-Sex ‘Marriage,’ Religious Liberty at UCLA Wednesday (Oct. 22, 2008), <http://www.alliancedefensefund.org/news/PRDetail/1994>.

344. Similar arguments were deployed by Christian Right advocates in support of Florida’s Amendment 2, which defined “marriage” to exclude same-sex couples. Press Release, Liberty Counsel, Parents, Teachers, Clergy and Attorneys Hold News Conference About Threats to Parental Rights, Freedom of Speech and Religion (Oct. 22, 2008), <http://www.lc.org/index.cfm?PID=14100&PRID=742> (“When the Wirthlins objected to having their second grader’s teacher read to the class ‘King and King,’ a cartoon book about same-sex marriage, school officials insisted that parents had no right to object because same-sex marriage is legal in Massachusetts. The Wirthlins joined other parents in a federal lawsuit against the school, which they lost.”).

345. Chris Gacek, *The California Supreme Court’s Edict Redefining Marriage Will Affect All Americans*, FAMILY RES. COUNCIL, <http://www.frc.org/marriage/redefining-marriage-will-affect-all-americans> (last visited Jan. 12, 2011).

346. *Proposition 8 Arguments*, *supra* note 330, at 56.

347. See Vote Yes on Prop 8, *Robb and Robin Wirthlin’s Story*, YOUTUBE (Oct. 20, 2008), <http://www.youtube.com/watch?v=WLHWBWSaW-4> (featuring an interview with the Wirthlins); see also Chai Feldblum, *The Selling of Proposition 8*, GAY & LESBIAN REV., Jan.–Feb. 2009, available at <http://www.greview.com/article.php?articleid=140> (describing Family Research Council videos and television advertisements featuring the parents).

longer been real. Litigation loss, then, demonstrated the need for broad public action.

This appeal seemed to work. Schools and parental rights began to occupy advertising space in the campaign against Proposition 8, and attention shifted from the substantive issue—marriage equality—to a largely unrelated issue—gay-inclusive school programming.<sup>348</sup> Polling data suggest that advertisements focused on the school-programming message contributed to increased support for Proposition 8, and limited exit-poll data suggest that parents of school-age children voted for Proposition 8 in higher numbers than their counterparts.<sup>349</sup> Indeed, an initiative to repeal the amendment, proposed shortly after its passage, preemptively explained in its text that “the initiative is not intended, and shall not be interpreted, to modify or change the curriculum in any school.”<sup>350</sup>

Certainly, Christian Right advocates focused on the litigation loss at the California Supreme Court to shape public opinion in a way that supports Rosenberg’s account of the courts’ countermajoritarian limitation. Yet at the same time, the fact that advocates spent so much time and money on a school-programming message, which had a much more attenuated connection to the “activist court” trope, complicates Rosenberg’s empirical claim linking backlash specifically to court decisions.<sup>351</sup> Furthermore, Christian Right advocates have mobilized opposition to LGBT *legislative* gains by criticizing *legislators* as antimajoritarian and elitist. In 2009, anti-same-sex-marriage advocates in Maine successfully urged voters to use the initiative process to overturn the marriage-equality decision of a state legislature, and they did so by positioning the legislature—albeit populated by democratically elected officials—as elitist, out-of-touch, and

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348. See Cummings & NeJaime, *supra* note 9; Feldblum, *supra* note 347 (“The primary argument advanced by Prop 8 supporters was that providing access to marriage for gay couples would reduce the rights available to others. They claimed that marriage recognition for gay couples in California would make life harder for parents in California who wanted to shield their young children from learning about homosexuals.”); see also Matt Coles, *Prop 8: Let’s Not Make the Same Mistake Next Time*, HUFFINGTON POST (Feb. 26, 2009, 1:48 PM), [http://www.huffingtonpost.com/matt-coles/prop-8-lets-not-make-the\\_b\\_170271.html](http://www.huffingtonpost.com/matt-coles/prop-8-lets-not-make-the_b_170271.html) (“The idea that school-age children might be taught that they could be gay gave those conflicted voters a way to decide to vote ‘Yes’ without feeling mean about it.”).

349. See THE THOMAS & DOROTHY LEAVEY CTR. FOR THE STUDY OF L.A., THE LEAVEY CENTER FOR THE STUDY OF LOS ANGELES 2008 EXIT POLLS OF THE PRESIDENTIAL PRIMARY AND NATIONAL ELECTIONS IN THE CITY OF LOS ANGELES (2008), *available at* <http://www.lmu.edu/AssetFactory.aspx?did=32036> (finding that according to exit polls, Los Angeles voters with a child under eighteen voted 55% against and 45% in favor of Proposition 8, compared to those voters who are not parents of a child under eighteen who voted 75% against and 30% in favor of Proposition 8); Cummings & NeJaime, *supra* note 9, at 1321–24.

350. Press Release, Debra Bowen, Cal. Sec’y of State, Marriage-Equality Initiative Enters Circulation (Mar. 20, 2009), <http://www.sos.ca.gov/admin/press-releases/2009/dbog-015.pdf>.

351. See Cummings & NeJaime, *supra* note 9, at 1323.

unaccountable.<sup>352</sup> Accordingly, situating the “activist court” trope within the anti-same-sex-marriage movement more generally demonstrates that it functions as merely one (particularly powerful) tactic in an advocacy campaign that responds to advances by the opposing movement on every front. Indeed, the fact that Christian Right advocates themselves use litigation as a key tactic in their arsenal—and yet strategically deploy “activist court” rhetoric for political purposes—underscores how litigation functions as part of a broad tactical repertoire and remains a crucial part of multidimensional advocacy.<sup>353</sup>

Ultimately, the Proposition 8 campaign demonstrates the way in which savvy advocates deploy and reconfigure litigation loss to speak to the public. A judicial defeat may allow advocates to paint the judiciary as dangerously countermajoritarian and may inspire voters to restore majoritarian policy. Christian Right lawyers hoped to prevail in court, but when they lost, they did not simply ignore the litigation. Rather, they reconfigured the judicial decision to aid their political campaign. In this sense, they extracted positive effects from what they viewed as an otherwise disappointing result.

## V. CONCLUSION

This Article provides new evidence of the indirect effects of litigation. It attests to the ways in which social movement advocates use litigation to mobilize constituents, influence decision makers, and convince the public to support their cause. In doing so, it bolsters and supplements legal mobilization and cause lawyering scholarship.

My analysis, however, moves beyond the existing literature by integrating explicit and direct consideration of courts’ limitations into an account of litigation’s extra-judicial effects. In doing so, it fills a significant gap in sociolegal scholarship by showing how litigation loss may, counterintuitively, produce positive indirect effects.

Future legal mobilization and cause lawyering scholarship can build on the theoretical claims offered in this Article. Specifically, empirical work examining how movement advocates in a variety of substantive domains understand and manage judicial defeat may provide evidence that supplements, qualifies, or questions my claims. Future work might focus not only on the effects of litigation loss and advocates’ management of those

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352. See *Myths and Facts About the People’s Veto of Homosexual Marriage Legislation (LD 1020)*, STAND FOR MARRIAGE MAINE, [http://standformarriagemaine.com/?page\\_id=271](http://standformarriagemaine.com/?page_id=271) (last visited Jan. 12, 2011) (“A handful of politicians cannot be the only ones to decide what the definition of marriage should mean for the entire state of Maine.”); see also Cummings & Nejaime, *supra* note 9, at 1324–25 (noting that voters overturned a bill enacted by the Maine legislature).

353. See discussion *supra* Part III.B; cf. Post & Siegel, *supra* note 10, at 377 (arguing that antiabortion activists “will use every available political means to press [their] constitutional vision on courts, even if progressives embrace constitutional theories that advise courts to avoid conflict”).

effects, but also on the conditions under which litigation loss may aid a social movement. Obviously, not all (and not even many) losses have positive effects. My analysis attempts to understand which losses can, how they do, and why, but it does not specify a set of circumstances under which advocates extract gains from litigation loss. At a minimum, though, it suggests a set of questions relevant to research on such conditions: How is movement infrastructure related to the ability to cultivate litigation loss? How does the relationship of the losing social movement organization to the broader movement relate to the organization's ability to use loss productively? How does hostility from legislative and executive actors affect, or even foreclose, the ability to use loss for gain? Are certain types of litigation (or certain types of issue areas) more amenable to productive post-loss use than others? Does it matter whether the losing party is the plaintiff or the defendant? How does the position of state actors in the litigation—as adversaries, allies, or neutral parties—affect the implications of loss? How do identity-based, minority-rights movements differ in their ability to deploy litigation loss from more far-reaching, instrumental movements?

While more work must be done on the conditions required to positively cultivate judicial defeat, my analysis of the intersection between litigation loss and opposing-movement relationships suggests particularly pressing questions for future research: How does the existence of an opposing movement allow advocates to fit litigation loss into their work? How does the movement-counter-movement relationship shape the way in which advocates reconfigure litigation loss? Additional research may not only provide greater depth to the theory of litigation loss articulated in this Article, but may also shed light on the relationship between judicial defeat and movement-counter-movement phenomena.