

# The Dark Side of Litigation as a Social Movement Strategy

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## I. INTRODUCTION

In *Winning Through Losing*,<sup>1</sup> Doug NeJaime dives into the voluminous literature about law, rights, and social change and makes a compelling and substantial contribution. He provides a sophisticated new framework within which to evaluate the contentious debate about the promise and limits of litigation as a strategy for social change. Given how much ink has been spilled in this rich debate, NeJaime’s contribution is no small accomplishment. His surprising and controversial argument is that not only litigation, but also litigation *loss* can bolster and mobilize social movements, and he makes a convincing case for it. My first goal in this commentary is to develop, extend, and perhaps critique NeJaime’s framework, with an eye toward guiding future empirical research.

My second goal is to step back and consider some potential negative consequences of litigation strategies for social movements—win, lose, or draw. In this analysis, I raise caveats about balancing the potential for change against some subtle, and often unrecognized, risks of litigation. For the most part, these risks are not the ones NeJaime and others address:

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diverting scarce resources from more productive strategies,<sup>2</sup> discouraging collective action,<sup>3</sup> or mobilizing the opposition.<sup>4</sup> Instead, my comments focus on the less tangible, more meaning-based consequences of litigation for social movements and social change. Drawing on framing process theories<sup>5</sup> and the cultural turn in sociology more generally,<sup>6</sup> I argue that litigation strategies, regardless of outcome, have the potential to deradicalize and subtly reshape social movements in undesirable ways, all while supporting the status quo. Because these constitutive influences are largely beyond the control and even conscious recognition of movement participants, activists do not always take them into account in the decision to litigate. They should.<sup>7</sup>

## II. A NEW FRAMEWORK

### A. INTERNAL AND EXTERNAL EFFECTS OF LITIGATION

The law and society debate over litigation and social change falls, roughly, into two camps, which I will call the “myth-of-rights” camp and the

2. Michael W. McCann & Helena Silverstein, *Rethinking Law's Allurements: A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 261–92 (Austin Sarat & Stuart Scheingold eds., 1998); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 10–12, 420–29 (2d ed. 2008); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 49–53 (2d ed. 2004).

3. MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 200 (1986); SCHEINGOLD, *supra* note 2, at 6.

4. ROSENBERG, *supra* note 2, at 155–56 (concluding that after the NAACP's victory in *Brown v. Board of Education*, “white groups intent on using coercion and violence to prevent change grew” and that “[b]y stiffening resistance and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights”); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 452–82 (2005); *see also* Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 477 (2000) (“[B]acklash tends to emerge when the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance.”).

5. For a discussion of framing process theories, *see generally* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986); David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, 1 INT'L SOC. MOVEMENT RES. 197 (1988).

6. *See generally* Roger Friedland & John Mohr, *The Cultural Turn in American Sociology*, in *MATTERS OF CULTURE: CULTURAL SOCIOLOGY IN PRACTICE* 1, 1–70 (Roger Friedland & John Mohr eds., 2004).

7. Of course, some activists are well aware of the deradicalizing forces I discuss and consider those dangers when deciding whether to litigate; my claim is not a categorical one. Nevertheless, in both the literature and in practice, the constitutive dangers of litigation strategies do not receive sufficient attention and analysis.

“symbolic/strategic” camp.<sup>8</sup> Myth-of-rights proponents tend to be pessimistic about litigation as a strategy for social change. They argue that legal victories bring about only incremental change and are too easily dismantled.<sup>9</sup> Some fault the institutional limitations of courts, including their inability to enforce their own judgments and the constraints of precedent and *stare decisis*.<sup>10</sup> Others argue that relying on rights reinforces an ideological legal system that legitimizes the status quo<sup>11</sup> and that legal rights impose material and psychological costs on those who claim them.<sup>12</sup> In addition, individual litigation can narrow issues and atomize collective grievances, undermining broader collective action.<sup>13</sup> Symbolic/strategic proponents are generally more positive about law and litigation. They contend that rights litigation can change social meanings and understandings, providing individuals with symbolic recognition and personal dignity.<sup>14</sup> Litigation can also create issues around which to organize a movement; attract media attention, financial resources, and participants to a movement; provide leverage in informal negotiations; and publically embarrass a movement’s opponents into capitulation.<sup>15</sup>

NeJaime offers two important distinctions that are seldom made in this wide-ranging and somewhat unruly debate. The first is between the internal and external effects of litigation as a social movement strategy.<sup>16</sup> Internal effects have to do with the movement itself: for example, its allocation of resources, its understanding of its identity, and the financial resources and participants it can attract.<sup>17</sup> External effects have to do with the broader public as target or observer of the movement’s strategy: how the state, opponents, potential allies, and the general public respond to the

8. CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 11–17 (2010).

9. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 23–24 (1978); SCHEINGOLD, *supra* note 2, at 5–6; Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 137–38 (1974).

10. David Kairys, *Legal Reasoning*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 11, 15–16 (David Kairys ed., 1982); ROSENBERG, *supra* note 2, at 15–16.

11. See Kairys, *supra* note 10, at 15–16; ROSENBERG, *supra* note 2, at 11–12.

12. Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 437–438 (1987).

13. MCCANN, *supra* note 3, at 200; ROSENBERG, *supra* note 2, at 12; SCHEINGOLD, *supra* note 2, at 6.

14. See DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 4 (2003) (“Although relatively few [interviewees] have actually asserted their rights by using the legal mechanisms made available under the ADA, many have found their lives and careers changed by the indirect, symbolic, constitutive effects of rights.”).

15. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10, 139 (1994).

16. NeJaime, *supra* note 1, at 973–1003.

17. See *id.* at 973–88.

movement's litigation and its outcome.<sup>18</sup> Whether they are internal or external, these effects can be either positive or negative.

As straightforward as the distinction between internal and external effects may seem, it offers a much needed and very useful toehold for organizing and theorizing the various arguments in the debate over litigation and social change. I extend and theorize NeJaime's distinction a bit further by developing a formal typology of potential effects. This typology has two dimensions. The first dimension distinguishes between internal and external effects of litigation as a social change strategy. The second dimension distinguishes between positive and negative effects. Most of NeJaime's discussion about the various effects of litigation aligns with this typology.

	<b>Internal Effects</b>	<b>External Effects</b>
<b>Positive Effects on the Movement</b>	Raise consciousness and develop oppositional consciousness  Form a collective identity  Attract financial resources and participants to the movement	Increase bargaining power  Attract publicity and public attention  Provide legitimacy to movement's claims  Provide a legal remedy  Provide recognition and dignity to individuals
<b>Negative Effects on the Movement</b>	Drain resources and divert energy from more effective strategies  Potentially demobilize participants if the litigation is unsuccessful	Mobilize opponents, countermovements, and backlash  Shore up the legal system  Fail to produce meaningful change on the ground, resulting in symbolic victory only

**Table 1. Effects of Litigation Strategies on Social Movements**

Organizing NeJaime's argument into this typology has some advantages for developing theory. This formal typology offers a checklist of social locations in which to look for the effects of litigation—locations that may function differently in terms of how litigation relates to social change. It also offers a systematic way to evaluate what a given argument claims and what that argument may have overlooked. Indeed, one of the important products of the debate about law and social change is a much broader definition of

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18. *See id.* at 988–94.

what constitutes social change: not just the attainment of legal remedies, but also movement-building effects, changes in activists' oppositional consciousness, and shifts in the public debate over inequality itself. NeJaime's distinction between external and internal effects provides an analytical framework for examining those effects and questioning what else might be missing.

Along those lines, once I fit NeJaime's excellent analysis of the rights and social change literature into this rubric, it became clear that some of these cells warrant further development. NeJaime's significant contribution is to develop one of these areas: the positive effects of litigation loss. In addition, as NeJaime notes, with the cultural turn in law and society and in the social sciences more generally, scholars have come to understand the effects of rights litigation to include constitutive or meaning-based change as well as instrumental change.<sup>19</sup> NeJaime's careful summary indicates that in the rights litigation literature, these meaning-based changes appear as the positive, internal effects of identity formation and the development of oppositional consciousness or awareness of one's problem as a collective wrong.<sup>20</sup> Constitutive changes of the negative, internal variety, however, are not addressed in the literature in the same detail, if at all. Most scholars seem to assume that changes to collective identity and oppositional consciousness are, by definition, positive. This is not necessarily so, a point I develop more fully below.

This typology also prompted me to consider who constitute the actors that are external to the social movement. NeJaime's discussion suggests at least two: the general public and countermovements. (Of course, one activist's opposition can be another's social movement.) In my view, when analyzing external actors, one should also consider the state's potential to mobilize legal strategies of its own. For example, the sociologist Steven Barkan shows through his analysis of civil rights protests that legalistic responses to protests were much more effective than police violence in sapping the momentum of the movement and undermining its legitimacy.<sup>21</sup> The potential for countermobilization by the state puts law in a less celebratory light, showing how the cloak of its legitimacy can be mobilized to suppress political opposition and discourage protest. Thus, in the universe of external actors, the state may play a qualitatively different role than

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19. *Id.* at 960–63.

20. *See id.* at 960–69; *see also* DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, 51 (1982) (“[M]ovement emergence implies a transformation of consciousness within a significant segment of the aggrieved population . . . [wherein] people must collectively define their situations as unjust and subject to change through group action.”).

21. Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 *AM. SOC. REV.* 552, 562–63 (1984).

countermovements or the general public and therefore warrant special analysis in its own right.

Civil rights activists were well aware of law's legitimizing effects on state action. They also worked hard to turn these legitimizing effects to their advantage instead. For example, in his Letter from a Birmingham Jail, Martin Luther King, Jr. responded to arguments that sit-ins and civil rights protests constituted illegitimate lawlessness by claiming that unjust laws were not legitimate and therefore did not deserve obedience, a clear reference to natural law principles.<sup>22</sup> Yet he also recognized the symbolic power of challenging unjust laws by violating them and then accepting the consequences:

In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.<sup>23</sup>

In this way, King sought to preserve the authority of law (including *Brown v. Board of Education*<sup>24</sup>) while simultaneously challenging the legitimacy of Jim Crow statutes. But as this example suggests, mobilizing law's authority and legitimacy is a tricky business for social movements, one dependent in part on the ways in which countermovement activists and the state attempt to do the same.

#### B. THE EFFECTS OF LITIGATION ON SOCIAL MOVEMENTS VARY WITH OUTCOMES

NeJaime's second significant theoretical distinction is among possible outcomes of litigation strategies, with an eye toward positive effects that are unique to litigation loss.<sup>25</sup> NeJaime primarily distinguishes between wins and losses, but there is also a third category of simply playing the game that is useful for understanding these dynamics. Again, taking into account both positive and negative effects, a second typology drawing on NeJaime's argument can be developed here:

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22. See Letter from Martin Luther King, Jr. to Fellow Clergymen (Apr. 16, 1963), available at <http://www.mlkonline.net/jail.html>; see also Rhys H. Williams, *Constructing the Public Good: Social Movements and Cultural Resources*, 42 SOC. PROBS. 124, 131-32 (1995) (describing social movement groups' use of natural law language in their attempts to change laws).

23. King, *supra* note 22.

24. 347 U.S. 483 (1954).

25. NeJaime, *supra* note 1, at 968.

	<b>Play</b>	<b>Win</b>	<b>Lose</b>
<b>Positive</b>	Publicity Raise consciousness Attract financial resources and participants Bargaining power from uncertainty (but short lived) Legitimize movement claims by forcing courts to consider them	Legitimate claim/identity; validate the social movement Obtain a legal remedy Raise the status of a social movement organization relative to others within the movement	Raise the status of a social-movement organization relative to others within the movement Cultivate a narrative of oppression that shores up collective identity and attracts financial resources Mobilize other actors Find other, perhaps more friendly venues Network with allies
<b>Negative</b>	Deradicalize message or goal of movement by asking for a legally viable remedy rather than what movement participants want Drain resources Reinforce unjust system Shape movement identity consistent with conservative claim Privilege elite and mainstream participants over the “radical fringe”	Countermovement mobilization and backlash Resistance to implementation Demobilization of participants who view the battle as won	Delegitimize the movement or its objective Potentially denigrate movement’s collective identity Loss of resources with no formal legal remedy Demobilization of discouraged participants

**Table 2. Effects of Litigation on Social Movements by Outcome**

NeJaime makes a wonderful contribution to this literature by developing the Positive/Lose box of this typology. He shows how involuntary litigation loss (as opposed to strategic settlement) can produce significant benefits for social movements and social change. NeJaime draws on his insightful distinction between internal and external effects to organize his argument.<sup>26</sup> With regard to internal effects, he notes that litigation loss can

26. *Id.* at 955–56.

define and solidify the identity of a social-movement actor or organization within the movement. As an example, NeJaime cites the Thomas More Law Center (“TMLC”), which took on controversial cases, such as defending public schools that adopted science curricula that challenged evolution; these cases had little chance of success but spoke to deeply held core values of the Christian right.<sup>27</sup> Although TMLC lost most of these cases, the litigation gave the organization “a national platform and [constructed an identity of a firm] willing to put religious principle above legal rules,”<sup>28</sup> confirming arguments by Michael McCann and others that simply playing the litigation game can have important benefits for movement actors and organizations.<sup>29</sup> NeJaime also notes, however, that losing these cases allowed TMLC to develop a narrative of oppression and resistance in relation to law, and to use this narrative both to legitimize and to attract funding to TMLC in the crowded field of public-interest organizations working on behalf of the Christian right.<sup>30</sup> In other words, TMLC staked out issues near and dear to the heart of its constituency, took one (or more) for the cause and then successfully pleaded for more resources and support on the basis of its widely publicized loss, effectively edging out organizations that were more cautious in their litigation strategies.

More broadly, NeJaime contends that when courts reject a legal claim, social movement actors can argue “the demand that the legal claim embodies might be made more pressing and the deprivation more acute [by the loss].”<sup>31</sup> As a result, litigation loss “might encourage new, more vibrant mobilization and direct action by bringing awareness to courts’ ineffectiveness and explicitly demonstrating the failed promise of litigation.”<sup>32</sup> Movement leaders can use litigation loss to highlight unfairness, raise consciousness, and mobilize constituents, and also to show movement participants why strategies beyond litigation (and the money to fund these strategies) are needed, given the hostility of the courts to their claims. This effect of losing, NeJaime argues, contrasts with the complacency and demobilization that can follow a legal victory and “lull movement members into a false sense of security.”<sup>33</sup> Here, he offers the example of the increase in funding for the lesbian, gay, bisexual, and transgender (“LGBT”) organizations following a high profile loss in the Supreme Court in *Bowers v. Hardwick*,<sup>34</sup> and how this case became a symbol of unfair treatment that raised consciousness and mobilized constituencies.

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

28. NeJaime, *supra* note 1, at 979.

29. MCCANN, *supra* note 15, at 154–56; SCHEINGOLD, *supra* note 2, at 49–53.

30. NeJaime, *supra* note 1, at 979–80.

31. *Id.* at 984.

32. *Id.*

33. *Id.*

34. 478 U.S. 186 (1986).

With regard to the external effects of litigation loss, NeJaime notes two possible dynamics. First, litigation loss may prompt social-movement actors to turn to other lawmaking institutions, including courts in other jurisdictions and legislative bodies.<sup>35</sup> The federalist structure of American courts, with multiple federal jurisdictions and relatively autonomous state courts interpreting state constitutional provisions provides multiple venues to essentially “give it another go” in terms of court-based social change.<sup>36</sup> Second, movement activists can cite litigation loss as a reason for legislative reform, seeking legislative override of the court’s decision.<sup>37</sup> Social-movement actors can also use judicial defeat to appeal to the public, arguing that a court’s counter-majoritarian status delegitimizes its decision and that legislative override is necessary and appropriate.<sup>38</sup>

As examples, NeJaime offers the LGBT movement’s shift toward legislative strategies in the wake of *Bowers*.<sup>39</sup> He also notes the movement’s litigation success in state court venues after the movement’s priorities shifted toward relationship recognition and parenting.<sup>40</sup> Rather than arguing that these strategies are mutually exclusive, NeJaime sees these two venues as related.<sup>41</sup> In Florida, when courts refused to repeal a ban against adoption by lesbians and gay men, activists turned to the legislature to seek reform.<sup>42</sup> Even though the court challenge was unsuccessful, the case helped particularize the harm of the ban by identifying specific families who were caring for children with pressing medical and emotional needs whom the ban affected.<sup>43</sup> More generally, NeJaime notes, these venues can play off one another because elected officials may not act on controversial issues when they hope courts will address them (and, of course, the reverse can be true as well). When litigation loss makes it clear that the courts will not act, legislative reform may become possible.

### C. UNDER WHAT CONDITIONS CAN LOSING BE WINNING?

There are some important insights in NeJaime’s analysis. First, the importance of federalism and multiple venues for regrouping and outmaneuvering the opposition to social movements has not been

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35. NeJaime, *supra* note 1, at 989.

36. *Id.* at 998–99.

37. *Id.* at 999.

38. Gwendolyn Leachman, *A Social Constructionist Approach to Legal Framing: Imagining New Legal Possibilities “in the Shadow of Social Institutions,”* in *STUDIES IN LAW, POLITICS, AND SOCIETY* (forthcoming 2011); see, e.g., KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 159–62 (2006).

39. NeJaime, *supra* note 1, at 986–87.

40. *Id.* at 988–90.

41. *Id.* at 987.

42. *Id.* at 991–93.

43. *Id.* at 993.

recognized and analyzed in such detail before. This insight about the relationship between the effects of litigation loss and the institutional structure of the state invites more empirical and comparative work on this point. Second, NeJaime's analysis avoids the problematic tendency of prior research to treat litigation and legislative strategies as separate and unrelated, rather than as different parts of an integrated strategy for change. Third, NeJaime's argument highlights the agency of movement activists to frame litigation losses in ways that mitigate harm and, in some instances, turn losses into a narrative of oppression that mobilizes participants and attracts resources. In most accounts, narratives of oppression come before, not after, legal mobilization, and NeJaime's analysis develops a more nuanced account of their role and timing in litigation strategies for change.

That said, in my view, the key words in NeJaime's argument, are "may," "might," "can," and the like. Given his well-chosen examples, it is indeed hard to argue that litigation loss will *always* be negative for social movements. Effective spin, responsive strategizing in other venues, and fast regrouping in the wake of litigation loss may very well produce some positive effects for social movements and their causes. But then again, they may not. Just as winning a case can legitimize a group's identity and demands, losing a case can delegitimize their cause, marking it as beyond the protections and recognition of the law. Whether that rejection comes to be seen as the proper exercise of authority or as oppression depends on factors other than the loss itself (factors that I explore in more detail below). One must also ask whether litigation loss provides benefits relative to the alternative—litigation victory. Nothing about NeJaime's argument suggests that the benefits of loss outweigh the benefits of victory, or even of playing the game without a definitive outcome one way or the other. Instead, the claim is that loss is not an unmitigated negative, something that some (but not all) scholars have conceded.<sup>44</sup>

Similarly, it is not at all clear that groups that stake out the radical fringe and take one for the cause, so to speak, will always prosper as a result. Social-movement scholars have identified a radical flank effect in which the demands and actions of the radical actors within a social movement cause the state to grant the more moderate demands made by other actors

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44. See MCCANN, *supra* note 15 at 154–56 (arguing that “even losses in court often have brought significant financial benefits to the plaintiffs . . . litigation, even when not ultimately successful in court, can generate political pressure for significant policy change at several stages of the process;” that “[m]ost defeats in court have . . . often brought significant financial benefits to the plaintiffs;” and that “worker defeats in the courtroom also sometimes generated bad publicity and other pressures sufficient to compel large concessions . . . after the trial”); see also Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization*, 13 AMICI 8 (2005) (arguing that “losing an important legal decision can in many ways propel a movement into proactive activity”).

because those demands seem reasonable in comparison.<sup>45</sup> Where this dynamic exists, the actions of radical factions draw attention, resources, and success to their more moderate fellow travelers rather than resources and attention to themselves, although perhaps it could be argued the movement as a whole benefits from their radical stance.

By raising these points, I do not mean to suggest that NeJaime's arguments are wrong; I only suggest that they don't yet speak to the conditions under which litigation loss will lead to positive effects for social movements and social change. NeJaime readily acknowledges this point in his conclusion when he calls for more research about the circumstances under which litigation loss can lead to social change.<sup>46</sup> To some extent, these conditions are unknowable because of the uncertainty and contingency of social change itself. As the late Howard Zinn stated in his article *The Optimism of Uncertainty*, history is full of surprising victories of the powerless over the powerful not only through violent revolution but also through unexpected victories in democratic elections and even adjudication.<sup>47</sup> Zinn highlights the contingent, back-and-forth nature of the struggle for change that lies implicit in NeJaime's argument:

Revolutionary change does not come as one cataclysmic moment (beware of such moments!) but as an endless succession of surprises, moving zigzag toward a more decent society. . . . Even when we don't "win," there is fun and fulfillment in the fact that we have been involved, with other good people, in something worthwhile.<sup>48</sup>

In short, social change is wildly contingent, unpredictable, and yet often brought about from the persistence of actors who, in any rational estimation of the odds of their success, really have no chance at all but who gain something from the struggle itself.<sup>49</sup>

Nevertheless, even Gerald Rosenberg, perhaps the most famous naysayer in this debate, concedes that under some limited circumstances courts and litigation might make a difference.<sup>50</sup> Although NeJaime

45. See Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957-1970*, 32 SOC. PROB. 31, 32 (1984) (explaining that conservative movement factions become more powerful in one of two ways: either "[t]he radicals . . . provide a militant foil against which the moderate strategies and demands are redefined and normalized—in other words, treated as 'reasonable'" or "the radicals can create crises which are resolved to the moderates' advantage").

46. NeJaime, *supra* note 1, at 1012.

47. THE NATION, Sept. 20, 2004, available at <http://www.thenation.com/article/optimism-uncertainty>.

48. *Id.*

49. Recent events in Egypt that brought about unexpected political change only underscore this point.

50. See generally ROSENBERG, *supra* note 2.

acknowledges the need for generalizable theories about litigation and social change, he wisely avoids offering hypotheses about the conditions under which litigation loss might promote change. He provides some wonderful examples, however, and I attempt to build on them here to develop two tentative hypotheses on this point.

My first point expands on the idea that litigation loss can push movement activists into other jurisdictions (e.g., state courts) and other venues (e.g., legislative reform).<sup>51</sup> Social-movement scholars would likely argue that the success of these strategies depends on the state of political opportunity structures. So, for example, one hypothesis is that alternative strategies such as legislative-override campaigns are more likely to arise and be successful under conditions of divided government when opposing factions control courts and legislatures.<sup>52</sup> That was the case in at least two of NeJaime's examples including the legislative override of *Ledbetter*<sup>53</sup> and the enactment of the Pregnancy Discrimination Act.<sup>54</sup> More generally, divisions in government, including those created vertically and horizontally by federalism and the separation of powers, create the conditions under which definitive victory (or defeat) of a cause is unlikely.<sup>55</sup> Ironically, however,

51. NeJaime, *supra* note 1, at 963.

52. "Divided government" can mean several things, including divided control over different branches of government (e.g., Republican President, Democratically controlled Congress) or divided legislative government (e.g., when each bicameral chamber is controlled by a different party). My use of "divided government" in this piece refers to divided control over different branches of government. Also, for social-movement scholars, the important factor for mobilization is the *perceived* receptivity of political arrangements to movement demands, whether or not state actors strictly vote their political-party affiliation. See, e.g., William A. Gamson & David S. Meyer, *Framing Political Opportunity*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS* 275, 275-90 (Doug McAdam, John McCarthy & Mayer N. Zald eds., 1996); David S. Meyer & Debra C. Minkoff, *Conceptualizing Political Opportunity*, 82 *SOC. FORCES* 1457, 1470 (2004) ("[P]lausible perceptual indicators of a favorable environment for activism [include] Democratic advantage in Congress, the number of contested elections, and whether there is a Democratic president").

53. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). A Democratically controlled Congress passed the Lilly Ledbetter Fair Pay Act in 2009. The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 5-7 (2009). The Act overrode *Ledbetter* at a time when a majority of Supreme Court Justices were Republican appointees. See United States Senate, *Party Division in the Senate, 1789-Present*, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Mar. 17, 2011). A strong judicial dissent can also be important in encouraging legislative override. See, e.g., *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting).

54. A Democratically controlled Congress passed the Pregnancy Discrimination Act in 1978. The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 2076-77 (1978). The Act overrode *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) at a time when a majority of Supreme Court Justices were Republican appointees. See United States Senate, *Party Division in the Senate, 1789-Present*, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Mar. 17, 2011).

55. David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 *AM. J. SOC.* 1628, 1645 (1996).

social movement scholars Meyer and Staggenborg argue that these conditions of uncertainty also encourage the formation of countermovements because the state is less likely to decisively resolve the conflict in favor of either side.<sup>56</sup> Consider, for example, the successful initiative campaigns in several states to overcome judicial decisions recognizing same-sex marriage.<sup>57</sup> Although shifting to other venues may create new opportunities for success, these successes, and the availability of other venues in which to challenge them, may also facilitate successful opposition. Moreover, when one party controls all three branches of government, not only are shifts to other venues less likely to be successful, but losses can be much more damaging because they solidify legal policy against the movement far into the future. All this suggests that assessing the likely impact of litigation loss requires careful analysis of the structure of political opportunity, a factor that social movement actors should (and often do) consider before taking on litigation.

My second point is that the argument that courts are illegitimate counter-majoritarian policy makers may be easier to advance for social movements whose members are not disfavored minorities.<sup>58</sup> To make this argument, the movement, which typically is a minority of the electorate, must be able to identify a plausibly majoritarian value that the court's decision contravenes. For example, TMLC relied on broad religious affinities to argue that courts were counter-majoritarian activists rejecting fundamental Christian values.<sup>59</sup> The loss in *Bowers* was much harder to sell as a counter-majoritarian decision with which most Americans would disagree, particularly after the Court framed the question as whether the Constitution conferred a fundamental right to engage in homosexual sodomy, even though advocates tried hard to frame the case in terms of the right to privacy and freedom from state interference.<sup>60</sup> More generally, I would suggest that when groups can convincingly frame litigation loss as contravening widely held social values, social movements will be more successful in turning losses to their advantage. Social movements do not have complete control over how a particular issue is framed, however, and dominant cultural ideologies generally paint disfavored minorities in a negative light. Although disfavored minorities can strive to frame claims in terms of widely held values, to the extent that majoritarian sentiment is against the movement's goals, this framing may be difficult to achieve. Similarly, although movements can fall back on arguing that litigation loss reflects courts that are out-of-touch institutions unable to catch up with

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56. *Id.* at 1647–48.

57. See Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 *LAW & SOC'Y REV.* 151, 161–64 (2009).

58. NeJaime, *supra* note 1, at 1002–03.

59. *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986).

60. *Id.* at 191.

social reality, this tactic may only be successful if the broader public sees catching up with social reality as desirable. In other words, prevailing public opinion may be shaped by social movement arguments about the role of courts, but the resonance and success of those arguments may depend on how easily movement activists can link their cause to widely accepted values. This may be harder to do for disfavored minorities, although not impossible.

### III. THE DARK SIDE.

In this last section, I raise the concern that litigation strategies risk negative consequences for social movements win, lose, or draw. These risks include subtle dynamics that reshape the goals and message of the movement, often without the explicit choice or awareness of movement participants. To be fair to NeJaime, these concerns are largely beyond the scope of his project, which focuses on litigation loss specifically. Nevertheless, they are important in thinking more generally about the costs and benefits of litigation as a social movement strategy.

First, several scholars have shown how litigation as a social movement tactic can deradicalize both the message and the objectives of a movement. For example, Myra Marx Ferree's comparative, empirical study of abortion-rights movements in the United States and Germany found that social movements chose frames for their rights claims that hewed closely to the dominant legal discursive opportunity structures in their respective countries, pushing out elements of abortion justification that were inconsistent with these dominant legal frames.<sup>61</sup> Others note that lawyers, as elite actors, can reshape movement messages and objectives even when movement participants have different goals. For example, Derrick Bell analyzed how civil rights attorneys made school integration the goal of school desegregation litigation rather than adopting the more substantive objectives of their clients who wanted more resources and improved instruction for their children's schools.<sup>62</sup> Bell concludes that the way elite lawyers reframed the goals of the litigation produced negative educational outcomes for African American children.<sup>63</sup> Similarly, Sandra Levitsky's study of gay-rights-movement organizations in Chicago found that legal advocacy organizations rarely consulted with other organizations within the movement, and as a result, formulated their litigation agendas in an insular,

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61. Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOC. 304, 308 (2003); see also Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804, 814 n.20 (2008) (citing the Ferree study in noting that the frame should be centered around one idea in order to provide a way to measure its analysis and meaning over time).

62. Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 476-77 (1976).

63. *Id.* at 515-16.

exclusionary way.<sup>64</sup> Leaders of non-legal movement organizations felt the priorities of their constituencies, including the desire for protections in employment and housing, were not reflected in the litigation agendas of advocacy organizations, which tended to focus on gay marriage.<sup>65</sup>

Second, social movement scholars caution that litigation, including litigation loss, can reshape how the movement defines its identity and understands itself. For example, William Forbath's elegant study of the history of the American labor movement shows how labor's successful efforts to enact progressive laws at the end of the nineteenth century were eviscerated by the rise of labor injunctions and by how courts interpreted antitrust legislation to prohibit union activities.<sup>66</sup> These setbacks, Forbath argues, discouraged political action and led the labor movement to adopt a litigation frame of constitutional rights that ultimately curtailed the scope of labor's goals and weakened its efforts toward broader social change.<sup>67</sup> Forbath's analysis is not just a story of serial success and failure. He makes the deeper claim that the movement's interactions with the courts, including its own litigation strategies, constituted its identity and its understanding of itself in ways that deradicalized what it means to be a labor movement in America.<sup>68</sup>

Third, litigation as a social movement tactic can end up promoting some factions within a movement at the expense of others. As Levitsky notes, legal advocacy organizations occupy a disproportionately influential role in the movement because these groups possess greater organizational resources relative to other movement organizations.<sup>69</sup> She found that legal advocacy organizations tend to have larger budgets, more full-time professional staff, and more financial and human resources to pursue media attention, compared to non-legal organizations in the movement.<sup>70</sup> Movement participants perceived legal advocacy organizations as "not only selecting issues to litigate without grassroots participation, but also promoting those issues in ways that 'crowded out' other LGBT interests."<sup>71</sup> Thus, Levitsky argues, litigation strategies are not simply one form of social

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64. Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 145-163 (Austin Sarat & Stuart Scheingold eds, 2006).

65. *Id.* at 154-56.

66. WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 98-127 (1991).

67. *Id.* at 128-166.

68. *Id.* at 10-36.

69. Levitsky *supra* note 64, at 157.

70. *Id.*

71. *Id.* at 158. This dynamic may be a specific instance of a larger dynamic in which professionalization of a social movement leads to less radical demands and strategies. See Susan Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOC. REV. 585 (1988).

movement activity among many, and social movement organizations are not equivalently positioned actors regardless of their chosen strategy. Instead, legal advocacy organizations' greater resources and disproportionate share of media coverage allow their objectives to dominate the movement. Importantly, in Levitsky's study it is the interests of less-privileged movement participants—including the black LGBT community in Chicago—that fall by the wayside, which suggests legal advocacy organizations operating in isolation from the rest of the movement help reinforce inequalities by marginalizing the objectives of less-privileged communities within the movement.<sup>72</sup>

Finally, critical legal studies scholars offer a longstanding critique of litigation as essentially winning the battle, but losing the war. In this view, litigation strategies may win some short-term advantages for the parties, but by working within the system such strategies help legitimate the larger structure of domination through legal ideology and law.<sup>73</sup> The law, in this view, helps stave off revolution and justify the status quo of unequal social relations by providing nominal individual remedies for unequal treatment.<sup>74</sup> This critical stance dovetails with a larger skepticism among sociological social movement scholars about whether working within established channels, such as legislative action or litigation, meets the definition of a social movement activity.<sup>75</sup> From this perspective, litigation to change policy is just another form of interest-group politics, not a form of transformative collective action, but a type of elite contention. Echoing Piven and

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72. Levitsky, *supra* note 63, at 156.

73. Alan Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96 (David Kairys ed. 1982); Peter Gabel, *Reification and Legal Reasoning*, in *MARXISM AND THE LAW* (Piers Beirne & Richard Quinney eds., 1982); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

74. Gabel & Harris, *supra* note 73, at 369; Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982).

75. MCADAM, *supra* note 20, at 57 ("They key distinction is between institutionalized and noninstitutionalized tactics. Even if used to pursue 'radical' goals, the former implicitly convey an acceptance of the established, or 'proper,' channels of conflict resolution. Such tactics are, thus, viewed as nonthreatening by elite groups, both because they leave unchallenged the structural underpinnings of the political system and because it is within these 'proper' channels that the power disparity between members and challengers is greatest"); see also J. Craig Jenkins & Craig M. Eckert, *Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement*, 51 AM. SOC. REV. 812, 828 (1986) (finding that movement organizations that used institutional tactics attracted elite patronage and were thus "not likely to become unruly or make broad demands" and arguing that a movement's "survival depends on the pressures generated by the protests of the indigenous groups").

Cloward's statement that "a riot is clearly not an electoral rally,"<sup>76</sup> this view draws a line between strategies that push for change outside established state institutions and strategies that work for change within the system. Although most scholars of law and social change, including myself, would challenge this distinction as arbitrary and not accurate, there is a kernel of valid critique in the idea that working within the system, however radical the claim, reinforces the very structure of inequality one hopes to change.

These concerns suggest that litigation strategies, whatever their outcome, have the potential to deradicalize a movement, reshape it in ways that marginalize less-privileged communities, and inadvertently reinforce structures of domination and inequality. Like the dark side of the Force,<sup>77</sup> litigation can change social movements from within in deeply constitutive ways even as they wield it to victory. Let me be very clear that it does not necessarily follow that activists should abandon these strategies; no one denies that litigation has its strategic advantages, even, as NeJaime has shown, when social movements lose. Nevertheless, these subtle and potentially negative effects caution that the potential for winning by losing should be assessed with the dark side in mind.

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76. Frances Fox Piven & Richard A. Cloward, *Collective Protest: A Critique of Resource Mobilization Theory*, in *SOCIAL MOVEMENTS: CRITIQUES, CONCEPTS, CASE STUDIES* 139 (Stanford Lyman ed., 1995).

77. The Star Wars metaphor seemed oddly fitting here.