ESSAY

THE UPSIDE OF LOSING

*Ben Depoorter**

Conventional understanding in legal reform communities is that time and resources are best directed toward legal disputes that have the highest chance of success and that litigation is to be avoided if it is likely to establish or strengthen unfavorable precedent. Contrary to this accepted wisdom, this Essay analyzes the strategic decisions of litigation entrepreneurs who pursue litigation with the awareness that losing the case can provide substantial benefits. Unfavorable litigation outcomes can be uniquely salient and powerful in highlighting the misfortunes of individuals under prevailing law, while presenting a broader narrative about the current failure of the legal status quo. The resulting public backlash may slow down legislative trends and can even prompt legislative initiatives that reverse the unfavorable judicial decisions or induce broader reform.

This analysis revises some conventional wisdom about litigation. First, while it is traditionally understood that legal reform activists must persuade courts to recognize unattended rights or to confirm new rights and activist positions, the analysis here suggests that social changes can be obtained in litigation without requiring the involvement of courts as policymakers. Moreover, passive courts and judicial deference in fact strengthen the mobilizing effect of litigation by clearly shifting the burden to legislators and their constituents. Second, the dynamics of successful defeat in litigation shed new light on the costs and benefits involved with litigation. In the proposed framework, a plaintiff's decision to litigate rests not simply on the probability of success but also on a tradeoff between the potential costs of a negative precedent and the political benefits obtained in defeat. Third, the mobilizing potential of adverse court

* Professor of Law, Roger E. Traynor Research Chair, University of California, Hastings; Lecturer, Ghent University & Affiliate Scholar, Center for Internet & Society, Stanford Law School. For encouragement and invaluable advice, I am especially grateful to Henry Hansmann, Ian Ayres, Gideon Parchomovsky, and Susan Rose-Ackerman. This Essay benefited from discussion with and comments from Mario Barnes, Barbara Brandon, Charlton Copeland, Tommy Crocker, William Dodge, Dave Fagundes, Evan Lee, Ethan Lieb, Dan Markel, Anna-Maria Marshall, Chad Oldfather, Francesco Pairisi, Kerri Stone, Stephen Vladeck, Howard Wasserman, William Widen, Lesley Wexler, Verity Winship, and participants at the Law & Society Conference in Berlin. Evan Brewer, Eun Chang, and Brandon O'Hern provided excellent research assistance. I would also like to thank the editors of the *Columbia Law Review* for their insightful advice and careful editing. Contact: depoorter@uchastings.edu.

decisions presents a fascinating conflict between the immediate interests of the actual plaintiff and of the litigation entrepreneur or intermediary that supports the litigation with an eye on the underlying long-term goals of a social cause. Finally, the potential benefits of adverse outcomes refute some of the criticisms about the limitations and downsides of pursuing social change through courts.

> [W]inning is great, sure, but if you are really going to do something in life, the secret is learning how to lose. —Wilma Rudolph[1]

INTRODUCTION

Conventional understanding holds that winning is the name of the game in litigation. Many fundamental social rights and liberties were established in historic court victories and influential judicial precedents.[2] Constitutional law casebooks highlight the landmark decisions in which courts outlawed segregation, combated gender discrimination, improved labor conditions, created fundamental rights of privacy and free speech, and so forth.[3] Historic judicial victories are considered an essential component in the process of developing social change.[4]

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1. Wilma Rudolph, Wilma 65 (1977). Rudolph was the first female American runner to win three gold medals at a single Olympics.

2. See Austin D. Sarat, Redirecting Legal Scholarship in Law Schools, 12 Yale J.L. & Human. 129, 134 (2000) (book review) (describing how law changes society by providing individuals with framework to make sense of social life).

3. For examinations of racial and gender discrimination cases in the courts, see Randy E. Barnett, Constitutional Law: Cases in Context 533–76, 926–89 (2008); Erwin Chemerinsky, Constitutional Law 748–917 (3d ed. 2009); Geoffrey R. Stone et al., Constitutional Law 441–664 (6th ed. 2009). For a review of cases concerning economic

However, after the initial success of public interest litigation in, among others, the New Deal labor movement, the civil rights movement in the 1940s, and the women's rights movement in the 1960s, contemporary scholarship now expresses a deep skepticism about the effectiveness of pursuing social change on the basis of litigation.[5] First, there is a widespread perception that courts have become increasingly reluctant to adopt sweeping and progressive social changes in judicial decisions.[6] Some have argued that this has greatly reduced the role of courts as agents of social change. Because judges are perceived as reluctant to declare new, controversial rights, social movements and legal reform communities are being cautioned about the pursuit of legal strategies and court-based activism.[7] There is a fear that repeated losses not only strengthen adverse precedents but also reduce the support for the underlying cause.[8] If so, litigation in pursuit of social change may prove futile and possibly counterproductive by draining movements of scarce resources. Second, it has been argued that rights-based strategies tend to produce narrow remedies that apply only in limited circumstances and provide no assurance about broader rights-based implementation and enforcement. Questioning the capacity to bring about social change on

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substantive due process and labor rights, see Barnett, supra, at 374–403; Chemerinsky, supra, at 601–63; Stone et al., supra, at 735–61. For the progression of free speech and privacy in the courts, see Barnett, supra, at 582–616, 1085–182; Chemerinsky, supra, at 1205–664; Stone et al., supra, at 831–941, 1017–442.

4. Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 246–48 (2004) (discussing role of public in constitutional litigation); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1016, 1021–53 (2004) (providing historical overview of public interest litigation).

5. Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. Pa. L. Rev. 927, 947 (2006) ("Courts respond to social disruption by social movements rather than initiate it themselves . . . ."); Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 300–01 (2001) (documenting role of social movements in judicial interpretations of constitutional issues).

6. Although liberal activists might claim that conservative appointments on courts have created a more aggressive, activist agenda, recent empirical evidence on overturned legislation suggests that the track record of the recent Supreme Court is less activist than it has been historically. See Frank B. Cross & Stefanie A. Lindquist, The Scientific Study of Judicial Activism, 91 Minn. L. Rev. 1752, 1784 (2007) ("[W]hile the later years of the Rehnquist Court witnessed a period of conservative activism, this activism was fairly modest when viewed in historic context.").

7. For a comprehensive review of this contemporary critical scholarship, see Orly Lobel, The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics, 120 Harv. L. Rev. 937, 940 (2007) [hereinafter Lobel, Paradox] (arguing criticism of rights-based strategies also applies to nonlegal tactics and other suggestions of critical legal movement).

8. See Jules Lobel, Courts as Forums for Protest, 52 UCLA L. Rev. 477, 479–80 (2004) [hereinafter Lobel, Courts as Forums] (highlighting importance of persistence in pursuing social movement litigation, even in face of defeat in early stages).

the basis of litigation, some have argued that legal strategies mostly provide false, "hollow hope" to social movements.[9] Critics doubt the ability to bring about social change in litigation because it creates a process of legal cooptation of a social movement, a process by which "the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and transformative alternatives."[10]

Other scholars and commentators remain more optimistic about the potential role of litigation in the pursuit of social change. The ultimate value of litigation, it is argued, is not determined by the outcome in court but rather by the ability of litigation to bring attention to and to induce support for the social causes at issue in the litigation.[11] From this viewpoint, any individual case outcome is but a small step in a larger, multisequence process in which litigation can be a powerful tool to attract public attention, to communicate a legal and political agenda, and to place pressure on various levels of government and society.[12] Accordingly, if the power of public interest litigation lies in generating attention and garnering political support, much of the criticism of rights- and court-based strategies is misplaced. If an adverse decision can be used to

9. See, e.g., Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 422 (2d ed. 2008) (concluding courts can "almost never be effective producers of significant social reform").

10. Lobel, Paradox, supra note 7, at 939 (emphasis omitted). Accordingly, because a focus on legal rights may hinder the development of progressive movements, a strand of scholarship thus rejects litigation-based strategies altogether, favoring instead nonlegal means of social action, including community organizing, grassroots support campaigns, and broad-based social protests.

11. See generally, e.g., Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (1994) [hereinafter McCann, Rights at Work] (arguing that indirect effects of movement litigation such as increased awareness of social ills may be most important consequence of reform lawsuits); Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 3–10 (1974).

12. See generally Jules Lobel, Success Without Victory: Lost Legal Battles and the Long Road to Justice in America (2003) [hereinafter Lobel, Success Without Victory] (documenting historical cases of adversity in social movement litigation and value of pursuing continued and comprehensive litigation strategies).

mobilize support for a cause effectively,[13] advocates and social movements should push on and litigate even in the face of likely defeat.[14]

This Essay presents the first examination of the ex ante strategic decisions faced by litigation entrepreneurs who pursue litigation with the awareness that losing the case can provide substantial benefit. It argues that adverse court decisions may be particularly salient in raising awareness about an underlying social cause. Unfavorable litigation outcomes can be distinctively powerful in highlighting the misfortunes of individuals under prevailing law, while presenting a broader narrative about the current failure of the legal status quo. The resulting public backlash may mobilize public and political forces and ultimately slow down legislative trends, and can even prompt legislative initiatives that reverse the unfavorable judicial decisions or induce broader reform.

The analysis presented here revises some common wisdom on litigation. First, the dynamics of successful defeat in litigation provide new and counterintuitive insights into the potential role of courts in the pursuit of social change. While it is traditionally understood that legal reform activists must persuade courts into recognizing unattended rights or to confirm new rights and activist positions,[15] this Essay's analysis suggests, to the contrary, that social changes can be obtained in litigation without requiring the involvement of courts as policymakers. Counterintuitively, as the Essay explains in more detail below, passive courts and judicial deference can even strengthen the mobilizing effect of litigation. Judicial deference clearly shifts the burden to policymakers and their constituents. First, for social movements, an adverse judicial outcome is an opportunity to construct a narrative about the routine failure of courts to effectuate desirable changes.[16] This allows social movements to utilize

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13. For descriptive accounts of instances where social movements have made resourceful use of adverse outcomes in court, see generally, e.g., Douglas NeJaime, Winning Through Losing, 96 Iowa L. Rev. 941, 969–1011 (2011) (describing Christian Right and lesbian, gay, bisexual, and transgender (LGBT) movements); Steven A. Boutcher, Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization, Amici (Am. Sociological Assoc., Washington, D.C.), Fall 2005, at 8, 10–12 (describing LGBT movement's response to Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld Georgia's law criminalizing sodomy and was later overruled by Lawrence v. Texas, 539 U.S. 558 (2003)).

14. Deborah R. Gerstel & Adam G. Segall, Conference Report: Human Rights in American Courts, 1 Am. U. J. Int'l L. & Pol'y 137, 143 (1986) ("'The purpose of continuing lawsuits . . . , therefore, is to attempt to bring the action into a legal context. It is necessary to create a means for dialogue even if you know you are going to lose.'" (quoting unnamed conference participant)). On transnational litigation more generally, see Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2348 (1991) (describing goal of transnational public law litigation as enunciating public international norms "that will stimulate 'relief' in the form of a negotiated political settlement").

15. Lewis Sargentich, Complex Enforcement (1978); Sabel & Simon, supra note 4, at 1016–19.

16. Infra notes 102–104 and accompanying text.

antijudicial sentiments in order to mobilize the public. Also, passive courts and judicial deference render the pursuit of strategic litigation more predictable because courts are more likely to adhere to existing precedent. Additionally, if courts insist that their hands are tied by legislation, some of the public attention and pressure shifts to legislators.[17]

Second, standard models of litigation describe how a private litigant's choice between settlement and litigation depends on the probability that he or she will obtain a favorable precedent.[18] According to conventional wisdom, parties should only litigate when a favorable outcome is likely.[19] Conversely, a litigant is more inclined to settle if the odds of losing are high.[20] Similarly, the common understanding is that time and resources should be directed toward those legal disputes that have the best chance of success[21] and that litigation is to be avoided if it may establish or strengthen unfavorable precedent.[22] This Essay amends this elementary view of litigation. The mobilizing effect of litigation expands the considerations that figure into the decision to settle or litigate. The strategic potential of litigation complicates the decision of when or how to litigate or settle. A settlement eliminates the chance of establishing a favorable precedent but, in some circumstances, may also remove the opportunity to obtain the socially mobilizing effects of an unfavorable precedent. At the same time, in considering whether to pursue mobilizing litigation, a plaintiff must weigh the costs of an unfavorable judicial

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17. For some major examples of this phenomenon in intellectual property law, see, e.g., Stewart v. Abend, 495 U.S. 207, 230 (1990) ("Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); Graham v. John Deere Co., 383 U.S. 1, 6 (1966) ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.").

18. See generally Robert Cooter & Thomas Ulen, Law and Economics 377–81 (3d ed. 2000) (modeling expected value of legal claim for rational plaintiff as computation of expected payoff less litigation costs).

19. Any bargaining for settlement will occur with the likely outcome at trial as the backdrop. The classic treatment is Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 973 (1979).

20. Infra note 29 and accompanying text.

21. See Jack Greenberg, Litigation for Social Change: Methods, Limits and Role in Democracy, *in* 29 Rec. Ass'n B. City N.Y. 320, 326, 349 (1974) ("[C]ertain cases should not be brought if they are likely to be lost.").

22. Accordingly, a legal defeat might reduce the "opportunity structure" of a social movement since judicial victories "impart salience or legitimacy to general categories of claims (for example, antidiscrimination rights)." Michael W. McCann, How Does Law Matter for Social Movements?, *in* How Does Law Matter? 76, 88 (Bryant G. Garth & Austin Sarat eds., 1998) (reviewing role of law in social movement literature).

outcome against the uncertain benefits generated by the mobilizing effect of the adverse decision.

Third, the mobilizing potential of adverse court decisions presents a fascinating conflict between the immediate interests of the actual plaintiff and those of the litigation entrepreneur that supports the litigation with an eye on the underlying long-term goals of a social cause. Because a losing effort imposes immediate costs on the plaintiff, the litigation described in this Essay often features the active presence of a third party providing legal strategy advice and financial counsel to the plaintiff. As shown below,[23] ideologically motivated litigation entrepreneurs often actively control the litigation process, making strategic decisions while keeping in mind the overall impact of the litigation on the underlying cause.

Finally, the potential benefits of adverse outcomes in litigation refute some of the criticism about the limitations and downsides of pursuing social change through courts. For instance, some commentators argue that court victories might be counterproductive because they create a false sense of security among supporters, who tend to overestimate the impact of court decisions.[24] By the same token, however, the overestimation of the impact of judicial decisions might work to the benefit of movement mobilization because it makes an adverse outcome more salient and likely to generate substantial concern.[25]

The analysis presented here highlights the relative nature of legislative or judicial accomplishments. Major victories can instill a false sense of security in supporters of a cause, while inspiring opposing groups, who might have an easier road going forward, to erode the benefits of the judicial victory.[26] Moreover, when a social movement obtains public support because of an unfavorable verdict, the resulting political reversal of the judicial outcome may *in turn* become a source of agitation and political mobilization for supporters of the initial court decision.[27] Overall, the ongoing process of reaction and counterreaction may increase the degree of polarization in society.

This Essay unfolds as follows. Part I reviews the prevailing viewpoints on litigation and social change. Part II explores the dynamics of successful defeat in litigation. Part III identifies the essential aspects of mobilizing litigation: the involvement of litigation entrepreneurs and the selection of disputes for litigation. Part IV reflects on the mobilizing effect of litigation in the broad context of courts, legislatures, and individual litigants. That Part also reflects more broadly on the relation between

23. See infra Part III.A.

24. See infra notes 47–52 and accompanying text.

25. See infra Part IV.C.

26. See infra Part IV.D.

27. See infra Part IV.D.

mobilizing litigation and various other elements, including the authority and legitimacy of the legal system, the role of the judiciary, and the degree of polarization in society.

I. CONVENTIONAL PERSPECTIVES ON LITIGATION

Litigation is about winning. Vindicating a claim in court is expensive,[28] but a defeat is especially costly because the losing party may face the costs of the adverse judgment as well as a potentially unfavorable precedent.

In theoretical models of litigation, for instance, it is conventional wisdom that a litigant's decision to litigate depends on the probability that litigation will result in a favorable verdict.[29] Economic models of litigation describe how individuals decide to pursue litigation on the basis of the likelihood of being successful, the gains that would result from a positive outcome, and the litigation costs involved.[30] Rational actors settle cases they are mostly likely to lose, litigating only those cases that they expect to win.

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28. E.g., David M. Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 91–92 (1983).

29. The seminal works include John C. Goodman, An Economic Theory of the Evolution of Common Law, 7 J. Legal Stud. 393 (1979) (explaining parties will invest more resources to obtain efficient precedent); Gillian Hadfield, Biases in the Evolution of Legal Rules, 80 Geo. L.J. 583 (1992) (rejecting efficiency claims because judges see only biased sample of potential cases); George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977) (concluding inefficient precedents generate larger stakes and are more likely to be relitigated); Paul H. Rubin, Why Is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977) (arguing inefficient precedents create asymmetric stakes and are subject to greater selection pressure).

30. The leading economic models of settlements include John P. Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279, 283–93 (1973) (developing economic model to measure "trading behavior of two individuals in the face of uncertainty" and applying it in context of lawsuit); William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61, 99 (1971) (examining variables that influence criminal settlements); Steven Shavell, Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. Legal Stud. 55, 63–69 (1982) (comparing four methods of apportioning litigation costs and how those methods affect parties' litigation choices). On information costs as an explanation for litigation, see, e.g., Bruce L. Hay, Effort, Information, Settlement, Trial, 24 J. Legal Stud. 29, 42–43 (1995) (modeling settlement bargaining to analyze why some cases fail to settle); Kathryn E. Spier, The Dynamics of Pretrial Negotiation, 59 Rev. Econ. Stud. 93, 97–99 (1992) (analyzing role of incomplete information in sequential bargaining). On failed bargaining and emotional impediments to negotiations, see generally, e.g., Robert Cooter, The Cost of Coase, 11 J. Legal Stud. 1 (1982) (analyzing why distributive decisions in private bargaining are uncertain); Ward Farnsworth, Do Parties to Nuisance Cases Actually Bargain After Judgment? A Glimpse Inside the Cathedral, 66 U. Chi. L. Rev. 373, 384–91 (1999) (documenting remarkable absence of postjudgment bargaining in nuisance disputes).

Similarly, public law litigation focuses on the strategic pursuit of favorable case outcomes on the basis of individual verdicts.[31] The civil rights, women's rights, and New Deal labor movements are generally remembered for providing landmark victories and creating new rights where none existed before.[32] By selecting disputes carefully, choosing venues wisely, and timing certain claims accurately, social movements could gradually win cases and ultimately reform entire areas of law. The model of public interest litigation seeks to seize upon the romantic ideal that courts have the power to remedy structural, constitutional, and statutory wrongs.

Over recent decades, however, the once widespread enthusiasm about public law litigation has now turned into widespread disillusionment. The notion that social movements could call upon judges to "reorder whole institutions and change the fundamental nature of society"[33] has dissipated and made place for general skepticism about the promise of obtaining significant social change through litigation.[34]

Some believe that the promise of success for social movements is greatly reduced in the current economic and political climate. First, it is sometimes stated that in a system of precedent, judicial rulemaking is biased toward wealthy, powerful institutional litigants.[35] Because repeat players often face similar legal issues in other disputes, they have a strong interest in preventing adverse precedents. With so much at stake, institutional litigants can be expected to invest heavily to secure victory in landmark disputes.[36] An insurance company, for instance, will be willing to spend considerable time and resources in litigation. When repeat players fear losing in court, they may prefer to settle the case, thereby avoiding the creation of an unfavorable precedent. Typically, the investments of

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31. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1298 (1976); Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 2 (1979).

32. See supra note 4 and accompanying text.

33. Charles Fried, Order and Law 16 (1991).

34. Lobel, Paradox, supra note 7, at 938–39.

35. As a result, repeat players invest heavily in obtaining favorable decisions. See Marc Galanter, Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 114 (1974) (arguing disparity in legal resources plays critical role in evolution of law); see also Catherine Albiston, The Rule of Law and the Litigation Process: The Paradox of Losing by Winning, 33 Law & Soc'y Rev. 869, 870–72 (1999) (pointing out that, beyond financial resources, institutional features of litigation process favor repeat players).

36. This is the collective action perspective on the evolution of law, which postulates that areas of law expand more rapidly if plaintiffs are supported by the presence of long-term stakeholders in the expansion of remedies and awards. Paul H. Rubin & Martin J. Bailey, The Role of Lawyers in Changing the Law, 23 J. Legal Stud. 807, 808 (1994).

institutional litigants outweigh those of individual litigants.[37] While the former expect to face similar claims in the future, the latter merely seek to obtain direct compensation in the individual dispute. Accordingly, in a common law system, the "haves" come out ahead because they possess the expertise and financial resources to litigate winning cases and settle the cases they are likely to lose.[38] For instance, in major tort disputes it is understood that the imbalance between large defendants and individual litigants in interest, experience, and resources enables large corporations to exert significant control over the creation of judge-made law.[39] This description of the judicial process presents a bleak picture for social movements and activists seeking to address social injustice before courts.

Second, there is a growing perception that courts are increasingly reluctant to adopt sweeping and progressive social changes in judicial decisions.[40] Because judges are perceived as reluctant to declare new, controversial rights, social movement advocates and legal reform communities are being cautioned about the pursuit of legal strategies and court-based activism.[41] There is a fear that repeated losses not only strengthen adverse precedents but also reduce the support for the underlying cause.[42] If so, litigation in pursuit of social change may prove futile and possibly counterproductive by draining movements of scarce resources that could have been applied to constructive uses.[43]

Others share a more fundamental criticism of the pursuit of social change by law. A strand of scholarship expresses grave disappointment about the limitations of legal reform through courts.[44] Rights-based strategies, it is argued, tend to produce narrow remedies that apply only in limited circumstances and provide no assurance about broader rights-based implementation[45] and enforcement.[46] Even if a broad set of rights

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37. On the influence of repeat players on long-term litigation outcomes in a common law process, see Galanter, supra note 35, at 98–99 (listing competitive advantages of repeat players and litigation specialists); Rubin & Bailey, supra note 36, at 808–09 (highlighting, in products liability context, strong interest of lawyers in precedents that expand scope and complexity of law).

38. Galanter, supra note 35, at 98–99.

39. Id. at 103–04.

40. See supra notes 5–6.

41. For a comprehensive review of this contemporary critical scholarship, see generally Lobel, Paradox, supra note 7.

42. See Lobel, Courts as Forums, supra note 8, at 546–48.

43. Michael W. McCann, Taking Reform Seriously: Perspectives on Public Interest Liberalism 200 (1986).

44. Lobel, Paradox, supra note 7, at 940 ("[C]ontemporary legal scholars express a now-axiomatic skepticism about law's ability to produce social transformation.").

45. Chayes, supra note 31, at 1282–84.

46. Following the initial judgment, plaintiffs often face a secondary stage of litigation to obtain collection of payments ordered in the initial judgment. On the systemic effect of financial adequacy on behalf of defendants, see, e.g., Stephen G. Gilles, The Judgment-

has been confirmed by court order, the resources necessary to implement these rights might be lacking.

Questioning the capacity to bring about social change through litigation, scholars have argued that legal strategies mostly provide false, "hollow hope" to social movements.[47] While court victories are heralded as paradigm shifts and romanticized in constitutional law casebooks, it is argued that even sweeping legal reforms often fail to bring about substantial material change or fundamentally affect actual inequalities and injustices.[48] Because litigation serves to correct an individual wrong, it is mostly "backward looking" and fails to bring about long-term benefits.[49] This false optimism about the power of litigation outcomes is dangerous as it instills a false sense of security.[50] Most famously, Gerald Rosenberg's empirical study concluded that courts can "almost never be effective producers of meaningful social reform."[51] The complacence from symbolic victories[52] might reduce mobilization and shift focus away from obtaining further and more substantial political reform.

Some criticize the ability to bring about social change in litigation because "the focus on legal reform narrows the causes"[53] and diverts attention from other worthwhile causes. For instance, the success of sexual

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Proof Society, 63 Wash. & Lee L. Rev. 603, 617–33 (2006) (documenting legal rules that provide liability immunity to uninsured and underinsured); Lynn M. LoPucki, The Death of Liability, 106 Yale L.J. 1, 54 (1996) (analyzing legal institutions that accommodate deliberately judgment-proof defendants and discussing detrimental effects on deterrence).

47. Rosenberg, supra note 9, at 422; David Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2646 (1995) (emphasizing how financial burdens involved with litigation induce monetary settlements instead of structural transformations).

48. Joel F. Handler, Social Movements and the Legal System: A Theory of Law Reform and Social Change 233 (1978) (observing that in system of precedent, court-based success will necessarily be gradual).

49. E.g., Jennifer Gordon, Suburban Sweatshops 79 (2005).

50. Rosenberg, supra note 9, at 424–25.

51. Id. at 422.

52. Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1111 (1990).

53. Lobel, Paradox, supra note 7, at 939; see also, e.g., Sandra R. Levitsky, To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements, *in* Cause Lawyers and Social Movements 145, 146, 157–58 (Austin Sarat & Stuart A. Scheingold eds., 2006) ("[T]he dominance of legal advocacy organizations in social movements compromises—or tempers—the emancipatory potential of cause lawyering as a social movement strategy."); William H. Simon, Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism, 46 Wm. & Mary L. Rev. 127, 157–61 (2004) (outlining tension between representing individuals and furthering causes in law reform organizations); cf., e.g., Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought 3 (1988) (criticizing how litigation simplifies complexity of interests and needs of stakeholders involved in cause).

harassment litigation may have caused diversion from other forms of employee abuse and mistreatment in the workplace.[54]

Finally, some scholars present more principled objections to rights-based activism because a focus on legal rights may hinder the development of progressive movements, causing the so-called "legal cooptation" of a social movement. Social change litigation may be counterproductive not only by draining scarce resources from movements but also by generating confusion between real, substantive victories and mere symbolic ones.[55] Also, by pursuing litigation-based strategies, movements become overly dependent on the professional advice of lawyers,[56] and the agenda of social movements is softened and adjusted to existing legal conventions and thinking patterns.[57] More generally, by turning to law, a social movement is forced within a framework that excludes other more radical and perhaps equally effective alternatives such as protests, strikes, and pickets.[58] This presents the risk of compromising the goals and ideals of social movements. Moreover, success in court inadvertently may legitimize other "ongoing injustices[] and divert[] energies away from more effective and transformative alternatives."[59] Finally, and most pervasively, when certain social demands are vindicated in legal precedent, the legal protection may distract from the actual economic and social inequalities that continue to exist. For instance, "when a court decision declares the end of racial segregation but de facto segregation persists, individuals . . . begin to view continued inequalities as inevitable."[60] As a result, some reform communities and social movement advocates renounce litigation-based advocacy altogether. Concluding that the focus on rights-based

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54. Orly Lobel, Reflections on Equality, Adjudication, and the Regulation of Sexuality at Work: A Response to Kim Yuracko, 43 San Diego L. Rev. 899, 918 (2006) ("It is thus easier, or in a way *safer*, for private industry as well as for courts, to identify discrimination in sexually explicit activities, because this focus narrows the field of inquiry. It excludes deeper inquiries on distributive justice, pay equity, family responsibility rights, and firm decisionmaking structures.").

55. Scheingold, supra note 11, at 3–10 ("[J]udges cannot be counted upon to formulate a right to fit all worthwhile social goals.").

56. See, e.g., Gordon, supra note 49, at 196 ("[A] successful experience with legal services taught the worker nothing more than reliance on legal services.").

57. See Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2119 (1991) (criticizing poverty lawyers' displacement of client narratives with lawyers' own narratives).

58. See Michael 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, 263 (Austin Sarat & Stuart Scheingold eds., 1998) (surveying criticism of role of law in social movement action). On the potential transformative value of legal disobedience, see generally Eduardo Moisés Peñalver & Sonia K. Katyal, Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership (2010).

59. Lobel, Paradox, supra note 7, at 939 (emphasis omitted).

60. Id. at 957.

litigation hinders the development of progressive movements, those advocates favor instead nonlegal means of social action, including community organizing, grassroots campaigns, and broad-based protests.[61]

Other scholars maintain a more optimistic perspective on litigation. Michael McCann's work forcefully demonstrates the role of litigation in the development of pay-equity rights.[62] In the context of constitutional litigation, for instance, a school of thought suggests that social movements' disagreement over constitutional interpretation and values has a constructive impact on the development of constitutional law.[63] In their effort to influence the content of judicial decisionmaking, social movements instigate a public dialogue that inspires courts to consolidate common points of understanding into judicial doctrine.[64] This vision of litigation acknowledges the role of extralegal factors in the pursuit of litigation.[65] In the terminology of literature on social organization, litigation can act as a "collective action frame" that supports an action-oriented set of beliefs and meanings that inspire the social cause.[66] Similarly, a few scholars move the focus away from individual court victories, to argue

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61. On the need for nonlegal strategies, see generally Rosenberg, supra note 9. For an illustration of the potential role of grassroots collective action, see Carrie N. Baker, The Women's Movement Against Sexual Harassment 27–48 (2008). But see McCann, Rights at Work, supra note 11, at 296 n.19 (noting "critics who attribute much power to the myth of rights often romanticize alternative grassroots-oriented or state-centered tactics without assessing their feasibility in particular situations").

62. See generally McCann, Rights at Work, supra note 11. The work of McCann is a notable exception to the scholarly focus on precedent. On the basis of a wide-ranging empirical study, for instance, McCann argued that the threat of potential litigation could act as a lever to induce legislation addressing the underlying issues. Id. at 168–69.

63. This model of "democratic constitutionalism" is articulated in a number of articles including Robert Post & Reva Siegel, *Roe* Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007).

64. Balkin & Siegel, supra note 5, at 928–29; Siegel, supra note 5, at 300–01.

65. A few commentators highlight the potentially redeeming value of engaging in litigation, even when the odds of winning are not encouraging. Some herald the role of prophetic lawyers who push the barriers of the law in polarized areas of law, or advance international and new human rights, even if the chances of court victory are small. See, e.g., Koh, supra note 14, at 2349 (describing transnational public litigation's aim as "to provoke judicial articulation of a *norm* of transnational law, with an eye toward using that declaration . . . [as] a bargaining chip for use in other political fora"); Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 Cornell L. Rev. 1331, 1332–33 (1995) ("[T]he primary point of [losing cases] is to inspire political action . . . . They [speak] to the public, not just to the Court. Even more importantly, they [speak] to history."). However, losing litigation is not merely the province of naively optimistic litigants or revolutionary prophetic lawyers. As argued in Part II, infra, losing litigation can be part of a deliberate and strategic approach that fits within a larger pursuit of significant legal and social change.

66. For a review of the literature on collective action frames, see generally Robert D. Benford & David A. Snow, Framing Processes and Social Movements: An Overview and Assessment, 26 Ann. Rev. Soc. 611 (2000).

that any individual case outcome is but a small step in a larger multisequence process where litigation can be useful in attracting public attention, working as a form of communicating with others in society to put pressure on other levels of government.[67] For instance, in the civil rights context, Jules Lobel has set out a model of "prophetic" or "rebellious lawyering," where courts are used as a forum of protest.[68] From this viewpoint, the focus of litigation is not solely on winning or losing but also on using courts as a venue to engage in discussion and speech.[69] The primary objective of public law litigation is not related to judicial precedent, but instead relates to broader goals such as the advancement of a social movement or changing public opinion on the causes represented in the litigation. Similarly, in the context of international law and human rights litigation, Harold Koh advocates a model of transnational litigation where international litigation seeks immediate redress in favorable court verdicts but also broader results such as the declaration of norms, political pressure, and the abatement of government practices.[70]

These scholars identify a crucial aspect of cause-based litigation: the democratic potential of lawsuits as a way to speak out on political issues. Many historic changes in American society can be traced to cases that fall within this category. Many early legal defeats in the civil rights area, for instance, did not lead to immediate changes in the law but simply infused a new, expanding viewpoint into the public debate over certain civil rights causes.[71] The measure of success in litigation is not full legislative reversal of the legal status quo but rather a comparison of the public and political support for the cause before and after the litigation effort. The next Part pushes this insight further, to argue that *especially* losing in litigation can produce unique benefits to social movements, in both the legal and nonlegal spheres. Part III in turn examines the ex ante strategic decisions faced by litigation entrepreneurs who pursue litigation with the awareness that losing the case can provide substantial benefits.

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67. Koh, supra note 14, at 2397–98 (arguing transnational litigation fosters communication "between domestic and international law-declaring insitutions" and spurs national legislatures to follow global norms); Lobel, Courts as Forums, supra note 8, at 480.

68. Lobel, Success Without Victory, supra note 12, at 4–9.

69. Lobel, Courts as Forums, supra note 8, at 482.

70. Koh, supra note 14, at 2371, 2397–98.

71. Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 7 (2004) (characterizing focus on civil rights cases' direct effects as too narrow and describing litigation as "method of protest"). A classic example in this context is the Supreme Court opinion in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. Const. amend. XIV. For background on the case and its social context, see generally Mark L. Shurtleff, Am I Not A Man? The Dred Scott Story (2009); Alexander Tsesis, We Shall Overcome: A History of Civil Rights and the Law 77–82 (2008).

II. THE POWER OF DEFEAT IN LITIGATION

In the early 1990s the city of New London sought to promote urban renewal in one of Connecticut's most distressed communities. A private redevelopment plan envisioned the creation of a small urban village on a ninety-acre plot. Faced with fifteen or so reluctant sellers,[72] the city initiated condemnation proceedings against the homeowners. A few individual owners challenged the city's eminent domain decision. The proceedings ultimately reached the United States Supreme Court, where the constitutionality of economic development takings was examined once again.[73] The Court reaffirmed the power of local governments to expropriate private property under the Takings Clause of the Fifth Amendment, clarifying that private redevelopments that confer economic benefits on communities qualify as "public use."[74] The Supreme Court decision in *Kelo* received considerable attention in mainstream news and media reports. The case made for several salient talking points: None of the condemned homes was blighted, the redevelopment plan would benefit large corporations, and the facts highlighted how easily local governments can appropriate the property of individual landowners and hand it over to private developers. Commentators on both sides of the political spectrum expressed dismay over the decision. For the left, *Kelo* represents the uphill battle individuals face against major corporations that influence the political process.[75] For the right, the outcome negates individual liberty and private property rights in favor of a voluntarist state.[76] Congress held hearings on the issue.[77] State legislators

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72. For a description of the facts in *Kelo v. City of New London*, see Steven E. Buckingham, Comment, The *Kelo* Threshold: Private Property and Public Use Reconsidered, 39 U. Rich. L. Rev. 1279, 1283–90 (2005).

73. Kelo v. City of New London, 545 U.S. 469 (2005). The relevant precedents include National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992), Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), and Berman v. Parker, 348 U.S. 26 (1954). See infra note 134 (outlining precedents for *Kelo*).

74. *Kelo*, 545 U.S. at 489–90.

75. For example, see Representative John Conyers's (D-Mich.) statement that economic development takings are "used historically to target the poor, people of color, and the elderly." 151 Cong. Rec. 14,983 (2005). For an overview of the public reaction to *Kelo*, see Abraham Bell & Gideon Parchomovsky, The Uselessness of Public Use, 106 Colum. L. Rev. 1412, 1413–15 (2006).

76. See M. Albert Figinski, Op-Ed., Eminent Domain, Regulatory Takings: A Fifth Amendment Update, Daily Rec. (Balt.), Dec. 10, 2004, at 4B ("Conservative columnist James Kilpatrick opined that the *Kelo* case is a Big One, reaching to the very heart of what constitutional law is all about. . . . Kilpatrick expressed no doubt that such a taking is not for a public use." (internal quotation marks omitted)); see also Rosa Brooks, Op-Ed., It's Open Season on Private Property, L.A. Times, July 27, 2005, at B13 ("Libertarians denounced the decision as the death knell for private-property rights. It's outrageous, they argued, that government should be allowed to take houses away from their owners so that developers can build shopping malls and football stadiums.").

across the country recognized the public discomfort with the decision and the electoral value of taking a stand against *Kelo*. Ultimately, the public indignation about the outcome of the case prompted over forty states to adopt legislative measures that curtail economic development takings. Voters in twelve states faced ballot initiatives in the midterm election in November 2006 restricting the use of eminent domain.[78] Within five years of the case, forty-three states modified their laws to restrict the government's takings power.[79] Florida,[80] Georgia,[81] Nevada,[82] Michigan,[83] North Dakota,[84] New Hampshire,[85] and South Carolina[86] all amended their state constitutions to restrict the use of eminent domain for private development projects.[87]

What first resembled a resounding loss[88] eventually became a victory of a different sort for the opposition to economic development takings.

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77. E.g., Supreme Court's *Kelo* Decision and Potential Congressional Responses: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2006).

78. Les Christie, Kelo's Revenge: Voters Restrict Eminent Domain, CNNMoney.com (Nov. 8, 2006, 11:21 AM), http://money.cnn.com/2006/11/08/real_estate/kelos_revenge (on file with the *Columbia Law Review*). For examples of post-*Kelo* ballot measures, see Ariz. Dep't of State, Arizona 2006 Ballot Propositions (2006), Proposition 207, available at http://www.azsos.gov/election/2006/info/pubpamphlet/english/prop207.pdf (on file with the *Columbia Law Review*); Or. Dep't of Land Conservation & Dev., Information About the Election: Explanatory Statement in Voters' Pamphlet, available at http://www.oregon.gov/LCD/measure49/pages/misc_m37_information.aspx (on file with the *Columbia Law Review*) (last visited April 8, 2013).

79. Inst. for Justice, Five Years After *Kelo*: The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decisions 1, 3 (2010), available at http://www.ij.org/images/pdf_folder/private_property/kelo/kelo5year_ann-white_paper.pdf (on file with the *Columbia Law Review*); Castle Coal., 50 State Report Card: Tracking Eminent Domain Reform Legislation Since *Kelo*, http://www.castlecoalition.org/.php?=com_content&task=view&id=2412&Itemid=129 (on file with the *Columbia Law Review*) (last updated July 16, 2009).

80. Fla. Const. art. X, § 6.

81. Ga. Const. art. IX, § 2, para. 7.

82. Nev. Const. art. I, § 22.

83. Mich. Const. art. X, § 2.

84. N.D. Const. art. I, § 16.

85. N.H. Const. pt. 1, art. 12-a.

86. S.C. Const. art. I, § 13.

87. Voters in California, Idaho, and Washington rejected similar initiatives that would restrict eminent domain for private development. Jaime Jansen, Eminent Domain Restrictions Approved in 9 States, Rejected in 3, Jurist (Nov. 8, 2006, 2:04 PM), http://jurist.org/paperchase/2006/11/eminent-domain-restrictions-approved.php (on file with the *Columbia Law Review*); see also Ilya Somin, The Limits of Backlash: Assessing the Political Response to *Kelo*, 93 Minn. L. Rev. 2100, 2103–04 (2009) (arguing legislative restrictions on economic development takings post-*Kelo* are often relatively ineffective and symbolic, providing minimal protection to property owners).

88. For example, just a few hours after *Kelo* was issued, the city government in Freeport, Texas, filed papers seeking to seize two local seafood companies, to turn the

The history of *Kelo* illustrates that, as much as a plaintiff might hope to win a favorable verdict, substantial benefits also obtain in defeat. Fundamentally, *Kelo* and its aftermath suggest that certain disputes are worth litigating even if there is only a low ex ante probability of obtaining success in court.[89] The history of *Kelo* illustrates that plaintiffs, as much as they might hope to obtain a favorable verdict, recognize that substantial benefits might accrue in defeat.[90] It suggests that, if litigation has the potential to put into motion social and political support, certain disputes are worth litigating for the plaintiff, win or lose.

As has been recognized in the literature on social movements, litigation can play a unique role in stimulating public discussion. As one commentator described it, "a 20-page complaint and a temporary injunction are worth more than a 300-page report in the media."[91] Because the public is often poorly informed about the actual content of legal rules,[92] it is widely understood that litigation can provide an opportunity to inform the public about the law.[93] Media reports on legal proceedings raise the

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land into a private boat marina. Thayer Evans, Freeport Moves To Seize 3 Properties: Court's Decision Empowers the City To Acquire the Site for a New Marina, Hous. Chron., (June 24, 2005), http://www.chron.com/news/houston-texas/article/Freeport-moves-to-seize-3-properties-1941318.php (on file with the *Columbia Law Review*).

89. Although, on the one hand, *Kelo* can be regarded as a missed opportunity to overturn judicial precedent on economic development takings, it appears to be, on the other hand, an improvement over the status quo. Overall, then, the success of the case for the cause of restricting government power in economic development takings depends on (a) whether a different litigation strategy might have generated a more favorable judgment and (b) whether the benefits of a favorable judgment would outweigh the mobilizing effects of the controversial, adverse judgment. From the perspective of the Institute for Justice then, *Kelo* is a clear victory if the expected benefits from litigation would not likely exceed its estimated benefits from mobilization. As the Institute put it, "More than 16,000 homes and businesses [have been] saved since U.S. Supreme Court loss in *Kelo v. City of New London*," and "46 states protected property rights from eminent domain through legislative reform or state supreme court rulings after *Kelo*." Inst. for Justice, IJ at a Glance, http://www.ij.org/about-ij-ij-at-a-glance (on file with the *Columbia Law Review*) (last visited Nov. 1, 2012).

90. As detailed in Part III.B, infra, an important consideration and strategy is of course to minimize the precedential costs accrued in defeat.

91. Handler, supra note 48, at 210, 216.

92. Studies show that legal ignorance is widespread, even with regard to legal rules that have immediate impact on one's status, as is the case with regard to employment contracts, commercial transactions, or marriage and family rights. See, e.g., Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 144–45 (1991) ("Surveys of popular knowledge of the law relevant to ordinary household transactions . . . invariably show that the respondents have scant working knowledge of private law."); see also Stewart MacCaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 1, 10–11 (1963) (describing how professional relationships and norms make formal contract rights irrelevant).

93. Recent writings highlight the information function of litigation campaigns, for instance in the area of labor rights and pay equity. See, e.g., McCann, Rights at Work, supra note 11, at 13 (suggesting litigation can "publicize the equity issue, to nurture a growing

public's awareness of rights and legal issues.[94] Litigation can illustrate the constellation of rights among individuals or between individuals and the government in concrete situations.[95] By invoking the law, litigation also raises awareness about existing contradictions between substantive rights, on the one hand, and private or public norms, on the other. By observing outcomes of litigation through popular news reports, the public learns about prevailing legal positions on social issues. But litigation does more than simply inform the public about legal rules and their applications. Litigation is an adversarial process that frames issues and draws individuals into taking sides. In this opinion-formation process, litigated outcomes unavoidably identify winners and losers while creating opportunities to construct narratives that engender empathy and public support. As argued below, the mobilizing effects of litigation can often be stronger for losers than winners.

First, losing litigation generates a potentially powerful narrative.[96] Litigation involves identifiable parties engaged in a specific dispute. By demonstrating laws' effects on facts and individuals, losing litigation can punctuate the injustice that can result from the application of legal rules to concrete situations. Unfavorable case outcomes may conflict with the personal, social, cultural, or political values of some members of the public. In doing so, adverse litigation results might cause members of the

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'rights consciousness' among many working women"). An important disclaimer is that the representation of the law in media reports will often be very incomplete and sometimes distorted. On the chasm between law and media reports of law, see William Haltom & Michael W. McCann, Distorting the Law: Politics, Mass Media, and the Litigation Crisis 9 (2004) (arguing "institutionalized predilections driving entertainment-oriented mass media . . . shape the style and content of legal knowledge production" into "routinely dramatized, personalized media representations").

94. McCann, Rights at Work, supra note 11, at 53–54.

95. Litigation might demonstrate how legal rules constrain government action. However, a case might illustrate the sweeping regulatory powers and discretion of government actors. *Kelo*, for instance, provides a readily identifiable example of the considerable discretion of local governments to interfere with private property rights, as afforded by constitutional takings law. Similarly, recent decisions by the Supreme Court involving the Commerce Clause illustrate the sweeping power of the federal government to regulate economic activity. E.g., United States v. Comstock, 130 S. Ct. 1949, 1964 (2010) ("Congress relies on different enumerated powers (often, but not exclusively, its Commerce Clause power) to enact its various federal criminal statutes . . . ."); Gonzales v. Raich, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

96. As Ewick and Silbey have argued, narratives about law and everyday life can be powerful catalysts of change. Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories from Everyday Life 30, 220, 241–44 (1998) ("[S]tories are a potent means through which individual lives . . . become socially meaningful and potentially transformative.").

public to recognize gaps that exist between their own normative conceptions of justice and the legal status quo.[97]

Also, a legal defeat can be very effective at putting into context abstract legal issues. Take, for instance, the issue of economic development takings. Public policy on takings law involves a difficult tradeoff between governmental discretion and individual autonomy. Economic development takings policies must balance various values including efficiency, personal liberty, and democracy.[98] But in actual litigation, the public learns about the issue in the context of a story involving a specific government plan, a few commercial entities that benefit from the plan, and the plight of the negatively affected private landholders. The narrative nature of litigation helps capture the imagination of the public and increase public involvement with regard to the underlying issues. For instance, in popular media accounts, *Kelo* became a story of law-abiding citizens caught in the stream of industrial development, with powerful corporations influencing the political agenda.[99]

Moreover, storytelling in litigation is powerful because narratives enable the public to identify with the parties involved in the litigation. By presenting a narrative, litigation condenses a legal issue into a dispute involving individual litigants, creating the potential that the public will identify with the facts or the situation faced by a litigant. Empathy is especially likely if members of the public can draw parallels between the circumstances or facts in the case and their own lives.[100] Even the merely hypothetical possibility of suffering as litigants do could well induce identification with and sympathy for litigants and the cause they represent.

Second, a defeat in court will likely be especially effective if it highlights the misfortunes of certain individuals under prevailing law. In many cases, the mobilizing effect of litigation will be stronger when a case is lost. A defeat may often be salient and generate public attention, especially if the loss generates sympathy for the loser, portraying him or

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97. For contemporary literature on legal consciousness, see generally id.; Sally Engle Merry, Everyday Understandings of the Law in Working-Class America, 13 Am. Ethnologist 253 (1986); Ann Swidler, Culture in Action: Symbols and Strategies, 51 Am. Soc. Rev. 273 (1986). For a discussion of the role of law in shaping American political values and vice versa, see Scheingold, supra note 11, at 13–22. Additionally, litigation often produces dissenting opinions and amicus briefs that might lend further credibility to the viewpoints advocated by a social movement.

98. See Abraham Bell & Gideon Parchomovsky, Takings Reassessed, 87 Va. L. Rev. 277, 289–94, 300–04 (2001) (providing efficiency and fairness arguments in support of compensation to owners suffering economic losses arising from externalities of compensated invasion of others' land).

99. See supra notes 75–76 and accompanying text (discussing media and political reactions to *Kelo*).

100. On the cognitive and social foundations of empathy, see Stephanie D. Preston & Frans B.M. de Waal, Empathy: Its Ultimate and Proximate Bases, 25 Behav. & Brain Sci. 1, 1–5 (2002).

her as a victim in a story about the failure of the legal system. Such stories are convincing if the losing party and its goal generate empathy. If the public identifies with the plight of the losing litigant, such sympathy or compassion may benefit the underlying cause.

Third, the adversarial nature of litigation may compel individuals to take sides. A court verdict identifies a winner and a loser.[101] By its very nature, the adversarial process forces litigants to take inimical positions and to challenge aggressively the viewpoints of their adversaries. In this adversarial process, litigation fosters a discourse that is hostile, rather than conciliatory. The lack of compromise and middle ground inevitably polarizes the viewpoints in a dispute.

Finally, an adverse court decision identifies a target of action that can mobilize public pressure and political forces. If the impression is that courts decided a case on the basis of existing law, the litigation exposes the source of the possible ineffectiveness, inefficiency, or unfairness that is associated with the judicial decision. The litigation outcome suggests to members of the public that the legal status quo is unsatisfactory. Here, the link between the pursuit of social change and judicial deference becomes clear. If courts are simply applying the law to the facts of the dispute—as deferential judges often explicitly state in their opinions[102]—the ultimate responsibility for the verdict rests with the policymakers that implement the relevant statutory rules. Further, in a representative democracy, the ultimate responsibility for our substantive legal rules rests with democratic representatives and the voters who elect them into office.[103] In this sense, unsuccessful litigation holds a mirror to society. It informs the public of the inadequate state of the law or the ambiguities in the law. Litigation puts forth a direct course of action to address the inadequate situation. While traditional social movement advocacy may seek various means of support for an underlying cause,[104] litigation aims at a narrow but concrete target for social action: to build support that might one day overturn an existing legal rule that has been highlighted by the adverse court verdict. In this sense, losing litigation has a mobiliz-

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101. While this may seem obvious to those trained in the Anglo-American legal tradition, the adversarial system is not universal. See, e.g., Francesco Parisi, Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared, 22 Int'l Rev. L. & Econ. 193, 193–97 (2002).

102. See, e.g., Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 630 (2007) ("Respectful of the legislative process that crafted this scheme, we must 'give effect to the statute as enacted' . . . ." (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 819 (1980))), superseded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2. 123 Stat. 5.

103. 1 Bruce Ackerman, We the People: Foundations 6–7 (1991); Robert S. Erikson et al., Statehouse Democracy: Public Opinion and Policy in the American States 244 (1994).

104. See supra notes 9–10 and accompanying text (discussing nonlegal means of social action).

ing potential that may be more effective than many of the alternative means of action available to social movements, such as press releases, protests, boycotts, etc.

As a result of these dynamics, litigation may build substantial public support for a cause. There are at least three possible measures of potential success brought about by court defeat. In the most positive scenario, litigation brings attention to a social issue in a way that ignites public support for the cause, prompting legislators to overturn the judicial precedent. If a defeat in court generates a critical amount of public resentment, legislators and public representatives might be considered responsible for implementing (or not challenging) legal rules that are the foundation of the unpopular verdict. Similarly, state or federal legislators might be held accountable for failing to take action to correct the applicable rules. In a best-case scenario then, public dismay will be sufficient to prompt legislators to adjust or even overturn the legal rules that provided the basis of the judicial opinion. As cases such as *Kelo* illustrate, litigation can act as a lever for legislative counteraction that reverses the legislative action challenged in the lawsuit, or it can instigate legislation that overrules or minimizes the judicial precedent created by the litigation.[105]

A second possibility is that unfavorable litigation raises public and political awareness about the underlying cause, effectively slowing down an ongoing trend of legislative initiatives challenged by the case. Losing litigation can be worthwhile even if it falls short of setting in motion countervailing legislative action. In many instances, litigation has the more subtle effect of raising public awareness over legal issues. By bringing attention to issues and raising public awareness, litigation may induce public opposition to the state of the law or a resentment of certain legislative trends. The resulting sensitivity to these issues may make legislators more apprehensive about proceeding further in a direction that has been challenged by the litigation. Take for instance the major defeat of the free culture movement in *Eldred v. Ashcroft*.[106] Although the argument that recent copyright law extension exceeded Congress's power under the Copyright Clause in violation of the First Amendment failed,[107] the

105. See supra notes 77–87 and accompanying text (describing legislative responses to *Kelo*).

106. 537 U.S. 186 (2003).

107. With regard to petitioners' argument that the Copyright Term Extension Act (CTEA) evaded the "limited Times" constraint, U.S. Const. art. I, § 8, cl. 8, by creating effectively perpetual copyrights through repeated extensions, the Court emphasized that the Constitution specified that Congress merely needed to set time limits for copyright, the length of which was left to their discretion: "Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not. . . . Those earlier Acts did not create perpetual copyrights, and neither does the CTEA." *Eldred,* 537 U.S. at 209–10. In

case became a symbol representing the darker side of the expansion of intellectual property laws.[108] Media reports highlighted the intensive lobbying effort by the Disney Corporation in support of the Copyright Term Extension Act[109] and, in so doing, further spread the notion of the capture theory of copyright law. This theory holds that powerful interests in the entertainment industry have long determined the shape of copyright law and are currently deciding the future legality of emerging practices and technologies on the Internet.[110] The case brought new attention to the public interest issues involved in having a healthy public domain of works that are accessible for free use and as a source of inspiration for the creation of future works. In this regard, the *Eldred* case galvanized free speech activists and creative artists and writers, spurring a movement that continues to have a very active presence online.[111] Since the decision, the entertainment industry has thus far been unsuccessful in obtaining additional protections against digital copyright infringements.[112]

A third, more modest effect is obtained if litigation instigates involvement, creating a polarized political climate. A losing litigation effort may work as a focal point in the debate and become a part of the language in the social debate on the issue. In these instances, losing litigation can act as a rallying cry against the status quo and might instigate a new view. In this regard, mobilizing litigation is an inroad to public support and future political agendas. Even if only this more moderate effect

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other words, as long as the limit is not forever, any limit set by Congress can be deemed constitutional. The Court also rejected the various free-speech-based arguments made by the petitioners. Id. at 219–20.

108. See, e.g., Chris Sprigman, The Mouse That Ate the Public Domain: Disney, the Copyright Term Extension Act, and *Eldred v. Ashcroft*, Findlaw's Writ (Mar. 5, 2002), http://writ.news.findlaw.com/commentary/20020305_sprigman.html (on file with the *Columbia Law Review*) ("If we know little about the utility of longer copyright terms, there is abundant evidence regarding the vital importance to the progress of our culture of a robust stock of public domain works.").

109. Id.

110. See generally Jessica Litman, Copyright Legislation and Technological Change, 68 Or. L. Rev. 275 (1989) (describing effects of industry lobbying).

111. See, e.g., John Naughton, Mickey Mouse Threatens To Block All Ideas in Future, Observer (Feb. 23, 2002), http://www.guardian.co.uk/technology/2002/feb/24/business.columnists (on file with the *Columbia Law Review*) ("We all borrow ideas from one another all the time: imagine how few songs would be composed if songwriters had to pay for every song they'd ever listened to."). Anticopyright sentiments pervade the discourse of the online "Copyleft" movement. Rachel Aviv, File-Sharing Students Fight Copyright Constraints, N.Y. Times, Oct. 10, 2007, at B7 ("'We will listen to free music, look at free art, watch free film and read free books . . . . We refuse to accept a future of digital feudalism.'" (quoting Free Culture Manifesto, freeculture.org, http://wiki.freeculture.org/Free_Culture_Manifesto (on file with the *Columbia Law Review*) (last visited Feb. 26, 2013))).

112. Obviously, as is usually the case with counterfactuals, it is very hard to predict what a world without *Eldred* would look like. Perhaps it would not look very different at all.

obtains, unsuccessful litigation can be an improvement over the status quo of forgoing litigation or settling the case, especially if the precedential costs from the unfavorable verdict are modest.

III. ADVERSITY AND THE DECISION TO LITIGATE

This Part first examines the role of litigation entrepreneurs who pursue litigation with the awareness that losing the case can provide substantial benefits to a cause (III.A). Second, it analyzes the ex ante strategic decisions faced by litigation entrepreneurs when selecting disputes for litigation (III.B).

A. *Litigation Entrepreneurs*

Litigation is expensive. And a potential defeat increases the expected costs of litigation since the court might award damages to the winner. Perhaps then, success after a litigation loss is simply an unexpected by-product of an unsuccessful suit initiated by a hopeful and optimistic party.

Accidental cases of successful defeats certainly exist, but adverse litigation also fits within a deliberate strategy on behalf of third parties who have a long-term interest in the cause and who are willing to carry the financial burden of litigating a case that might not generate immediate material or judicial returns. To these intermediaries, the dynamics of adverse decisions, described in Part II above, present a significant opportunity to advance a cause.

Litigation entrepreneurs who strategically assess the impact of the litigation on the underlying cause are often the driving force behind successful defeats. In the *Kelo* litigation, for instance, Susette Kelo and her coplaintiff Matt Dery received substantial assistance from the Institute for Justice. The Institute describes itself as the "nation's only libertarian public interest law firm."[113] It bills its purpose as to "pursue cutting-edge litigation in the courts of law and in the court of public opinion on behalf of individuals whose most basic rights are denied by the government."[114] Tellingly, on its website, the Institute lists first and foremost not its victories in litigation but the fact that its "clients, cases and attorneys [are] featured frequently in the national media, such as ABC News 20/20 or the CBS News program 60 Minutes."[115] With "strategic litigation, training, communications, and outreach," as major instruments, the Institute seeks to fulfill its ideological goals to challenge "the ideology of the welfare state" and to "illustrate[] and extend[] the benefits of freedom to

113. IJ, Profile & Mission, Inst. for Just., http://ij.org/ij-profile-a-mission (on file with the *Columbia Law Review*) (last visited Feb. 26, 2013).

114. Id.

115. Id.

those whose full enjoyment of liberty is denied by government."[116] The Institute seeks out cases actively and recruits submissions for "Case Investigations" on its website.[117] *Kelo* presented ideal litigation conditions. The Institute for Justice hoped that it would win the argument but realized, at the same time, that a loss would provide additional political ammunition in its overall challenge to the government practice of economic development takings.[118] The dispute involved a number of homeowners who were very reluctant to leave their homes and who had already turned down substantial offers of compensation for their homes. This provided some reassurance to the Institute that its investments in the litigation would not be undermined by a settlement.

Grutter v. Bollinger offers another striking example of strategic litigation involving litigation entrepreneurs.[119] Although the plaintiff's constitutional challenge to Michigan Law School's affirmative action admission policies failed, the Supreme Court decision generated considerable public backlash, ultimately leading to a successful ballot initiative to change the Michigan Constitution and restrict the use of race in admission policies.[120] The litigation initiative in *Grutter* was supported by the Center for Individual Rights,[121] a libertarian nonprofit public interest law firm dedicated to the defense of individual liberties by enforcing constitutional limits on state and federal power. Acting as a litigation intermediary, the Center "provides free legal representation to deserving clients who

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116. Press Release, Inst. for Justice, Policing & Prosecuting for Profit: New Jersey Ex-Sheriff Fights Civil Forfeiture Abuse (Nov. 15, 2000), http://www.ij.org/new-jersey-civil-forfeiture-launch-release (on file with the *Columbia Law Review*).

117. Potential Case, Inst. for Just., http://ij.org/about/potentialcase (on file with the *Columbia Law Review*) (last visited Feb. 26, 2013).

118. Interview with Scott Bullock, Att'y, Inst. for Justice, at Univ. of Miami Law Sch., Coral Gables, Fla. (Oct. 6, 2006).

119. 539 U.S. 306 (2003) (upholding Michigan Law School's affirmative action admissions program).

120. See Carl Cohen, The Michigan Civil Rights Initiative and the Civil Rights Act of 1964, 105 Mich. L. Rev. First Impressions 117, 121 (2007), http://www.michiganlawreview.org/assets/fi/105/cohen.pdf (on file with the *Columbia Law Review*) (arguing Michigan Civil Rights Initiative effects same purpose as Civil Rights Act of 1964). Article I, Section 26 of the Michigan Constitution is also known as the Michigan Civil Rights Initiative (MCRI), or Proposal 2 (Michigan 06-2). The MCRI was subsequently overturned by the Sixth Circuit, but the Michigan Attorney General has appealed the decision to the Supreme Court. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466 (6th Cir. 2012), petition for cert. filed, No. 12-682 (U.S. Nov. 28, 2012).

121. Michael Rosman, Uncertain Direction: The Legacy of *Gratz* and *Grutter*, Jurist Online (Sept. 5, 2003), http://www.cir-usa.org/articles/167.html (on file with the *Columbia Law Review*) (explaining motivations behind litigation). For more information on the Center, see Center for Individual Rights, http://www.cir-usa.org/ (last visited Feb. 26, 2012).

cannot otherwise afford or obtain legal counsel."[122] The stated goals of the Center are to "aggressively litigate and publicize a handful of carefully selected cases."[123] The opportunistic use of legal disputes to persuade the public of a cause through the construction of a narrative is reflected in the Center's mission statement: "We represent real individuals who have been harmed by expansive state action. Demonstrating the concrete harms of the modern welfare state helps set legal precedent and, just as important, furthers the public case for limited government."[124] The Center recognizes and describes its role as litigation entrepreneur as follows:

> [We] take[] . . . an opportunistic approach to public interest law. Like a venture capital firm, we invest our resources in areas of the law that need reform and where we believe our expertise will help ensure a successful outcome. We assemble our own, original litigation . . . . We look for cases with strong facts that can move a public agenda through years of litigation. This approach allows CIR to set the terms of public debate regardless of whether we win or lose in court.[125]

If the odds of obtaining a favorable verdict are slim, a settlement will be tempting for the plaintiff with standing. Also, the other party's settlement offer might include additional compensation that reflects the value to the defendant of keeping the case from drawing public attention or discontent.[126] This presents a potential conflict between the plaintiff and the litigation entrepreneur. A settlement concession will have little or no impact on the cause—especially if nondisclosure agreements and confidentiality clauses apply.[127] As a result, litigation entrepreneurs may need

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122. The Mission of CIR, Center for Individual Rights, http://www.cir-usa.org/mission_new.html (on file with the *Columbia Law Review*) (last modified June 18, 2012).

123. Id.

124. Id. (emphasis omitted).

125. Id. The Center describes its litigation strategy as follows: "Our cases challenge excessive government regulation, unconstitutional state action, and other entanglements characteristic of the modern state." Id.

126. If the defendant is a repeat player and the plaintiff is not, the former will be more likely to offer a premium to the plaintiff in order to bury the dispute in a confidential settlement agreement. For an economic model, see Andrew F. Daughety & Jennifer F. Reinganum, Hush Money, 30 RAND J. Econ. 661, 664–70 (1999) (modeling benefits internalized by plaintiffs that sign nondisclosure agreements); Andrew F. Daughety & Jennifer F. Reinganum, Informational Externalities in Settlement Bargaining: Confidentiality and Correlated Culpability, 33 RAND J. Econ. 587, 591–95 (2002) (modeling external costs in confidential settlements in presence of correlated liability).

127. Settlements will benefit a movement more generally if the terms are public information and especially if the settlement attracts widespread public attention. Examples include consent decrees and master settlements. On consent decrees, see, e.g., Bernard T. Shen, Comment, From Jail Cell to Cellular Communication: Should the *Rufo* Standard Be Applied to Antitrust and Commercial Consent Decrees?, 90 Nw. U. L. Rev. 1781, 1787 (1996) ("[C]onsent decrees are published as court orders and therefore may have a

to persuade the plaintiff not to accept the settlement offer and to focus instead on the symbolic importance of the case.[128]

Upon first impression then, it seems that deliberate and strategic efforts of litigation mobilization are limited to situations where (a) litigation entrepreneurs are able to persuade the plaintiff to continue with litigation (for instance, by emphasizing the symbolic importance of the case); (b) plaintiffs strongly identify with the underlying cause; or (c) settlement offers are not forthcoming or are insufficient. In some cases, however, adverse litigation also offers the prospect of material benefit to the litigant. For instance, after *Kelo*, the public outcry against economic development takings caused the city of New London to suspend its development plans indefinitely.[129] Construction did not start until a settlement was reached with all of the landowners. Ultimately, Susette Kelo's house was moved to another part of the city. In addition, she received over $400,000 in compensation.[130]

The activities of litigation entrepreneurs fit within a larger tradition of cause lawyers and organizations that seek to support social causes through litigation. Most prominently, litigation efforts by organizations such as the American Civil Liberties Union have played an important role in establishing and protecting civil rights. Other examples include the National Rifle Association (NRA), which has a long tradition of financially supporting selected disputes in litigation in order to protect Second Amendment rights and often also attempts to challenge local and state laws that restrict gun ownership.[131] As described below, how-

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deterrent effect that otherwise would have been lacking had the parties resolved their dispute in a private settlement." (citing Thomas M. Mengler, Consent Decree Paradigms: Models Without Meaning, 29 B.C. L. Rev. 291, 317–18 (1988))). A prominent example of a master settlement is the Tobacco Master Settlement Agreement. Master Settlement Agreement Between Settling States and Philip Morris, Inc. et al. (Nov. 23, 1998), available at http://ag.ca.gov/tobacco/pdf/1msa.pdf (on file with the *Columbia Law Review*) (settling suits for recovery of tobacco-related healthcare costs between forty-six State Attorneys General and six largest U.S. tobacco companies).

128. In the conventional framework, a long-term stakeholder would need to convince the plaintiff of the importance of obtaining a favorable precedent; in the variant of mobilizing litigation the stakeholder would need to convince the plaintiff of the symbolic effect of the case and its potential political effects. For a discussion on issues of nonalignment between lawyer and client interests, see Cooter & Ulen, supra note 18, at 386–90; for a discussion on agency issues in the context of product liability litigation, see Rubin & Bailey, supra note 36, at 812–13.

129. William Yardley, Eminent Domain Project at Standstill Despite Ruling, N.Y. Times, Nov. 21, 2005, at A1.

130. Ms. Kelo received generous compensation, far exceeding the assessed value of the house. See Ted Mann, City Releases Fort Trumbull Settlements: State Kicked In an Additional $2.3 Million, Day (New London) (Aug. 22, 2006), http://www.theday.com/article/20060822/DAYARC/308229953/ (on file with the *Columbia Law Review*).

131. For an overview of the nearly one hundred cases that the NRA sponsors through its Civil Rights Defense Fund, see Current Litigation, NRA C.R. Def. Fund,

ever, there are significant differences between these established, more traditional forms of litigation advocacy and the litigation trend described in this Essay.

B. *The Selection of Disputes for Litigation*

In addition to the immediate material costs to the litigants, an adverse decision can also be costly for the underlying cause if an adverse judicial precedent is created or strengthened. This concern is amplified by the inherent uncertainty relating to the mobilizing benefits of any adverse decision.

Certainly, litigation entrepreneurs can preempt some of the precedential costs by carefully selecting disputes for litigation. For instance, invoking arguments that challenge a more stable adverse judicial precedent can reduce the potential precedential costs. The legal arguments of the plaintiff may, for instance, involve novel interpretations of longstanding legal precedents or creative approaches to constitutional interpretation. In those instances, the litigant is unlikely to face significant precedential costs in an adverse judgment, while the potential benefits of mobilization remain intact. As a downside, however, more remote legal arguments reduce the prospect of winning the case at all. Also, if a litigant challenges precedents that are too firmly entrenched, there is a good chance that the case will not make it to the higher courts or that a court will dismiss the claim as frivolous.[132] Overall, this presents a potential litigant with a difficult balancing decision.

Kelo reflects the difficult tradeoff between the costs of litigation and the gains of mobilization. Although there is some danger of reasoning in hindsight, the case can be made that the plaintiffs faced strong, relatively established lines of judicial precedent. The Supreme Court's decision to uphold the governmental power of eminent domain for commercial development fits within a settled line of precedents that favors the government position in eminent domain disputes.[133] As a matter of law, *Kelo* confirms an established line of precedents that defines "public use"

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http://nradefensefund.org/current-litigation.aspx (on file with the *Columbia Law Review*) (last visited Feb. 26, 2013).

132. Rule 11 sanctions complaints that are so baseless as to be frivolous. See Fed. R. Civ. P. 11. On the complications presented by Rule 11 for protest litigation, see Lobel, Courts as Forums, supra note 8, at 520–24. And even in the context of nonfrivolous suits, other barriers to court may impede judicial review. As a consequence, "many attempts to establish entitlements to important collective rights fail before courts can give them full consideration." Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 603, 607 (1992).

133. Richard A. Epstein, Public Use in a Post-*Kelo* World, 17 Supreme Ct. Econ. Rev. 151, 164 (2009) ("[T]here is little doubt that the decision is *consistent* with the broad language that was consciously adopted in the two earlier Supreme Court cases on this issue . . . .").

rather expansively. Contrary to what the public controversy may suggest, the verdict in *Kelo* confirms the generally accepted practice of commercial development takings.[134] As to the plaintiff's argument that the courts should reject the lack of realistic benefits from the taking, the Supreme Court has in the past stated that the public use requirement is "coterminous with the scope of a sovereign's police powers."[135] In this view, the Court has declared that it will accept any use of eminent domain that is "rationally related to a conceivable public purpose."[136] As a result, federal courts do not meaningfully review government officials' justifications for invoking eminent domain.[137] Thomas Merrill summarizes the consensus that "most observers today think the public use limitation is a dead letter."[138] Similarly, state courts have treated government officials' invocations of eminent domain with nearly complete deference.[139] This state of the law has frustrated some commentators, but in general, the U.S. Supreme Court has attempted to balance this expansive take on public use by expanding the definition of a "taking" and, consequently, the obligation of providing "just compensation."[140] Although *Kelo* represents

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134. The majority opinion in *Kelo* was in line with *Midkiff*, which had somewhat strengthened prior precedent set in *Berman*. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239–41 (1984) (upholding state's transfer of private land ownership to lessees as part of state program to break up inequitable landholding patterns); Berman v. Parker, 348 U.S. 26, 33–34 (1954) (upholding taking of unblighted building as part of larger redevelopment program). *Kelo*'s precedent also includes *National Railroad Passenger Corp. v. Boston & Maine Corp.* 503 U.S. 407 (1992) (upholding transfer of railroad track from one common carrier to another). On takings law generally, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985). The 5–4 decision in *Kelo* may seem to suggest that the decision was close. That is, however, but one interpretation. The four dissenting votes did not advocate a desire to overturn the established precedent favoring economic development takings projects as fitting the public use requirement. Rather, votes reflect some disagreement about the decision of the majority to strengthen the existing precedent from *Midkiff*. See Kelo v. City of New London, 545 U.S. 469, 504 (2005) (O'Connor, J., dissenting) ("It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. . . . Today nearly all real property is susceptible to condemnation on the Court's theory.").

135. *Midkiff*, 467 U.S. at 240.

136. Id. at 241.

137. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) ("The role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow."); *Midkiff*, 467 U.S. at 242–43 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts."); *Berman*, 348 U.S. at 35 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area.").

138. Thomas W. Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61, 61 (1986).

139. 2A Nichols on Eminent Domain § 7.02[3] (Julius L. Sackman ed., 3d ed. 2002).

140. Cases that expand the definition of "taking" include Dolan v. City of Tigard, 512 U.S. 374, 388–95 (1994), Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030–31 (1992), First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304,

a Supreme Court decision that was a turning point for popular opinion on eminent domain, it does not merit as much attention as a surprising or novel legal decision.

More generally, the potential gains of mobilization may offset some of the likely precedential costs to a litigation entrepreneur or cause lawyer. If a loss in court is likely to generate a narrative that induces sympathy and support for the underlying cause, an ideologically driven litigant has less to lose by engaging in litigation. Interestingly then, a plaintiff can afford to be less selective when deciding whether to enter trial. This selection effect could explain the alleged, and commonly criticized, low success rate of cause litigation.[141] It also presents a novel insight on the rate of litigation. While it has traditionally been understood that most easy cases settle and only the most difficult to predict claims are litigated,[142] this selection effect might account for a subset of cases that are litigated despite having a more modest chance of success.

IV. ADVERSE SUCCESS IN PERSPECTIVE

The dynamics described in Part II above result from the interaction among courts, public reaction, and political processes. This Part situates these insights in this broader perspective. Specifically, it describes the

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318 (1987), and Nollan v. California Coastal Commission, 483 U.S. 825, 838–39 (1987). For an example of how there is no de minimis exception to the just compensation requirement, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436–39 (1982).

141. See supra note 9 and accompanying text (describing weakness of courts as engines of social reform).

142. According to the selection effect, disputes selected for litigation concentrate toward decisions where parties' probability estimates of victory at trial are further away from one another, which is more likely where precedent is ambiguous. George L. Priest, Selective Characteristics of Litigation, 9 J. Legal Stud. 399, 403 (1980). This observation results in the so-called "fifty-percent rule," which holds that cases selected for litigation tend toward a fifty-percent success rate. See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 17–19 (1984). For empirical support and research presenting counterevidence, see, e.g., Daniel Kessler et al., Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. Legal Stud. 233, 253–58 (1996) (confirming divergent expectation models closely resemble fifty-percent win rate); Peter Siegelman & John J. Donohue III, The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects To Test the Priest-Klein Hypothesis, 24 J. Legal Stud. 427, 445–51 (1995) (providing empirical evidence based on examination of win rates for employment discrimination cases filed during recessions); Joel Waldfogel, The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory, 103 J. Pol. Econ. 229, 242–48 (1995) (providing evidence that selection hypothesis sheds light on trial rates and plaintiff win rates across case types and judges). But see Donald Wittman, Is the Selection of Cases for Trial Biased?, 14 J. Legal Stud. 185, 196–99 (1985) (presenting different model with findings to contrary).

relation between adverse litigation and the position of courts, the authority and legitimacy of the legal system, and social polarization.

A. *The Role of Deferential Courts*

A fundamental premise of rights-based activism and public interest litigation is that courts will be convinced of the importance of the values represented by the cause. As such, it is understood that public interest litigation is dependent on judges who must be persuaded to take active positions, perhaps contrary to established custom and legal precedent. Social change advocates are often wary of courts that, relying on the authority of precedent, may be resistant to alter the status quo by judicial decree.[143] This has caused social mobilization advocates to express skepticism about the value of litigation strategies in the pursuit of social change.[144] The experienced difficulty in obtaining major reforms in courts, especially since the civil rights and women's rights victories half a century ago, has led some to believe that it is nearly impossible to obtain significant reform by litigation.[145]

This Essay suggests to the contrary that, even in the face of reluctant courts, investing in litigation can be an effective strategy for social change movements. First, for social movements, an adverse judicial outcome is an opportunity to construct a narrative about an alleged failure of courts to bring about desirable changes. In doing so, social movements can use antijudicial sentiments to their advantage in order to mobilize public reaction. By characterizing courts as antidemocratic or countermajoritarian, a narrative of judicial defeat can help boost the argument that legislative change is necessary. Second, passive courts and judicial deference simplify the strategies of litigation entrepreneurs because courts can be relied on to adhere to past precedent.

For courts, judicial deference presents an opportunity to deflect criticism and shift focus away from the judiciary and onto the legislative branches.[146] To some degree, judicial deference simply designates legislators as the target for further mobilization efforts.[147] This assignment of

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143. Other schools of thought are more optimistic about the ability of social movements to bring about significant social change through judicial action. For example, Siegel and Post's model of democratic constitutionalism offers that courts are often responsive to social movements voicing their disagreement over constitutional practices and interpretations. See supra note 63 and accompanying text.

144. See supra notes 6–7 and accompanying text (collecting scholarship).

145. See Rosenberg, supra note 9, at 422 ("U.S. courts can almost never be effective producers of significant social reform.").

146. For major examples in intellectual property along with *Eldred v. Ashcroft*, see supra note 17.

147. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 208 (2002) ("[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.")

responsibility can be especially potent if the court explicitly states that the law or past precedent ties its hands and that nothing prevents the legislative branch from changing the status quo. The majority opinion in *Kelo* provides a neat example of this double punch:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. . . . [T]he necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. . . . Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.[148]

Cass Sunstein and a few others have examined whether courts should anticipate public reaction to their decisions.[149] Some scholars have maintained that public indignation over court decisions is something dangerous that allegedly threatens to undermine the legitimacy of adjudication and to reduce overall participation in the democratic process.[150] This literature assumes that public backlash is caused exclusively by controversial decisions in which courts make adventurous decisions in support of "the vanguard of a social reform movement,"[151] or where courts render decisions that move too swiftly and "cause established groups to exit from politics."[152] In order to preserve democratic engagement and participation in a pluralist society,[153] courts, it is suggested, should employ minimalist or pragmatic models of judicial review.[154]

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148. Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (footnote omitted).

149. E.g., Cass R. Sunstein, Backlash's Travels, 42 Harv. C.R.-C.L. L. Rev. 435, 446 (2007) (discussing whether "social planner" would want courts to anticipate or respond to public backlash and citing other analyses of backlash).

150. See, e.g., William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 Yale L.J. 1279, 1293–94 (2005) [hereinafter Eskridge, Pluralism] (advocating for pluralism-focused judicial review to preserve democratic involvement); Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 101 (1996) ("It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary.").

151. Michael J. Klarman, *Brown* and *Lawrence* (and *Goodridge*), 104 Mich. L. Rev. 431, 445 (2005) (contrasting these major decisions with consideration of political constraints by courts).

152. Post & Siegel, supra note 63, at 397. For documentation of the historical shift in antigay rhetoric, see generally William N. Eskridge, Jr., No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review, 75 N.Y.U. L. Rev. 1327, 1405 (2000).

153. Eskridge, Pluralism, supra note 150, at 1324–27 (arguing that Supreme Court should "say as little as possible for as long as possible" on the topic of gay rights to promote pluralism).

154. Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 54 (1999) (defending case-by-case approach).

In contrast to these jurocentric perspectives, this Essay provides an analysis of the issue of backlash from the perspective of individual litigants. The dynamics described in Parts II and III suggest that the phenomenon of backlash is not restricted to instances where "activist" courts overstep the traditional boundary between legislative and judicial decisionmaking. Instead, by strategically selecting disputes for litigation, social movements are able to obtain the benefits of mobilization without the active involvement of courts. Despite their best intentions, courts might not always be able to anticipate or prevent public reaction to litigation. If a litigation entrepreneur has selected a dispute with salient facts and a sympathetic plaintiff, but existing precedent clearly disfavors the cause represented in the claim, a judge may have few options but to apply the law and defer to the legislature to prevent such outcomes from persisting.

B. *Anticipating Backlash in Litigation*

If a defeat in court generates substantial public disapproval and ultimately induces legislators to remove its legal force, a victory obtained in court might well be counterproductive for the winning litigant. So it is reasonable to ask whether this insight might affect the decision of the likely winner in litigation. Why, for instance, would a defendant proceed with litigation if there exists a reasonable probability that a judicial victory will prove to be counterproductive overall? Would a defendant not simply try to settle the claim and avoid the mobilizing effects altogether?

First, the expertise and ability to forecast public backlash is probably distributed unevenly among parties in the dispute. A litigation entrepreneur might simply have better information about the likely outcome, or the opposing litigant might be overly optimistic about the public reaction to the likely outcome of the dispute.[155] An accurate prediction of mobilization requires an assessment of the likely attention that the litigation will capture and the public reaction that will develop in response to the litigation. Successful litigation entrepreneurs might have a better-developed understanding of the potential role of the media and a superior pulse on popular sentiments. Also, litigation entrepreneurs can select disputes involving opponents that do not have much feeling or concern with public reactions. Some litigants might simply not be very concerned with the long-term effects of mobilization spillovers that might result from the litigation. Second, while social movement advocates are long-term stakeholders in a cause, many opposing litigants might be more concerned with the immediate outcome of the particular dispute.

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155. This is simply a variation of the asymmetric-information or optimism models that are the dominant explanation for litigation in models of litigants' decisions. See supra note 29 and accompanying text (collecting scholarship on litigation as probability-of-success analysis).

Third, even if the opposing party is concerned about public reactions to the outcome, it might not always be possible to avoid litigation. For instance, a plaintiff with a principled position or a long-term perspective might simply refuse to accept a settlement offer from a defendant.

In summary, the varying degrees of knowledge, stakes, and interest might explain why mobilization through litigation can be successful even if both parties in the dispute recognize the potential effects.

C. *Successful Defeat and the Criticism on Rights-Based Strategies*

All litigation strategies—*win or lose*—are to some degree vulnerable to the criticism of litigation-based initiatives expressed in the contemporary scholarship. For instance, if the involvement of lawyers tends to compromise the core of a social movement, all litigation-based strategies are suspect.

On the other hand, however, not all arguments from this critical literature apply with equal force to losing in litigation. First, a common critique is that rights-based approaches accomplish little in the way of real social change.[156] Although the prospect of a favorable court outcome may speak to the imagination of a social movement, the general lack of enforcement or institutional implementation greatly diminishes the impact of court decisions on the ground.[157] Because the moderate effect of court remedies is not always fully acknowledged, obtaining a favorable precedent thus becomes a "hollow" end goal for social movements.[158] Clearly, this argument does not apply with equal force to losing efforts in litigation. Because an adverse decision negates the hoped-for outcome, it does not risk creating a false sense of accomplishment. Instead, an adverse court outcome might serve as a starting point for future mobilization efforts. Although an adverse verdict might demoralize some supporters, social movements can use the decision, as previously discussed, to fuel public indignation and strengthen public support for the underlying cause. In this process, the disappointment with the limits of rights-based approaches may create momentum for a broader movement encompassing activities that extend beyond court-based strategies. Ironically then, a court defeat might sometimes be an effective way to propel the very nonlitigation-based initiatives that critical scholars advocate as being most effective to social mobilization (protest, community organization, etc.).

Second, it is sometimes stated that major judicial victories can be counterproductive because they may instill a false sense of security

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156. See supra text accompanying notes 61–62 (collecting scholarly critiques).

157. See supra notes 59–60 (describing persistent social problems after litigation).

158. See supra notes 47–52 and accompanying text (explaining how litigation results may mask continuing collateral problems).

among supporters. Accordingly, if the public generally overestimates the impact of court decisions, the perception of accomplishment might induce unwarranted complacency.[159] Again, an adverse court decision does not present any risk of complacency. Moreover, when losses are involved, this alleged overestimation of the impact of judicial decisions potentially works to the benefit of movement mobilization. When the meaning and impact of judicial opinions are overestimated, an adverse outcome will be more salient to supporters and may generate substantial outrage. Subsequently, the subjective perceived state of urgency may galvanize substantial public support for a movement.

Third, some scholars claim that successful litigation tends to have a perverse effect on important social issues that are not addressed in a litigation campaign.[160] Accordingly, when movement supporters feel vindicated by a court decision, this may lead some to view other remaining injustices as inevitable, or to legitimize other inequalities. On this point as well, the argument seems limited to winning litigation. By contrast, a court defeat can bring about mobilizing benefits without necessarily legitimizing anything. In fact, when a court is perceived to have neglected the injustices raised in the litigation, the subsequent outrage or backlash might spill over into a broader countermovement that targets a range of issues that extend beyond the goals conceived of in the actual litigation.

Fourth, it is sometimes argued that rights-based strategies inevitably narrow the scope of action of social movements.[161] In order to engage in litigation, some critics state, a movement must conform to more conservative legal strategies that ultimately erode the core mission of a social cause. Here also, the insights on successful defeat provide an interesting twist on the conventional thinking about social movement litigation. Grave disillusionment over adverse court decisions might be the tipping point that convinces supporters to opt out of traditional approaches and adopt a more radical perspective. In this manner, successive court defeats can be instrumental in broadening the action radius of social movements.

D. *The Relative Success of Litigation*

Litigation and its mobilizing effects are integral to a larger, continuously evolving interaction between law and public sentiments. Any successful attempt at mobilization through litigation described in this Essay is but a link in a larger chain of reactions and counterreactions. In an optimal scenario of litigation mobilization, a social movement draws considerable public support from an unfavorable verdict. But if the resulting

159. Guinier, supra note 52, at 1111.

160. See supra notes 56–57.

161. See supra note 53.

political mobilization successfully reverses the judicial outcome, this may, however, in turn become a source of agitation and political mobilization. The political or legislative victory of the losing litigants may be a source of inspiration and mobilization for opponents, allowing them to raise political support or enabling them to challenge the new legislation through litigation. In this manner, opposing social movements may feed off of each other's victories in a continuing race for mobilization.

This process of reaction and counterreaction may increase the overall degree of social polarization. Because court victories or legislative successes create a sense of entitlement, each reversal obtained through courts or legislators has a mobilizing potential because it undoes expectations of rights and because it can be more agonizing to lose something than not get something that one never had.[162] In this regard, the various turning points in mobilization and legal adjustments may work as a ratchet and increase further polarization over the long run. Given the sustained involvement of opposing groups and ideological movements, the dynamics of mobilization thus impose a certain degree of relativity to legislative or judicial accomplishments of social movements.

Paradoxically, major legal and political victories might have detrimental effects on mobilization in the long run. Major victories often provide a sense of relief to supporters of a cause but may also create a false sense of security. As a result of this "sleeper effect," opposing groups often have an easier inroad going forward to effectively erode the benefits of the legal victory. Arguably, such a process has been occurring over the past twenty years since the major victory obtained by the prochoice movement in *Roe v. Wade*.[163] The decision has become a major symbolic target for antiabortion and prolife groups that have gradually obtained various legal victories, while falling short of overturning *Roe*.[164] For example, they have succeeded in obtaining prohibitions on late-term abortions, various mandatory notice requirements, and most recently, the inclusion of vari-

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162. See generally Richard Thaler, Toward a Positive Theory of Consumer Choice, 1 J. Econ. Behav. & Org. 39 (1980) (illustrating gap between willingness to pay and willingness to accept offer for same item). One potential explanation for the endowment effect is an inherent aversion to losing items that are in one's possession.

163. 410 U.S. 113 (1973); see Sarah Kliff, Remember *Roe*! How Can the Next Generation Defend Abortion Rights When They Don't Think Abortion Rights Need Defending?, Newsweek, Apr. 26, 2010, at 38, 38–39 (describing relative lack of mobilization of prochoice supporters compared to energized support among antiabortion activists).

164. See generally Cass R. Sunstein, Three Civil Rights Fallacies, 79 Calif. L. Rev. 751, 766 (1991) ("[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents."); see also Michael J. Klarman, Fidelity, Indeterminacy, and the Problem of Constitutional Evil, 65 Fordham L. Rev. 1739, 1751 (1997).

ous administrative burdens for abortions in the Obama Administration's healthcare reform bill.[165]

A success in court can be especially limited if the legal privileges obtained in court are small in comparison to the political mobilization that is gained by the opposing side. Consider in this regard the Supreme Court decision in *Lawrence v. Texas*.[166] The outcome of the dispute favored the rights of gay couples with regard to sexual intercourse. However, the case has inspired socially conservative movements to challenge further developments in gay rights and to challenge same-sex marriage rights in various states. As this antigay movement has accomplished some of its legal objectives, this in turn has inspired public mobilization against it.[167] These observations provide a cautionary note on the difficulty of assessing success in the legal arena when considering the public and political effects in the long run.

E. *Winning Versus Losing*

If a loss results in substantial social and political mobilization in opposition to the verdict, what initially appeared a resounding defeat may turn out to be a blessing in the end.

But when can a court defeat safely be considered a victory and compared to what, specifically? First, as indicated above, the mobilization of opposition to the adverse decision must be substantial enough to outweigh the costs from the precedent set by the litigation. Ex ante, a litigation entrepreneur may be able to reduce the potential precedential costs

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165. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(a)(1)(B), 124 Stat. 119, 169 (to be codified as amended in scattered sections of 26 and 42 U.S.C.) (disallowing public funding for certain abortions); id. § 1303(b), 124 Stat. at 171 (declining to preempt state abortion laws); id. § 4101, 124 Stat. at 549 (prohibiting funds awarded to school-based health centers from being used for abortions); id. § 10104, 124 Stat. at 897 (permitting states to prohibit abortion coverage in certain health plans).

166. 539 U.S. 558 (2003) (striking down antisodomy laws on grounds that intimate consensual sexual conduct is part of liberty protected by substantive due process under Fourteenth Amendment).

167. For empirical evidence on backlash generated by *Lawrence* and Goodridge v. Department of Health, 798 N.E. 941 (Mass. 2003), see generally Nathaniel Persily, Patrick Egan & Kevin Wallsten, Gay Rights, *in* Public Opinion and Constitutional Controversy 234 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008); Rick Norton, The Suppression of Lesbian and Gay History (Feb. 12, 2005), http://rictornorton.co.uk/suppress.htm (on file with the *Columbia Law Review*). For a description of the mobilization against same-sex marriages resulting from the assertion of rights in Baehr v. Miike, 910 P.2d 112 (Haw. 1996), see generally Jonathan Goldberg-Hiller, The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights (2002).

somewhat by strategically selecting disputes and arguments in a case.[168] Second, a judicial defeat that generates countervailing benefits in the public arena does not necessarily imply that the cause was better served by the loss than a favorable judgment. For instance, in *Kelo*, the Institute for Justice might have preferred to convince the Supreme Court to narrow the scope of public use. A constitutional limitation on economic development takings might be more effective than the ballot measures and state-level initiatives that gave rise to the current patchwork of legislative restrictions. At the same time, it is worth emphasizing that litigation strategies need not aim for a win-or-lose outcome. Litigation entrepreneurs can make a best effort to win the case, yet benefit from the mobilization that might be generated by a loss. The prospect of a defeat's mobilizing effect may simply be viewed as reducing the expected costs of litigation since, even in defeat, some social and political benefits might ensue. Again, the relevant measure of success for adverse outcomes is whether the mobilization of public opinion in response to an adverse decision produces net gains that advance the status quo without legal action.[169] In this sense, the upside of losing is that the judicial costs of precedent are less daunting if political mobilization benefits are within reach. In any case, losing might generate political benefits that far outweigh anything that could have been obtained by judicial decree.

In most instances, of course, both the outcome of the litigation and the potential for mobilization are uncertain ex ante. But in the framework developed here, a litigation entrepreneur can do its very best to win the legal argument in court, while at the same time optimizing potential social benefits in the event of a loss by making a conscious effort to carefully select disputes, sympathetic plaintiffs, and compelling narratives.

CONCLUSION

Contemporary scholarship has become deeply skeptical about the opportunities afforded by litigation to foster sweeping social changes and rights.[170] Many doubt that the historic victories, for instance of the civil rights or the Warren Court era, can be replicated in the current judicial

168. For instance, the selection of the plaintiff in *Kelo* (a grandmother with whom anyone could empathize) might help explain why the reaction of the public was stronger than in *Eldred* (where the plaintiff was an Internet archiver).

169. Another consideration is the long-run costs created by the legal challenge. If a particular constitutional challenge fails to optimize the legal arguments while at the same time falling short in mobilizing benefits (for instance, because of the selection of a less sympathetic plaintiff or less appealing narrative), this might reduce the opportunity for future challenges since the Supreme Court might be less likely to grant certiorari on the same issue.

170. E.g., Rosenberg, supra note 9, at 422.

environment.[171] Others claim that courts are more generally inhibited as policymakers because they have limited control over their docket—litigants, not judges, set the judicial agenda by filing claims.[172]

This Essay opposes this bleak perspective on litigation. It argues that social movements can make sensible use of litigation strategies without needing to rely on courts as policymakers. The analysis of mobilizing litigation in this Essay suggests that social movements can in fact benefit from unfavorable outcomes in litigation. A defeat in court provides a unique opportunity for a movement to present to the public a narrative that generates sympathy in ways that assist the underlying cause. The resulting public and political awareness about the underlying cause may ultimately slow down legislative trends or, sometimes, even prompt legislative initiatives that reverse the unfavorable judicial decision or improve the general legal framework. In this process, passive courts and judicial deference strengthen the mobilizing effect of litigation because judicial deference clearly shifts the burden to policymakers and their constituents.

171. On trends in judicial activism, see Orin S. Kerr, Upholding the Law, Legal Affairs (March/April 2003), http://www.legalaffairs.org/issues/March-April-2003/feature_marapr03_kerr.msp (on file with the *Columbia Law Review*).

172. On this ground, it is sometimes argued that judge-made law is not an effective instrument to implement goals of distributive justice. Richard Posner, Economic Analysis of Law 272 (2007); see also Chris William Sanchirico, Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View, 29 J. Legal Stud. 797, 798 (2000) (positing tax code rather than judge-made law as potential avenue to pursue distributive goals).

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