

# THE YALE LAW JOURNAL

GREGORY BRIKER

## The Anatomy of Social Movement Litigation

**ABSTRACT.** What do those seeking social change stand to gain or lose when they turn to litigation? Scholars of legal mobilization have addressed how litigation can shape social movements through its indirect effects, as going to court can unite, mobilize, or legitimize activists and their opponents. But these previous studies tend to disregard the nuts and bolts of litigation, instead focusing on judicial decisions or treating lawsuits as monolithic events. In contrast, this Note attends to the process of litigation in all its complexity, arguing that particular elements of litigation—namely claiming, discovery, and record building—are critical sources of indirect effects. This Note further argues that while such elements offer activists distinctive opportunities to draw extralegal benefits from legal action, these benefits are enabled and constrained by the procedural rules and norms that structure litigation. By constructing a new approach to legal mobilization that highlights the centrality of procedure, this Note challenges the terms of the debate over the utility of courts to social movements.

**AUTHOR.** Yale Law School, J.D. expected 2024; Yale University, Department of History, Ph.D. expected 2027. I am deeply grateful to Scott Cummings, Justin Driver, Allison Frank, Joseph Mead, Douglas NeJaime, Reva Siegel, Rachael Stryer, and Alexander Zhang for their feedback, support, and encouragement. I would also like to thank the editors of the *Yale Law Journal*, especially Michael Loedel, Thomas Ritz, and Saylor Soinski. Finally, I owe a debt of gratitude to those who spoke with me about their work in East Ramapo: Olivia Castor, Oscar Cohen, Ana Maeda-Gonzalez, Perry Grossman, Willie Trotman, and Steve White.



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## INTRODUCTION

Why do social movements go to court? Sometimes the answer is straightforward: activists seek the coercive power of a judicial decree. But litigation can also shape social movements in indirect ways. Legal concepts like rights can frame grievances and unite activists around particular goals. Judicial decisions can inspire movements by providing symbolic victories or defeats. The filing—or the mere threat—of a lawsuit can bring recalcitrant parties to the bargaining table. Though legal mobilization scholarship examines the indirect effects of litigation on movements, this field was long neglected by legal academics and left to sociological scholars in other disciplines.<sup>1</sup> A generation ago, one could lament that law professors and sociological scholars “communicate only fitfully, if at all, with one another,” facing a “language barrier . . . higher than the one between English and French, German or Italian.”<sup>2</sup>

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1. For notable sociolegal work produced by scholars outside of legal academia, see MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974); Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201 (1991); and Kevin J. McMahon & Michael Paris, *The Politics of Rights Revisited: Rosenberg, McCann, and the New Institutionalism*, in *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* 63 (David A. Schultz ed., 1998). Some sociolegal scholars were trained in law schools but primarily identified with adjacent disciplines or movements like law and society. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117 (Keith O. Boyum & Lynn Mather eds., 1983); William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81). Several notable legal scholars have long explored how law shapes social movements, but their ranks were few prior to the early 2000s. See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88).
  2. Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 2 (2001); see also Eskridge, *supra* note 1, at 422 (“Just as law professors have much to learn from social movement scholarship about the dynamics of public law, so sociology professors have much to learn from us about the dynamics of social movements . . .” (footnote omitted)); Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76, 76 (Bryant G. Garth & Austin Sarat eds., 1998) (describing the two fields as “mostly independent”).

Recently, the legal mobilization framework has come to play a larger role in legal scholarship.<sup>3</sup> Despite this welcome change, significant divides remain between scholars of law and of social movement theory. “[G]reater interdisciplinary dialogue” is still necessary to fully appreciate the effects of law on movements.<sup>4</sup> While legal academics and their colleagues across campus may now be speaking the same language, they do so in decidedly different dialects.

This Note seeks to bridge the divide between legal and social movement scholarship by applying the legal mobilization framework to the *process* of litigation in all its complexity. Previous studies of law’s indirect effects on social movements have generally disregarded the nuts and bolts of litigation, instead focusing on how indirect effects flow from judicial determinations and reducing the ordeal of litigation to its conclusion. This bias is understandable: in law schools, the judicial decision is the coin of the realm. Legal education foregrounds judicial

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3. See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011) [hereinafter BROWN-NAGIN, *COURAGE TO DISSENT*]; CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE* (2010); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740 (2014); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 *EMORY L.J.* 663 (2012) [hereinafter NeJaime, *Legal Mobilization Dilemma*]; Douglas NeJaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941 (2011) [hereinafter NeJaime, *Winning Through Losing*]; César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 *TEX. L. REV.* 1669 (2011); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 *BERKELEY J. EMP. & LAB. L.* 1 (2009) [hereinafter Cummings, *Hemmed In*]; Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 *UCLAL. REV.* 1235 (2010); Scott L. Cummings, *Law in the Labor Movement’s Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 *CALIF. L. REV.* 1927 (2007) [hereinafter Cummings, *Wal-Mart*]; Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 *COLUM. L. REV.* 1436 (2005); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1016 (2004); Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 *LAW & SOC. INQUIRY* 659 (2003). For further discussion of this developing field, see Scott L. Cummings, *The Social Movement Turn in Law*, 43 *LAW & SOC. INQUIRY* 360 (2018); Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 *UCLA L. REV.* 1554 (2017) [hereinafter Cummings, *The Puzzle of Social Movements*]; Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 609–12 (2009); Steven A. Boutcher & Holly J. McCammon, *Social Movements and Litigation*, in *THE WILEY BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 306 (David A. Snow, Sarah A. Soule, Hanspeter Kriesi & Holly J. McCammon eds., 2d ed. 2019); and Sandra R. Levitsky, *Law and Social Movements: Old Debates and New Directions*, in *THE HANDBOOK OF LAW AND SOCIETY* 382 (Austin Sarat & Patricia Ewick eds., 2015).
  4. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 *MICH. L. REV.* 877, 879 (2013) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011)); see also McCann, *supra* note 2, at 78 (calling for a “synthesis” of legal and social movement scholarship).

opinions to the exclusion of context and procedural history.<sup>5</sup> Though unsurprising, the tendency to focus on outcomes alone is misguided, akin to losing sight of the journey by fixating on the destination. For their part, sociolegal scholars outside of legal academia have also explored the indirect effects that stem from litigation as a whole but have tended to focus more on what happens beyond rather than within the courtroom. These analyses offer crucial insights into how legal action shapes activism on the ground, but they do not always consider the intricacies of litigation.

Missing from both sets of prior accounts is the centrality of procedure to legal mobilization. Although the phases, norms, and rules of procedure go unnoticed or undertheorized, they shape the dividends that movements can reap from their legal efforts. This Note argues that particular elements of litigation—including the pleading of claims, the collection of evidence through discovery, and the creation of a judicial record—are sources of indirect effects, presenting activists with distinctive opportunities to derive extralegal benefits from legal action. However, as this Note demonstrates, these benefits are far from inevitable. Instead, they are facilitated or frustrated by the procedural rules and norms that structure litigation itself.

Disentangling the process of movement litigation sheds new light on whether and how courts are useful vehicles for those seeking social change. Activists have long questioned the value of litigation, characterizing legal action as too slow and too conservative.<sup>6</sup> Critical scholars have echoed them, casting doubt on the capacity of courts to produce social change.<sup>7</sup> Some charge that litigation is not only ineffective but also harmful, providing pyrrhic victories that

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5. See Hendrik Hartog, *Four Fragments on Doing Legal History, or Thinking with and Against Willard Hurst*, 39 *LAW & HIST. REV.* 835, 839 (2021) (“Any common law case, any of the chestnuts of the first year law school casebook, when examined closely, will require accounting for a history that has been forgotten or skipped over or, more likely, been taken for granted, but that is implicit in the language of the case.”); Jill Lepore, *On Evidence: Proving Frye as a Matter of Law, Science, and History*, 124 *YALE L.J.* 1092, 1141 (2015) (“Case law and case method instruction obliterate context . . .”).

6. See, e.g., Christopher W. Schmidt, *Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 *LAW & HIST. REV.* 93, 113 (2015) (“The very identity of the first wave of sit-in protesters formed in opposition to court-focused approaches to civil rights.”). *But see* BROWN-NAGIN, *COURAGE TO DISSENT*, *supra* note 3, at 194-200 (arguing that some civil-rights lawyers aimed to “marry litigation and direct action,” viewing the courtroom “as a forum for extending a voice to citizens shut out of formal politics, not necessarily as an end in itself”).

7. See, e.g., ROSENBERG, *supra* note 1.

demobilize, deradicalize, and distort movements.<sup>8</sup> For these critics, litigation is indeed a source of indirect effects, but such effects do more harm than good.<sup>9</sup> Others, including critical race theorists, have defended rights-based legal-reform efforts as limited but valuable means of movement building.<sup>10</sup> Arguments over the utility of courts to social movements have only intensified in recent years.<sup>11</sup> Legal mobilization scholarship emerged out of this debate, employing empirical methods to better understand how legal action advances and impedes movement goals.<sup>12</sup> By foregrounding the role of procedure in producing indirect effects, this Note challenges the terms of the debate: any account of the possibilities and dangers of movement litigation must attend to how procedure enables and constrains indirect effects.

This Note explores the anatomy of social movement litigation by attending to its constituent parts.<sup>13</sup> Placing sociolegal research in conversation with civil-

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8. See, e.g., Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 30 (1993). For further discussion of these critiques, see Scott L. Cummings, *Law and Social Movements: An Interdisciplinary Analysis*, in HANDBOOK OF SOCIAL MOVEMENTS ACROSS DISCIPLINES 233, 240 (Conny Roggeband & Bert Klandermans eds., 2d ed. 2017); and Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939, 946-48 (2007).
  9. See GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 269 (2009) (arguing that while resorting to litigation can “break[] through the barriers that are a part of the American system,” it can also “kill politics” by “tak[ing] the wind out of the political sails”).
  10. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1365 (1988); see also *id.* at 1384-85 (“Rights have been . . . the means by which oppressed groups have secured . . . the survival of their movement in the face of private and state repression.”); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405 (1987) (underscoring “the idealistic or symbolic importance of rights” for “the disenfranchised”). For further discussion of these qualified defenses of litigation and rights talk, see Cummings, *The Puzzle of Social Movements*, *supra* note 3, at 1602-03.
  11. See, e.g., Nikolas Bowie, Comment, *Antidemocracy*, 135 HARV. L. REV. 160, 212 (2021) (characterizing impact litigation as embodying “an aristocratic theory of change”); Amna A. Akbar, Sameer Ashar & Jocelyn Simonson, *What Movements Do to Law*, BOS. REV. (Apr. 26, 2022), <https://bostonreview.net/articles/what-movements-do-to-law> [https://perma.cc/ZL94-MZQT] (critiquing “court-centered strategies for progressive social change championed by liberal elites”).
  12. See, e.g., Cummings, *The Puzzle of Social Movements*, *supra* note 3, at 1638-42; Cummings, *supra* note 8, at 242; MCCANN, *supra* note 1, at 12.
  13. A brief definitional comment is in order. This Note embraces a capacious understanding of social movement litigation as any litigation bearing on the goals of a group “linked together by ideology, beliefs, or collective identities.” Rubin, *supra* note 2, at 4. It thus declines to take a narrow view of social movement litigation as limited to “impact litigation,” Boutcher &

procedure scholarship, this Note highlights how specific elements of litigation generate indirect effects. It applies this framework to a range of historical examples, revisiting iconic cases on issues as varied as school desegregation, fair employment, marriage equality, consumer protection, and property law. In each case, the courtroom did not serve merely as a venue to resolve private disputes.<sup>14</sup> Instead, courts provided conceptual, informational, and rhetorical resources to activists of all stripes. In no small part, these resources were products of process.

This Note argues that three procedural stages, and their accompanying rules and norms, are especially pertinent to legal mobilization. First, the act of *claiming* can frame grievances in new terms and unite activists around a common vision. Second, *discovery* enables movement litigants to garner information from their adversaries that may be useful well beyond the courthouse. Even if a document produced during discovery is not critical to one's legal case, it can be a smoking gun in the court of public opinion. Third, *record building* enables activists to enshrine and validate their experiences in ways that can be seized upon in further political actions. Claiming, discovery, and record building operate dynamically but produce distinctive indirect effects that can contribute to legal mobilization. They reflect some, though certainly not all, of the ways in which procedure shapes social movement activity.

This Note then proceeds to an in-depth case study of a recent voting-rights lawsuit in East Ramapo, New York—a curious instance when activists went to court knowing full well that a favorable judicial decree would have little direct impact.<sup>15</sup> While the East Ramapo Central School District overwhelmingly

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McCammon, *supra* note 3, at 307, or as inherently linked to the protection of “politically marginalized constituencies,” Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1690. Staking the outer edges of what counts as movement litigation is beyond the scope of this project, though this important question has generated rich debates among scholars and practitioners. See, e.g., Cummings, *supra*, at 1660-61; Catherine Albiston, *Book Review*, 63 J. LEGAL EDUC. 554, 554-57 (2014) (reviewing ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* (2013)); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3, 5 (Austin Sarat & Stuart Scheingold eds., 1998); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1224 (2005).

14. Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (describing “public law litigation” as encompassing cases against both public and private defendants in a wide range of fields, provided that they focus on “grievance[s] about the operation of public policy” rather than “dispute[s] between private individuals about private rights”).
15. Narrative case studies are particularly useful in sociolegal scholarship, as telling “whole stories rather than excerpts” allows one to better attend to “the details of legal practice.” McMahon & Paris, *supra* note 1, at 106, 108 (quoting LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE*

served low-income students of color, its Board was controlled by white members who exclusively sent their children to private religious schools. As the Board cut back on programs and staff, public-school advocates opposed such changes but made little headway in political channels. In 2017, they filed a federal vote-dilution lawsuit against the district, targeting the at-large system of elections rather than the educational disparities faced by students of color. Members of the public-school community understood that even with a victory in court, they would still lack control of the Board. Drawing on original interviews and contemporaneous reporting, this Note demonstrates that activists instead sought and attained the indirect effects of litigation. These effects flowed from particular stages of litigation and were mediated by procedural rules and norms. This Note thus provides evidence that even when activists are well aware that they will not find salvation through judicial decrees, they may nonetheless turn to courts because of the benefits that radiate from the litigation process.<sup>16</sup>

Part I reviews traditional accounts of indirect effects, demonstrating that they tend to neglect procedural intricacies and treat litigation as a monolith. Part II advances a disaggregated model of social movement litigation, showing how discrete elements of litigation and their procedural rules and norms are critical to the production of indirect effects. Part II further applies this framework to a wide variety of historical cases. Part III uses this model to examine the case of East Ramapo, relying on public reporting, court documents, and interviews with activists to demonstrate how litigation procedure shapes movement activism outside the courthouse walls.

## I. TRADITIONAL THEORIES OF LEGAL MOBILIZATION

Since the 1970s, sociolegal scholars have examined how law and legal action influence movement activism. Their work has embraced a “constitutive vision of

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POLITICS AND HISTORY OF FAMILY VIOLENCE 18 (1988)). While this Note embraces the “interpretivist” case-study method, scholars have long debated the value of such research as opposed to “positivist” approaches that use broader source bases to develop generalizable theories. Compare Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435, 446 (1996) (reviewing MCCANN, *supra* note 1) (arguing that interpretivist case studies lose “the ability to generalize” by “celebrat[ing] the particular over the general”), with Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being So Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 472-73 (1996) (advocating for interpretivism because of its attention to the “variable, complex, indeterminate dimensions of social life”).

16. See *infra* Part III.



law,” in which “legal discourse, categories, and procedures” not only play a “coercive” role but also “shape social relations.”<sup>17</sup> Sociolegal scholars have applied this framework to social movements to explore law’s indirect or extralegal effects on activism, which emanate from law and litigation but are distinct from the enforcement of court orders.<sup>18</sup>

Early work on legal mobilization focused primarily on how activists could derive extralegal benefits from judicial victories. In 1974, political scientist Stuart Scheingold rejected what he called a “myth of rights,” under which litigation was valuable mainly as a way to secure formal legal entitlements through court orders.<sup>19</sup> Scheingold instead endorsed a “politics of rights,” whereby rights are “political resources”<sup>20</sup> that can be wielded to alter “public policy indirectly.”<sup>21</sup> This indirect impact stemmed from the capacity of legal victories to improve a movement’s bargaining position, spark mobilization, and foster collective identity among activists.<sup>22</sup> While Scheingold did not focus exclusively on legal outcomes,<sup>23</sup> he did generally attend to the “post-judgment” phase of litigation.<sup>24</sup> Following Scheingold, law professor Joel Handler similarly examined the indirect effects of activists’ legal pursuits. Handler emphasized how judicial victories offered “symbolic rewards” to litigants and allowed activists to draw “aspirations and values” from formal changes in law.<sup>25</sup>

As legal mobilization theory proliferated and spread into law schools, scholars identified a range of instances in which judicial victories bolstered movement

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17. Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1140 (2002) (reviewing AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (2001)); see also Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMANS. 129, 134 (2000) (“[L]aw shapes society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive, and coherent.”); Boutcher & McCammon, *supra* note 3, at 313 (describing the “constitutive approach to legal mobilization”).
  18. NeJaime, *Legal Mobilization Dilemma*, *supra* note 3, at 667–68.
  19. See SCHEINGOLD, *supra* note 1, at 147–48.
  20. *Id.* at 148.
  21. *Id.* at 84.
  22. *Id.* at 7–8.
  23. See, e.g., *id.* at 139 (discussing how the mere presence of lawyers can “lend an air of importance and legitimacy” to movement organizations).
  24. *Id.* at 8–9. To the extent Scheingold explored litigation procedure, he held a pessimistic view of its ability to produce indirect effects. Procedural rules enabled recalcitrant defendants to engage in “legal evasion” through “a series of separate legal encounters” that demanded “painstaking” attention by activists’ attorneys. *Id.* at 119–20.
  25. HANDLER, *supra* note 1, at 36–37.

activity.<sup>26</sup> *Brown v. Board of Education* offered a paradigmatic example of legal mobilization in action. Although *Brown* produced “strikingly little public school desegregation”<sup>27</sup> for a decade, scholars have underscored its impact on the civil-rights movement insofar as the decision inspired activists, drew media attention, and set the terms of a national debate.<sup>28</sup>

A parallel line of work highlights the negative indirect effects of even victorious movement litigation.<sup>29</sup> Such scholarship stresses, for example, how litigation can foster backlash by activists’ opponents and dissenters within their own ranks.<sup>30</sup> Litigation might also produce demobilization and complacency, as winning in court can “lull movement members into a false sense of security.”<sup>31</sup> Some scholars critique movement litigation in material terms, arguing that court-based strategies divert activists’ scarce resources away from other tactics.<sup>32</sup> Others raise concerns about the potential for lawyers to distort, co-opt, and dominate movements.<sup>33</sup>

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26. See, e.g., Eskridge, *supra* note 1, at 463, 518 (noting the significance of even “little” legal victories for various identity-based social movements).
27. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 21 (1996).
28. Eskridge, *supra* note 1, at 446-47; David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151, 151-60 (1994); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1775 (1993). For more recent appraisals of *Brown*’s indirect effects, see JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 248-51 (2018); and Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 787-88 (2010).
29. See generally Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 61 (2011) (exploring “the negative consequences of litigation strategies for social movements”).
30. See, e.g., Tushnet, *supra* note 8, at 31-32 (arguing that rights-based litigation “generates a rhetoric of counter-rights”); Lisa Vanhala, *Social Movements Lashing Back: Law, Social Change & Intra-Social Movement Backlash in Canada*, 54 STUD. L. POL. & SOC’Y 113, 120 (2011) (examining how social movement litigation can produce backlash “within the social movement itself”); see also Klarman, *supra* note 1 (studying the role of sociolegal backlash in the civil-rights movement).
31. NeJaime, *Winning Through Losing*, *supra* note 3, at 984; see also Tushnet, *supra* note 8, at 30 (“[H]aving won in court, supporters of change may think that they no longer have to be as worried, and can turn their attention from political and legal matters to other things . . .”).
32. See, e.g., ROSENBERG, *supra* note 1, at 339 (“[L]itigation . . . siphons off crucial resources and talent, and runs the risk of weakening political efforts.”).
33. For a classic statement of the cooptation problem, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976) (“Unfortunately, clients are all too willing to turn everything over to the lawyers.”). See also Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT*

The most vehement critics of social movement litigation suggest that legal action is inherently atomizing and thus corrosive to collective politics.<sup>34</sup> Even for those who do not share this view, these critical perspectives serve as a reminder that legal victory does not inevitably bolster activism. Rather, as Scheingold argued, judicial victories are “contingent” resources.<sup>35</sup> A variety of contextual factors – from media coverage and sympathetic courts to strength of opposition and coordination between lawyers and organizers – bear on the indirect benefits of litigation.<sup>36</sup>

Additional research traces indirect effects of litigation not only to judicial victory but also to the mere prospect of victory. On this view, legal action helps movements to achieve mass mobilization because it offers “the possibility of the state as an ally” if successful.<sup>37</sup> The possibility of success in court can create movement cohesion by convincing activists that they are part of a “realistic cause for collective action.”<sup>38</sup> Such a sense is undergirded by previous wins in court, which create momentum and demonstrate to activists that they “might be able to count on judicial support for their cause.”<sup>39</sup> Moreover, activists can often secure political bargaining power simply by filing meritorious suits because defendants – from companies to government agencies – may “fear losing control of decision-making autonomy” through adverse judgments.<sup>40</sup>

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*Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1685 (2013) (summarizing cooptation arguments as rooted in the notion that “lawyers . . . are often preoccupied with legally achievable ends”); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIA. L. REV. 1099, 1099 (1994) (responding to arguments about “the problem of lawyer domination”).

34. See, e.g., ROSENBERG, *supra* note 1, at 12; Tushnet, *supra* note 8, at 26; Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1586-90 (1984). For a contrary account, see JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 149-50 (2005).

35. SCHEINGOLD, *supra* note 1, at 148.

36. See Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 18-20, 30-31 (2006); NeJaime, *Legal Mobilization Dilemma*, *supra* note 3, at 733; Cummings, *Hemmed In*, *supra* note 3, at 72-73.

37. Eskridge, *supra* note 1, at 459-60.

38. MCCANN, *supra* note 1, at 57.

39. *Id.* at 89.

40. *Id.* at 146. Plaintiffs gain further bargaining power because defendants seek to avoid the transaction costs associated with litigation. *Id.* at 145; Susan M. Olson, *The Political Evolution of Interest Group Litigation*, in *GOVERNING THROUGH COURTS* 225, 232 (Richard A.L. Gambitta, Marlynn L. May & James C. Foster eds., 1981).

Later works explored how even judicial defeat can have positive indirect effects on social movements.<sup>41</sup> According to Thomas Stoddard, legal losses may spark “culture-shifting”<sup>42</sup> and thus “contain[] the seeds of eventual victory.”<sup>43</sup> Douglas NeJaime similarly argues that “the failure of courts and litigation may . . . actually produce positive effects for a social movement.”<sup>44</sup> Despite de-centering judicial victories, these works remain preoccupied with the outcomes of litigation. As a result, they often collapse the process of litigation into the court’s decision and position judicial dispositions as the main drivers of indirect effects.<sup>45</sup>

Some scholars have moved beyond victory and defeat, studying how litigation per se produces indirect effects. However, these works generally still fail to break litigation down into its constituent parts. Legal mobilization work on framing provides a case in point. Sociolegal scholars argue that law is a crucial framing device, as litigation helps activists articulate grievances, assign blame, and demand rights to remediation.<sup>46</sup> Going to court can expose previously invisible harms, foster movement cohesion, and draw external support by invoking the language of rights.<sup>47</sup> For example, Michael McCann shows how legal discourse can contribute to “building a movement,” as rights claims supply activists with “normative language for identifying, interpreting, and challenging”

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41. NeJaime, *Legal Mobilization Dilemma*, *supra* note 3, at 667-68; see also STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 243 (2008) (“[I]t is possible to win, in the sense of encouraging popular mobilization and inducing action in venues other than the courts, by losing.”).
42. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 973 (1997).
43. *Id.* at 989.
44. NeJaime, *Winning Through Losing*, *supra* note 3, at 956.
45. See, e.g., ALBISTON, *supra* note 3, at 191 (“Most of the social effects of litigated rights claims, however, depend upon the rule-making function of courts.”).
46. See, e.g., Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. SOCIO. 1718, 1723-25 (2006); Felstiner et al., *supra* note 1, at 635-36. On the role of framing in social movement activity, see Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 614-17 (2000).
47. Marshall, *supra* note 3, at 660; see also NeJaime, *supra* note 4, at 892 (“Frames . . . identify problems, expose responsible parties, and suggest solutions.”); McCann, *supra* note 36, at 31 (“[T]he very framing of issues in terms of rights can transform debates and add weight to claims.”).

injustices.<sup>48</sup> While analyses like McCann's capture the nuances of social movement activity,<sup>49</sup> they tend not to treat the litigation process with similar care and instead focus on the general act of claiming rights.

Finally, a group of legal and sociolegal scholars has turned away from courts altogether, eschewing "litigation-centric" approaches and examining how other sources of law influence movement activity.<sup>50</sup> For example, Reva Siegel examines how "constitutional culture . . . elicits and channels dispute" about fundamental political questions.<sup>51</sup> Other areas of focus include legislative and administrative advocacy, private law, and international law as alternative sites of legal mobilization.<sup>52</sup> By shifting attention away from courts and toward a more eclectic range of legal sources, these works open crucial new avenues of inquiry. However, in so doing, they yet again leave the distinctive process of litigation unexplored.

To be sure, several scholars gesture at the role of discrete elements of litigation in the production of indirect effects. These scholars work both in and out of

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48. MCCANN, *supra* note 1, at 10, 48. McCann further underscores the symbolic value of rights talk insofar as it invites "harsh moral judgment" of activists' adversaries. *Id.* at 146-48. McCann is hardly alone, with other scholars drawing similar conclusions about the mobilizing effects of rights claims as an outgrowth of litigation. *See, e.g.*, BROWN-NAGIN, *COURAGE TO DISSENT*, *supra* note 3, at 427-29; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 611 (1986); Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and to, Social Movements*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 1, 10-12 (Austin Sarat & Stuart A. Scheingold eds., 2006); Frances Kahn Zeman, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 700 (1983).
49. MCCANN, *supra* note 1, at 11 (discussing "the utility of disaggregating social movement activity itself into distinct 'stages' or phases").
50. Guinier & Torres, *supra* note 3, at 2756 (examining the "recursive relationship between social movements and law" in all of society's "formal institutions").
51. Siegel, *supra* note 1, at 320-21. Siegel's approach is intentionally "hermeneutic rather than institutional," focusing on constitutional discourse across contexts rather than on the specific norms and rules of a particular venue like courts. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1329 (2006).
52. *See, e.g.*, Cummings, *Wal-Mart*, *supra* note 3, at 1945; Pedriana, *supra* note 46, at 1732; Jennifer Woodward, *Making Rights Work: Legal Mobilization at the Agency Level*, 49 LAW & SOC'Y REV. 691, 693 (2015); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 860 (2008); Freek van der Vet, "When They Come for You": *Legal Mobilization in New Authoritarian Russia*, 52 LAW & SOC'Y REV. 301, 327 (2018).

law schools, and their ranks include McCann<sup>53</sup> as well as Lucie White,<sup>54</sup> Michael Paris,<sup>55</sup> and César Rodríguez-Garavito.<sup>56</sup> Ultimately, however, these exceptions prove the rule. In general, sociolegal scholars have not fully theorized the role of procedural choices and rules in enabling and constraining legal mobilization.

Legal mobilization scholarship's neglect of the litigation process has not gone unnoticed. In the early years of the field's development, Marc Galanter called for research on the indirect effects "not only of doctrinal pronouncements" but also "all the other components of the total message transmitted by the courts."<sup>57</sup> For Galanter, such components included judicial "patterns" like "discovery, settlement, cost, remedies," and other "court routines" rather than just "the occasional dramatic ruling."<sup>58</sup> Unfortunately, sociolegal scholarship has continued to treat litigation as a relatively monolithic process. Part II takes up Galanter's call to explore legal mobilization through the components of litigation.

## II. TOWARD A DISAGGREGATED MODEL OF SOCIAL MOVEMENT LITIGATION

As described in Part I, legal mobilization scholarship has typically neglected the procedural details of litigation. This Part places existing scholarship in conversation with work on civil procedure and social movement history to construct a model that highlights the central role of procedural stages, norms, and rules in producing indirect effects on social movements. This Part focuses on three aspects of the litigation process through which indirect effects often unfold: claiming (Section II.A), discovery (Section II.B), and record building (Section II.C).

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53. MICHAEL W. MCCANN & GEORGE I. LOVELL, UNION BY LAW: FILIPINO AMERICAN LABOR ACTIVISTS, RIGHTS RADICALISM, AND RACIAL CAPITALISM 289-304 (2020) (alluding to discovery as a source of indirect effects); Michael McCann, William Haltom & Shauna Fisher, *Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States*, 38 LAW & SOC. INQUIRY 288, 292-93 (2013) (same).
54. White, *supra* note 1, at 539 & n.21 (highlighting how record building enables lawsuits to become "vehicles for presenting detailed stories" that in turn "raise public consciousness"); see also *id.* at 543 (arguing that the procedural trappings of litigation can "hav[e] the effect of silencing poor people").
55. MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 20, 26 (2010) (examining how claiming decisions bear on the capacity of litigation to mobilize broader political activity).
56. Rodríguez-Garavito, *supra* note 3, at 1695 (arguing that Latin American courts' choices of remedies influence whether their rulings "unleash . . . indirect effects").
57. Galanter, *supra* note 1, at 134.
58. *Id.*

### A. Claiming

When filing suit, activists and their attorneys pursue specific rights claims amid a variety of options.<sup>59</sup> To be sure, the Federal Rules of Civil Procedure allow each plaintiff to raise “as many claims as it has against an opposing party.”<sup>60</sup> Federal law encourages this “claim aggregation” through the doctrine of claim preclusion, which bars unraised claims in future lawsuits.<sup>61</sup> The Rules therefore lead some litigants to invoke a variety of rights, throwing numerous claims at the courtroom wall in hopes that at least one will stick.<sup>62</sup>

However, for movement litigants, such a tactic is not always desirable. Claims are not simply legal arguments but also “rhetorical narratives.”<sup>63</sup> Civil-rights lawyers have thus long recognized that the complaint can be a source of constituency building insofar as it “communicates what the problem is all about” to those most impacted and “to the greater community.”<sup>64</sup> “[S]peaking one way rather than another within law” can have consequences on political-mobilization efforts that stem from litigation.<sup>65</sup>

The history of social movement litigation offers myriad examples of how claiming can shape political action. In the 1940s, the NAACP shifted its focus from due-process claims about material inequities faced by Black workers to equal-protection claims about segregated schools.<sup>66</sup> NAACP attorneys further eschewed equalization suits—which demanded that segregated schools be substantially equal—for challenges to segregation itself.<sup>67</sup> These decisions shaped civil-rights activism out of court, reframing the movement in some observers’

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59. See Kapczynski, *supra* note 52, at 814.

60. FED. R. CIV. P. 18(a).

61. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 8 (2018) (“[C]laim preclusion . . . prevents parties from litigating claims not raised in a previous suit that could have been raised because of their close relation to previously litigated claims between the parties.”).

62. See, e.g., Arthur D. Wolf, *Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney’s Fees Awards Act*, 2 W. NEW ENG. L. REV. 193, 203–04 (1979).

63. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES* 134 (2000).

64. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 772 (1995).

65. PARIS, *supra* note 55, at 3; see also *id.* at 220 (“[T]he specific content and connotations of a legal claim may help mobilize some people, neutralize others, and countermobilize still others . . .”).

66. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 12 (2007).

67. MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 140–41 (1987).

eyes as one concerned with the intrinsic evils of segregation.<sup>68</sup> The decision to center antisegregation in court also influenced activists, for whom the inherent inequality of separate schools became a calling card.<sup>69</sup>

In contrast to NAACP attorneys, abortion-rights proponents in the 1970s chose to challenge abortion restrictions as violations of liberty rather than violations of equal protection.<sup>70</sup> While advocates began to advance equality arguments after *Roe v. Wade*, the abortion right remained doctrinally tethered to the Due Process Clause.<sup>71</sup> Just as in the desegregation context, the nature of the abortion-rights claim has shaped political action. Whereas an equal-protection frame can inform policy arguments about access to health care,<sup>72</sup> a liberty frame provides the language for a politics of bodily autonomy both within and beyond the abortion context.<sup>73</sup>

In another example, Michael Paris found that school-finance reformers' distinctive legal claims regarding educational adequacy "defined the language of public debate, structured the organization of education politics, and led directly to certain kinds of policy processes and outcomes."<sup>74</sup> While scholars like Paris demonstrate the extralegal importance of claim selection, the choice among claims is typically characterized as one of substantive legal strategy and political principle. However, understanding claiming as a stage of litigation highlights how procedural rules enable and constrain its indirect effects.

Consider the rules governing pleading. The liberal approach to pleading suggested by claim aggregation is circumscribed by the Supreme Court's insistence

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68. See *id.* at 160-64.

69. See, e.g., Alvin C. Adams, *Picket over Chicago School Segregation: 'Separate, Unequal' Facilities Are Hit*, CHI. DAILY DEF., Dec. 21, 1960, at 1 ("The interracial picket team displayed such signs as: 'Let's Educate, Not Segregate' . . ."); Al Kuettner, *Supreme Court Decision 10 Years Ago Shook Up a Nation: "Separate Educational Facilities Inherently Unequal,"* NEW J. & GUIDE, May 16, 1964, at 9 (quoting NAACP Executive Secretary Roy Wilkins as stating that *Brown* "awakened the conscience of white America to the immorality and injustice of segregation").

70. Brief for Appellants at 94, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054.

71. Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 162-64 (2013).

72. See, e.g., Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207, 229 (2018); Reva Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 83-84 (2023).

73. See, e.g., Rachel Bluth, 'My Body, My Choice': How Vaccine Foes Co-Opted the Abortion Rallying Cry, NPR (July 4, 2022, 5:01 AM ET), <https://www.npr.org/sections/health-shots/2022/07/04/1109367458/my-body-my-choice-vaccines> [<https://perma.cc/4Z65-U6R9>].

74. PARIS, *supra* note 55, at 163.



that each claim have “facial plausibility” to “survive a motion to dismiss.”<sup>75</sup> These more stringent requirements have paradoxical effects on movement litigants in and out of court. Critics of plausibility pleading argue that it diminishes access to justice, especially for civil-rights plaintiffs.<sup>76</sup> To the extent that pleading serves not only to claim a legal right but also to establish a narrative frame for activists, the pleading regime may also push litigants toward frames that they would not otherwise pursue.<sup>77</sup>

While activists do not necessarily fear losing in court—and can even turn losses to their advantage<sup>78</sup>—dismissal at an early stage of litigation may be particularly demobilizing. As such, plausibility pleading may encourage movement litigants to embrace safer legal claims, even if more experimental arguments would serve as better political-framing devices.<sup>79</sup> On the most pessimistic view, the pressure to make safer claims does not simply distort movements, but might undermine collective action as American legal culture primarily recognizes “individualistic” rights.<sup>80</sup> Furthermore, strict pleading standards may contribute to lawyers’ control over their clients, raising the stakes of choosing a viable claim and therefore exacerbating the tendency of clients to defer to their attorneys on the question of how to plead their cases. These critiques suggest that procedural rules can magnify issues of lawyer domination and cooptation that have concerned some scholars.<sup>81</sup>

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75. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) (arguing that in part because of plausibility pleading, “the liberal-procedure ethos . . . has given way to a restrictive one”).
76. See, e.g., Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Pleading Decisions on the U.S. Courts of Appeals*, 169 U. PA. L. REV. 2127, 2143-44 (2021); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519-22 (2010); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 160-61 (2010).
77. See Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 612 (2018) (describing higher pleading standards as a form of “narrative-erasing procedure” because they “force plaintiffs into existing narratives to demonstrate their claim’s plausibility”); see also SILVERSTEIN, *supra* note 9, at 65, 69 (arguing that reliance on legal tactics can foster “path dependence” among litigants by pressuring them “to fit their claims inside the frames that are more likely to win favor in court rather than to press new or different frames”).
78. NeJaime, *Winning Through Losing*, *supra* note 3, at 971-72.
79. See Ralph, *supra* note 77, at 612 (suggesting that plausibility pleading can discourage “path-breaking” litigation narratives and instead push plaintiffs toward “narratives that have already been recognized as plausible”).
80. See Tushnet, *supra* note 8, at 26 (suggesting incompatibility between “essentially individualistic” rights claims and “progressive change”).
81. See *supra* note 33 and accompanying text.

While plausibility pleading may inhibit access to courts and pressure activists into making particular legal claims, it is possible that the regime also aids social movement litigants. Plausibility pleading displaced a system of notice pleading, whereby a plaintiff merely had to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>82</sup> Notice pleading allowed lawsuits to proceed liberally, permitting thin complaints with minimal detail.<sup>83</sup> While notice pleading provided greater access to courts, such thin complaints may have detracted from the indirect benefits that activists obtain through litigation.

Insofar as pleadings function as narrative devices, thin complaints forced observers to “squint to see the stories behind them.”<sup>84</sup> While notice pleading did not prevent attorneys from drafting more detailed complaints, the regime may have worked in concert with legal-professional norms to create an “instinct not to overplead.”<sup>85</sup> The advent of plausibility pleading can be understood as “inviting litigants . . . to endow pleadings with narrative richness.”<sup>86</sup> For movement litigants, such narrative richness can generate powerful indirect effects by articulating clear frames which can in turn be drawn upon in extralegal activism.<sup>87</sup>

Beyond pleading, other procedural rules and choices enable litigants to emphasize particular claims to significant extralegal effect. For example, even after pleading various causes of action, parties can selectively appeal specific issues upon receiving an adverse judgment in a lower court.<sup>88</sup> Property-rights advocates took this approach in *Kelo v. City of New London*, which challenged the use of eminent domain to further a private redevelopment project.<sup>89</sup> In their initial

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82. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

83. *See id.*; Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300-02 (2010).

84. Eastman, *supra* note 64, at 789.

85. *Id.* at 792; *see also* Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 8-9 (2009) (describing the “thinness” of complaints under notice pleading).

86. Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMANS. 1, 2 (2014).

87. Part III’s case study displays these very dynamics.

88. SUP. CT. R. 14.1(a) (“Only the questions set out in the petition [for a writ of certiorari], or fairly included therein, will be considered by the Court.”); FED. R. APP. P. 3(c)(6) (“An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited.”). To be sure, appellate courts, and the Supreme Court in particular, do not necessarily confine themselves to the questions presented by the parties seeking review. *See, e.g.*, Bert I. Huang, *A Court of Two Minds*, 122 COLUM. L. REV. F. 90, 92 (2022); Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691, 699 (1995).

89. 545 U.S. 469, 472 (2005).

complaint, the plaintiffs—individuals whose homes were slated for condemnation—not only invoked the Takings Clause of the Fifth Amendment<sup>90</sup> but also raised distinct claims under the Equal Protection Clause<sup>91</sup> and the Due Process Clause.<sup>92</sup> Despite this variety of claims, the plaintiffs’ attorneys—staff members of a nonprofit focused in part on eminent-domain abuse<sup>93</sup>—primarily concentrated on the Takings Clause.<sup>94</sup> After an unfavorable judgment in the Connecticut Supreme Court, the plaintiffs presented only the takings issue on appeal to the U.S. Supreme Court, abandoning their equal-protection and due-process claims.<sup>95</sup> The Court ruled against the plaintiffs in 2005, allowing the takings to proceed.<sup>96</sup>

In the wake of this defeat, property-rights activists initiated “Hands Off Our Home” campaigns, successfully lobbying for legislative constraints on eminent domain in forty-four states.<sup>97</sup> The post-*Kelo* movement was a textbook example of legal mobilization, with the case “framing issues in stark, moralistic ways” to

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90. Complaint at 1, 15, *Kelo v. City of New London*, No. 01CV0557299 (Conn. Super. Ct. Dec. 20, 2000), 2000 WL 35542907 (arguing that the proposed takings were inconsistent with the Fifth Amendment’s public-use requirement).
91. *Id.* (arguing that New London’s decision to target private homes for condemnation while sparing a politically connected cultural institution violated equal protection); see also JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* 65-66, 206-07, 247 (2009) (discussing issues related to the plaintiffs’ equal-protection argument).
92. Complaint, *supra* note 90, at 17 (arguing that the project violated due process by “delegating too much governmental authority” to development entities “without adequate safeguards and review standards in place”).
93. The case was litigated by the Institute for Justice. On the organization’s property-rights orientation, see TELES, *supra* note 41, at 237-44; and Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain*, INST. FOR JUST. 9 (Apr. 2003), [https://ij.org/wp-content/uploads/2015/03/ED\\_report.pdf](https://ij.org/wp-content/uploads/2015/03/ED_report.pdf) [<https://perma.cc/32ZT-V7YE>].
94. The trial court noted that the plaintiffs’ equal-protection and due-process claims were “somewhat short on substance.” *Kelo v. City of New London*, No. 01CV0557299, 2002 WL 500238, at \*78 (Conn. Super. Ct. Mar. 13, 2002). One of the plaintiff’s attorneys explained that the equal-protection and due-process claims served to highlight “how absurd” the city’s “decision rationale was.” BENEDICT, *supra* note 91, at 207.
95. Petition for Writ of Certiorari, *Kelo v. City of New London*, 542 U.S. 965 (2004) (No. 04-108), 2004 WL 1659558, at \*i.
96. *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005).
97. See TELES, *supra* note 41, at 241-42; *Legislative Center*, CASTLE COALITION (Nov. 9, 2012), <http://castlecoalition.org/legislativecenter> [<https://perma.cc/8L85-SA8X>]; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2120-21 (2009).

“build . . . political mobilization” around the issue of eminent-domain abuse.<sup>98</sup> But this framing was not inevitable. Rather, it was made possible by procedural rules that allowed the plaintiffs to narrow their claims over the course of litigation. Focusing on equal-protection or due-process claims might have fostered different types of mobilization, such as calls for government reforms that safeguard against political cronyism in contexts beyond takings.<sup>99</sup>

In sum, claiming enables plaintiffs to frame their injuries in the language of the law, which can provide moral weight and clarity to their grievances. The act of claiming occurs not only at the moment of filing a complaint, but through decisions over the course of litigation. At each of these points, claiming can make plain the precise injustice that activists seek to eradicate, identifying a common cause and a vernacular with which to make arguments outside of court. These effects depend in part on the procedural rules that guide the act of claiming, including claim aggregation, pleading standards, and selective appeals.

### B. Discovery

After pleading, litigants begin the process of discovery,<sup>100</sup> through which they can request documents and take depositions on “any nonprivileged matter that is relevant to any party’s claim or defense.”<sup>101</sup> Discovery is traditionally justified as a necessary component of the adversarial system: the “full exchange of information” fosters fair and accurate outcomes, while pushing parties toward settlement.<sup>102</sup> This view is largely internal to the instant case: attorneys use discovery to “identify and evaluate all the data that the trier of fact might consider”

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98. TELES, *supra* note 41, at 243; *see also* Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES (June 24, 2005), <https://www.nytimes.com/2005/06/24/us/for-homeowners-frustration-and-anger-at-court-ruling.html> [<https://perma.cc/44WY-HMNL>] (describing how *Kelo* made “the rights of owners” into “populist causes”).

99. *See* Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST (Oct. 9, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/10/07/AR2005100702335.html> [<https://perma.cc/AA22-Y3EF>] (suggesting that the case had less to do with property rights and more with a general “malfunction of democracy”). Some members of the Supreme Court seemed amenable to such arguments, as they highlighted the relative powerlessness of the plaintiffs. *Kelo*, 545 U.S. at 505 (O’Connor, J., dissenting); *id.* at 521-22 (Thomas, J., dissenting).

100. FED. R. CIV. P. 26(f)(1).

101. *Id.* 26(b)(1).

102. Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 89-94 (2020).

and to create a “favorable impression” of their case so as to bring their opponents to the settlement table.<sup>103</sup>

Some scholars and practitioners have advanced a more external view of discovery, highlighting how the process serves to compile information that is useful to litigants and nonjudicial policymakers alike.<sup>104</sup> This perspective coheres with an understanding of litigation as a mode of private administrative enforcement. In such a regime, private plaintiffs are analogous to regulators, having been delegated the power to enforce the law. Discovery, in turn, grants them “the same investigatory powers as federal agencies.”<sup>105</sup> The regulatory perspective emphasizes the “social benefits” of discovery: it saves administrative expenses, disincentivizes lawbreaking by raising the cost of litigation, and exposes wrongdoing to public view so as to allow policymakers to fine-tune substantive laws.<sup>106</sup>

While these analyses focus on the utility of discovery to the regulatory system, they are less attentive to discovery’s extralegal effects on nongovernmental interests. When commentators have considered nongovernmental interests, they have largely focused on defendants, for whom discovery either threatens

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103. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1316 (1978).
104. See STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 69 (2017); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 35 (1994). The notion that litigation serves a social role beyond resolving “narrow disputes between individual litigants” dates to the era of legal realism and was embraced by Charles Clark, primary author of the Federal Rules of Civil Procedure. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 966 (1987) (quoting Charles Clark, *Fact Research in Law Administration*, 1 MISS. L.J. 324, 324 (1929)).
105. SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3, 8 (2010); see also Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) (arguing that discovery is an “alternative to the administrative state” because it gives private attorneys the equivalent of “subpoena power by which misdeeds can be uncovered”).
106. Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 651 (2015); Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1106 (2016); Paul Stancil, *Discovery and the Social Benefits of Private Litigation*, 71 VAND. L. REV. 2171, 2175 & n.10 (2018). These benefits suggest that private discovery is crucial to public policy and even an instrument of regulation in its own right. See Zambrano, *supra* note 102, at 75-78 (arguing that discovery is “the lynchpin of private enforcement”).

“abuse”<sup>107</sup> or affords an opportunity to engage in “introspection.”<sup>108</sup> Few scholars consider how plaintiffs—including movement litigants—obtain extralegal benefits from discovery and how procedural rules shape those benefits.<sup>109</sup> Although movement lawyers and critical scholars pointed out discovery’s potential as a mobilizing tool as early as the 1970s, there has been no sustained examination of activists’ use of discovery in practice.<sup>110</sup>

Historical examples demonstrate how discovery—by making available previously confidential information—can inspire outrage, mobilize activists, embarrass parties’ opponents, and clarify the aims of political-reform efforts. High-profile tobacco litigation in the 1980s and 1990s presents an instructive case study. In 1983, Rose Cipollone—a smoker dying of lung cancer—sued several cigarette companies, alleging that they had long known and concealed the health risks of smoking.<sup>111</sup> While the litigants received no remedy,<sup>112</sup> the discovery materials produced ahead of trial became critical to the broader campaign against

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107. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641 (1989); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 B.Y.U. L. REV. 579, 579; William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1132 (1951).

108. Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1055-59 (2015) (arguing that discovery enables defendants to “learn about their own behavior” and pursue internal reforms).

109. There are several exceptions in which scholars allude to discovery as a source of indirect effects. See sources cited *supra* note 53; see also Lisa Vanhala, *Coproducing the Endangered Polar Bear: Science, Climate Change and Legal Mobilization*, 42 LAW & POL’Y 105, 117 (2020) (referencing litigation’s “epistemic power” to “force government and corporate entities to disclose” information).

110. Poverty lawyer Gary Bellow argued that by revealing a defendant’s practices and records, discovery creates a “base” on which “coalitions and publicity can be built.” Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1087 (1970). Bellow asserted that insofar as lawsuits serve to “build[] coalitions and alliances,” discovery is “far more important” than any “legal rule or court order” obtained. *Id.* Similarly, Derrick Bell noted the “fringe benefits” of litigation, including the possibility that it could serve as “an investigatory medium.” Derrick A. Bell, Jr., *School Litigation Strategies for the 1970’s: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257, 276; see also Bell, *supra* note 33, at 514 n.142 (“[D]iscovery may provide the detailed documentation that can spur movements for real political change.”). While Bellow and Bell proposed that discovery could be a valuable movement resource, they did not further theorize its function or its relationship to the broader litigation process.

111. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 508-09 (1992).

112. After Cipollone died in 1984, her husband and son maintained the case, winning \$400,000 in damages at trial. *Id.* at 509, 512. However, Cipollone’s family never saw the money, abandoning the suit amid a series of protracted appeals and remands. McCann et al., *supra* note 53, at 293.

the tobacco industry, revealing “gross duplicity and knowing manipulation . . . by tobacco companies.”<sup>113</sup>

*Cipollone* marked the first time that a litigant successfully obtained such files in a Big Tobacco lawsuit. Ralph Nader noted that the documents made *Cipollone* a “rallying point” for the antismoking community.<sup>114</sup> Activists seized the opportunity presented by discovery and pursued an intentional media strategy, holding press conferences and capturing the attention of the national press.<sup>115</sup> Elected officials took notice as well, and the House Subcommittee on Health and the Environment quickly announced hearings on deception by the tobacco industry.<sup>116</sup> Activists and politicians alike asserted that the evidence “destroyed” the credibility of Big Tobacco,<sup>117</sup> reframing the cigarette companies as quasi-criminal actors and paving the way for new federal legislation to regulate tobacco.<sup>118</sup>

Beyond showing how discovery can offer resources to activists regardless of a lawsuit’s result, *Cipollone* highlights the complex dynamics between movement actors and individual litigants. The case was brought by a smoker seeking damages for her own injuries, and she was represented by an attorney in private practice who took the case for profit.<sup>119</sup> However, *Cipollone*’s lawyer collaborated with antitobacco activists who strategized to use litigation “to force tobacco producers to release likely incriminating information through discovery.”<sup>120</sup> *Cipollone* thus shows the importance of legal-movement coordination to realizing the

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113. McCann et al., *supra* note 53, at 293. Documents turned over during discovery included a 1961 Ligett memo acknowledging that cigarettes contained “cancer causing” and “poisonous” substances, and a 1972 Tobacco Institute memo praising the industry’s strategy of “creating doubt about the health charge without actually denying it.” Myron Levin, *Taking on Tobacco: Even After a Wave of Legal Setbacks, Marc Edell Wasn’t About to Let Landmark Case Go Up in Smoke*, L.A. TIMES (June 20, 1988, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1988-06-20-vw-3410-story.html> [<https://perma.cc/MP9C-HEFF>].
114. Kurt Eichenwald, *Tobacco Verdict Could Revive Bills*, N.Y. TIMES, June 15, 1988, at B7.
115. Morton Mintz, *Foes of Smoking Call for Congressional Probe*, WASH. POST (Mar. 27, 1988), <https://www.washingtonpost.com/archive/politics/1988/03/27/foes-of-smoking-call-for-congressional-probe/bc751d9e-af4d-4dcf-8230-2300de0a548a> [<https://perma.cc/YTG7-U637>]; Matthew L. Wald, *Using Liability Law to Put Tobacco on Trial*, N.Y. TIMES, Feb. 14, 1988, at F11.
116. Patricia Bellew Grey, *Smoking Foes Cite New Evidence Emerging in Tobacco-Liability Suit*, WALL ST. J., Apr. 4, 1988, at 19.
117. *Id.*; Eichenwald, *supra* note 114.
118. McCann et al., *supra* note 53, at 295-97, 315. For a more negative appraisal of the role of litigation in the broader campaign against Big Tobacco, see SILVERSTEIN, *supra* note 9, at 247.
119. In fact, *Cipollone*’s attorney had previously represented asbestos companies in mass-tort suits against them. Levin, *supra* note 113.
120. McCann et al., *supra* note 53, at 292; see also Richard A. Daynard, *Tobacco Liability Litigation as a Cancer Control Strategy*, 80 J. NAT’L CANCER INST. 9, 10 (1988) (arguing for the use of discovery to embarrass the tobacco industry by documenting corporate “disinformation campaigns”).

indirect effects of litigation. Moreover, the case suggests that even where a plaintiff does not set out to use litigation in furtherance of activist ends, her case may nonetheless become a rallying point.

Another illustrative case involves the campaign against sex discrimination in the workplace. In 1984, Ann Hopkins sued Price Waterhouse for declining her promotion to partner on the basis of sex—a violation of Title VII.<sup>121</sup> Although Hopkins’s performance was excellent, a senior partner explained that she was denied partnership because of her “interpersonal skills,”<sup>122</sup> with evaluation comments describing her as “macho,” “overly aggressive,” having “overcompensated for being a woman,” and needing a “course in charm school.”<sup>123</sup> During discovery, Hopkins requested documents related to Price Waterhouse’s partnership-nomination process, including evaluation forms and meeting minutes.<sup>124</sup> Once produced, these documents corroborated Hopkins’s account while also revealing a broader pattern of gendered commentary about other women nominated for partnership.<sup>125</sup> These revelations enabled Hopkins’s attorneys to argue that Price Waterhouse had engaged in a pattern of sex stereotyping, and the Supreme Court affirmed that such stereotyping could violate Title VII.<sup>126</sup>

Discovery also had a significant impact outside of court, as partners’ comments about Hopkins and other women were widely reported in newspapers across the country during and after litigation.<sup>127</sup> Once public, these comments informed activists’ arguments about sex discrimination in the workplace: women’s rights groups pointed to the case as an example of “second-generation”

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121. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1989); *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112–13 (D.D.C. 1985).

122. *Hopkins*, 490 U.S. at 234–35; Ann Hopkins, *Price Waterhouse v. Hopkins: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 357, 374 (2005).

123. *Hopkins*, 490 U.S. at 235 (internal citations omitted); *Hopkins*, *supra* note 122, at 361.

124. *Hopkins*, *supra* note 122, at 370.

125. Previous female candidates were characterized as “Ma Barker” or “women’s libber” and criticized for being “curt” or “brusque.” See GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN’S LIVES AT WORK* 132–33 (2016); Deborah L. Rhode, *Litigating Discrimination: Lessons from the Front Lines*, 20 J.L. & POL’Y 325, 338 (2012).

126. *Hopkins*, 490 U.S. at 250–51. On the development of the sex-stereotyping theory by Hopkins and her attorneys, see ANN BRANIGAR HOPKINS, *SO ORDERED: MAKING PARTNER THE HARD WAY* 193–96 (1996); and *Hopkins*, *supra* note 122, at 373–76.

127. Barbara Carton, *Forget Charm School*, BOS. GLOBE, June 19, 1990, at 53; Pamela Mandels, *She Didn’t Get Her Partnership, and It Didn’t Add Up*, NEWSDAY, June 3, 1990, at 62; Reed Abelson, *If Wall Street Is a Dead End, Do Women Stay to Fight or Go Quietly?*, N.Y. TIMES, Aug. 3, 1999, at C1.



employment discrimination,<sup>128</sup> in which sexism manifests in subtler forms like “demeanor bias.”<sup>129</sup> The *Wall Street Journal* suggested that Hopkins’s story empowered “[a]ssertive [w]omen in the [w]orkplace,”<sup>130</sup> and an attorney for Price Waterhouse later observed that the embarrassment resulting from discovery served as a “teaching example” for the firm.<sup>131</sup> Advocates also called for firms to screen out inappropriate performance evaluations, require employee-education programs about stereotyping, hire staff members dedicated to diversity issues, and adopt internal complaint procedures.<sup>132</sup>

Like *Cipollone*, *Hopkins* presents an instance in which an ostensibly personal lawsuit transformed into a rallying point for activists. While Hopkins did not consider herself a “movement person,”<sup>133</sup> her attorneys actively consulted with women’s rights groups that were drawn to the case.<sup>134</sup> Hopkins attributed the success of the lawsuit in part to the commitment of the “civil rights community,”<sup>135</sup> embracing the possibility that the case would become a “landmark” for the women’s movement.<sup>136</sup>

*Hopkins* and *Cipollone* showcase the indirect effects of discovery as well as how these effects are linked to decision points in the litigation process. First, discovery works in tandem with claiming, as the breadth of discovery is linked to the claims pled earlier in litigation: under the Federal Rules, broad discovery requests must be “relevant to any party’s claim or defense.”<sup>137</sup> A plaintiff’s choice of claim, therefore, is important not only for reasons of narrative framing, but also because it impacts the information available through discovery. *Hopkins*, for example, involved a claim that Price Waterhouse’s entire evaluation process was permeated by gender-based stereotyping.<sup>138</sup> Such a claim enabled discovery of

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128. Al Kamen, ‘Social Grace’ Case Raises Question of Subtle Sex Bias in Workplace, *WASH. POST*, Oct. 29, 1988, at A3.

129. Debbie Ratterman, *The New Wave: Demeanor Bias*, *OFF OUR BACKS*, Dec. 31, 1988, at 9.

130. James R. Hagerty, *Ann Hopkins Struck a Blow for Assertive Women in the Workplace*, *WALL ST. J.* (July 20, 2018, 11:08 AM ET), <https://www.wsj.com/articles/ann-hopkins-struck-a-blow-for-assertive-women-in-the-workplace-1532099287> [<https://perma.cc/S8AT-YFRS>].

131. Andrea Sachs, *A Slap at Sex Stereotypes*, *TIME* (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,151787,00.html> [<https://perma.cc/3CFZ-NE6A>].

132. See, e.g., Cynthia Fryer Cohen, *Perils of Partnership Reviews: Lessons from Price Waterhouse v. Hopkins*, 1991 *LAB. L.J.* 677, 680-82.

133. Kamen, *supra* note 128.

134. Hopkins, *supra* note 122, at 373.

135. *Id.* at 367.

136. Kamen, *supra* note 128.

137. FED. R. CIV. P. 26(b)(1).

138. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1116-17 (D.D.C. 1985), *aff’d in part, rev’d in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev’d*, 490 U.S. 228 (1989).

Hopkins's own performance reviews as well as those of other female candidates.<sup>139</sup>

Relatedly, the plausibility-pleading regime can block plaintiffs from discovery, which courts may stay while motions to dismiss are pending.<sup>140</sup> While such stays are not mandatory, the Supreme Court explicitly cited the burdens of discovery in its adoption of the plausibility-pleading standard, concluding that thinner pleadings ought “not unlock the doors of discovery.”<sup>141</sup> To the extent that heightened pleading standards place discovery out of reach, they inhibit movement litigants from obtaining information that informs activism outside the courtroom walls.

Other procedural rules can similarly constrain discovery's utility to movement litigants by directly limiting the scope and use of discovery. While the Federal Rules contemplate broad discovery, allowing parties to obtain material that “need not be admissible in evidence,” discovery must be “proportional to the needs of the case.”<sup>142</sup> In at least some civil-rights cases, proportionality can pose an obstacle to plaintiffs seeking discovery. For example, employment-discrimination plaintiffs might be prohibited from obtaining personnel files of nonparties—precisely the information that proved critical in *Hopkins*.<sup>143</sup> While plaintiffs can influence the scope of permissible discovery through their pleading choices, they have no control over judicial discretion with respect to proportionality.

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139. See *id.* at 1117 (“Some comments on other women partnership candidates in prior years support the inference that the partnership evaluation process at Price Waterhouse was affected by sexual stereotyping.”).

140. Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 77 (2012).

141. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

142. FED. R. CIV. P. 26(b)(1). The proportionality factors include “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.* These factors—which have been present in the Federal Rules since 1983 but were made more explicit by a series of amendments in 2015—have prompted scholarly debate as to their impact on the availability of discovery. Compare Bernadette Bollas Genetin, “*Just a Bit Outside!*”: Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts, 34 REV. LITIG. 655, 660 (2015) (“This amendment . . . completes the move in the federal courts from a default philosophy of broad and liberal discovery to a landscape in which there is no default or guiding principle, other than an open-ended appeal to proportionality.”), with Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 30 (2016) (“The 2015 amendments . . . arguably encourage courts to apply the discovery rules in ways that will facilitate, rather than undermine, access and enforcement.”).

143. See, e.g., *Pothen v. Stony Brook Univ.*, No. 13-6170, 2017 WL 1025856, at \*4 (E.D.N.Y. Mar. 15, 2017) (determining that allowing “the production of a non-party’s personnel file” during discovery “would not be proportional with the needs of this case”).

Much like heightened pleading standards, heightened standards for discovery can thus impede movement litigants who seek information that will be valuable outside of court.

Once discovery materials are produced, procedural rules also bear on whether litigants may publicize them. The Supreme Court has framed discovery as “a matter of legislative grace” rather than a constitutional right, enabling a variety of limits on the use of discovery materials.<sup>144</sup> While litigants are presumptively allowed to publicize documents obtained through discovery,<sup>145</sup> the Federal Rules allow parties to move for protective orders, which can limit the ability of adversaries to disseminate discovery materials.<sup>146</sup> Protective orders require a showing of good cause, but this standard is undefined in the Rules and varies by jurisdiction.<sup>147</sup>

When the standard is high and protective orders are difficult to obtain, litigants are better able to use discovery materials in out-of-court pursuits. Such was the case in *Cipollone*, where the district court denied the tobacco companies’ motion for a protective order on the basis that good cause was not established even if the “plaintiffs intend to use these materials outside of . . . litigation,” so long as discovery was “procured in good faith.”<sup>148</sup> Other courts, however, are more liberal in granting protective orders.<sup>149</sup> In such instances, defendants can use protective orders to prevent lawyers and litigants from distributing discovery

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144. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-37 (1984). The Court limited an earlier D.C. Circuit decision which subjected judicial orders restricting the dissemination of discovery to heightened scrutiny on the grounds that the First Amendment protects the right to use litigation as a means of “political expression.” *In re Halkin*, 598 F.2d 176, 191, 196 (D.C. Cir. 1979).

145. See *In re Halkin*, 598 F.2d at 188 (“The discovery rules themselves place no limitations on what a party may do with materials obtained in discovery. . . . The implication is clear that without a protective order materials obtained in discovery may be used by a party for any purpose, including dissemination to the public.”). Although one might read ethical and procedural rules as barring the use of litigation to obtain discovery materials, courts have been unwilling to issue sanctions for the dissemination of discovery in otherwise nonfrivolous actions. See, e.g., *Garcia v. Chapman*, No. 12-21891, 2013 WL 12061867, at \*6 (S.D. Fla. Oct. 22, 2013); see also Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 561 (2004) (arguing that lawsuits should not be deemed frivolous simply because they are brought “to generate publicity for one’s cause”).

146. FED. R. CIV. P. 26(c).

147. See Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 357 (2006).

148. *Cipollone v. Liggett Grp., Inc.* 113 F.R.D. 86, 93 (D.N.J. 1986).

149. See Karen L. Stevenson, *View from the Bench: A Protective Order Doesn’t Guarantee Sealing*, 42 LITIG. NEWS 18, 18 (2017) (noting that some courts consider good cause to be “not a difficult standard to meet”).

materials.<sup>150</sup> The unpredictability of the good-cause inquiry poses a challenge to activists who pursue litigation in part for the fringe benefits of discovery.

Even if procedural devices do not stand in the way of activists' use of discovery materials, it is worth considering how discovery can undermine social movements instead of aiding them. Critical scholars have argued that litigation diverts activists' scarce resources away from preferable strategies like political organizing.<sup>151</sup> Discovery, of course, is among the most resource-intensive aspects of civil litigation. As a result, to use litigation as a fact-finding tool is a particularly costly endeavor. Moreover, requesting broad discovery in an effort to obtain sensational materials can backfire by inviting strategic overproduction.<sup>152</sup> If litigation becomes protracted as a result, its mobilizing effects may diminish in turn.<sup>153</sup> While discovery can be transformative, it can also leave activists immobilized under mountains of paper. For social movements, the utility of litigation processes like discovery is ultimately contingent.

As this Section has argued, discovery offers crucial informational resources to social movement litigants by providing evidence that can be deployed in the court of public opinion. Beyond revealing wrongdoing, discovery materials can inspire activists, embarrass adversaries, and convince allies to join a cause. But discovery's potential as an activist tool is contingent on a number of factors, including legal-movement coordination and the ability of litigants to drown one another in documents. It also depends on procedural rules, as pleading regimes regulate access to discovery itself while proportionality and good-cause inquiries affect which documents are produced and how they are used.

### C. Record Building

The trial record itself constitutes another source of indirect effects often utilized by social movements. Over the course of litigation, parties build records by examining witnesses and submitting evidence. These records, in turn, can reach the public in various ways. Some jurisdictions allow trials to be broadcast,

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150. See Cummings, *Hemmed In*, *supra* note 3, at 34.

151. See ROSENBERG, *supra* note 1, at 339.

152. See EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, PRETRIAL DISCOVERY: STRATEGY AND TACTICS § 9:32 (2022); Loren Kieve, *Discovery Reform*, 77 A.B.A. J. 79, 80 (1991).

153. On this view, cases like *Cipollone* may well be exceptional. The cigarette companies responded to Cipollone's discovery requests by providing over 100,000 documents. Myron Levin, *New Tobacco Records: Did Industry Know Risks Early?*, L.A. TIMES (Apr. 21, 1988, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1988-04-21-vw-2440-story.html> [<https://perma.cc/8MDT-E4ZC>]. That Cipollone's lawyers managed to extract valuable items from this deluge rather than drown in it was no small feat.

though ultimate discretion resides with each judge.<sup>154</sup> Trials are also transcribed in full, but transcripts can be expensive or difficult to procure.<sup>155</sup> Given these limits, the most prominent vehicle for disseminating information about trial records is the trial-court opinion itself. Opinions, insofar as they consist of factual records in addition to judicial decrees, can play an important role in activists' extralegal efforts.<sup>156</sup>

While federal judges are not required to issue judicial opinions, they have historically tended to do so.<sup>157</sup> Scholars and jurists have offered several justifications for providing written rather than oral opinions. One traditional view holds that written opinions are essential to the proper functioning of a common-law system because they enable "systematic and reasoned invocation of the past as precedent."<sup>158</sup> A body of opinions provides "collective experience over time" and allows attorneys to ascertain what prior opinions "meant."<sup>159</sup> An alternative justification focuses on how opinions enable courts to overcome their countermajoritarian difficulties. Judge Patricia Wald argued that written opinions allow judges "to justify [their] power to decide matters important to [their] fellow

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154. Blair S. Walker, *Once Novel, Televised Trials Now Common in Most States*, STATELINE (Dec. 3, 1999), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/1999/12/03/once-novel-televised-trials-now-common-in-most-states> [https://perma.cc/6VHP-N46N]; Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 992 (2016).
155. See Alison Shea, *No-Cost and Low-Cost Ways to Monitor U.S. Legal Information*, 16 LEGAL INFO. MGMT. 25, 26 (2016); Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 884 (2008).
156. Scholars have previously examined the extralegal power that activists can draw from opinions in their capacity as judicial decrees. See, e.g., Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365, 1371 (2021) (arguing that judicial opinions have the capacity to teach "constitutional lessons" through their legal pronouncements); see also *id.* at 1421-23 (arguing that from the perspective of social reformers, "judicial victories can subsequently be translated into policy and legislative victories").
157. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1184 (2004). The Federal Rules of Civil Procedure allow, but do not require, federal judges to issue written opinions. FED. R. CIV. P. 52(a)(1). On the lack of an affirmative duty for federal courts to issue opinions, see Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 526-28 (2015). For an argument that courts are "constitutionally required to state the reasons for many of their decisions," see Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 297-98 (1982).
158. James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995).
159. *Id.* at 1363-64. Put in more dire terms, written opinions are so critical to common law and thus to social orderliness that "chaos would ensue" without them. G.A. Farabaugh & Walter R. Arnold, *The Why of Written Opinions in the Appellate Court in Cases Affirmed*, 4 IND. L.J. 407, 412 (1929).

citizens” and to provide “consistency” across cases.<sup>160</sup> From this perspective, courts are held accountable because citizens are able “to read a fully-reasoned judicial opinion.”<sup>161</sup> These analyses consider the relationship between written legal reasoning and the legal system’s functionality or legitimacy, but they do not view opinions as vehicles for disseminating factual records compiled through litigation.

Other scholars have examined judicial opinions and trial records with respect to their role in supporting subsequent litigation. This understanding accords with a traditional view of the trial record as first and foremost a basis for appeal rather than a political resource.<sup>162</sup> For example, in a study of *Hollingsworth v. Perry*—which concerned the constitutionality of California’s prohibition on same-sex marriage—Kenji Yoshino celebrates the trial transcript as a “luminous civil-rights document.”<sup>163</sup> For Yoshino, however, the transcript’s practical value resided mainly in its applicability to future cases, as it “created a record below that advocates . . . could mine” for evidence in appeals and further litigation.<sup>164</sup> This reflects a court-centric perspective, whereby judicial records are useful to social movements insofar as those movements pursue further judicial action.

Even sociolegal scholarship tends to view trial records as relevant primarily to litigation. In their study of the campaign for marriage equality, Scott Cummings and Douglas NeJaime argue that movement lawyers “engag[ed] in *multi-dimensional advocacy* across legal and political domains.”<sup>165</sup> For example, they “carefully creat[ed]” legislative records that would aid “future marriage litigation.”<sup>166</sup> At the same time, litigation over nonmarital-relationship recognition for the sake of inheritance and parentage rights produced “powerful stories of real human suffering” on which advocates “relied . . . in seeking additional rights

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160. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995); see also Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL’Y 67, 74 (2000) (arguing for judicial transparency in the name of the citizenry’s “right . . . to scrutinize the actions of our public officials”); Robert H. Plaskov, *Written Opinions in the Modern Legal System: Publish and Perish*, 41 ALB. L. REV. 813, 815 (1977) (“A decision without a rationale, no matter how sound, stands less chance of mollifying the parties than a decision joined with an explanation.”).

161. Ehrenberg, *supra* note 157, at 1163–64. The English system purports to achieve such accountability through oral opinions, which provide the ability “to see a judge decide a case.” *Id.*

162. JON R. WALTZ & JOHN KAPLAN, EVIDENCE: MAKING THE RECORD 1 (1982) (“[C]ounsel . . . must do everything he can to generate a record of the trial that will serve to convince a reviewing court that justice did not prevail in the court below.”).

163. KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 7 (2015).

164. *Id.* at 257.

165. Cummings & NeJaime, *supra* note 3, at 1312.

166. *Id.* at 1313.

from the legislature.”<sup>167</sup> However, it was not trial records or judicial opinions that conveyed such stories but the plaintiffs themselves, who later testified before the state legislature.<sup>168</sup> To the extent that judicial records proved useful to activists, it was because they “strengthen[ed] [movement] lawyers’ position” in other legal cases.<sup>169</sup>

But court records, particularly as embodied in opinions, can mobilize activists outside the judicial domain. Along with discovery, these records provide information that activists can wield in subsequent political and legislative battles. To be sure, activists need not wait for the issuance of an opinion to use materials compiled during litigation to “raise public consciousness.”<sup>170</sup> However, judicial opinions are teaching instruments of a special kind.<sup>171</sup> They can validate activists’ arguments and perspectives by giving particular narratives an official stamp of approval.

Indeed, the movement for marriage equality is replete with examples of activists using judicial records as powerful political tools. *Perry* challenged California’s Proposition 8, a ban on same-sex marriage that was motivated in part by the idea that “being gay was different, inferior, and not normal.”<sup>172</sup> In response, proponents of marriage equality sought to show that same-sex couples were “normal.”<sup>173</sup> From a doctrinal perspective, demonstrating normalcy could show courts that the state lacked a compelling reason to forbid same-sex unions. But politically, it could also turn public opinion in favor of marriage equality. As such, the *Perry* plaintiffs introduced evidence attesting to the psychological normalcy of same-sex relationships.<sup>174</sup> The plaintiffs’ own participation in the trial as witnesses reinforced the normalcy argument, showing them to be “ordinary people who worked hard, raised children, and were committed to loving relationships.”<sup>175</sup>

The idea of normalcy, undergirded by a surfeit of evidence entered into the record, proved critical to both legal success and extralegal mobilization. In *Perry*, the trial court held Proposition 8 unconstitutional, finding that the state “has no

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167. *Id.* at 1314.

168. *Id.* at 1263, 1267.

169. *Id.* at 1274, 1289.

170. White, *supra* note 1, at 539.

171. *Cf.* Driver, *supra* note 156, at 1422 (examining “judicial opinions’ capacity for teaching”).

172. NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* 243 (2017).

173. *Id.* at 240, 264.

174. YOSHINO, *supra* note 163, at 162.

175. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 198 (2013).

interest in asking gays and lesbians to change their sexual orientation” because “homosexuality is a normal expression of sexuality.”<sup>176</sup> Outside of court, activists seized on the extensive judicial record in the case and its validation of same-sex normalcy. In a press release following the decision, Lambda Legal underscored how the “detailed factual record” developed in the case “adds to the growing consensus in courts and legislatures across the country that there are no good reasons” to prohibit same-sex marriage.<sup>177</sup> This “evidence,” including “testimony of leading experts,” showed how such a prohibition “harms devoted same-sex couples and their families, and helps no one.”<sup>178</sup> The group promised that the “detailed record” would offer a “potent tool” not only for “other legal cases” but also for “the many, ongoing educational campaigns.”<sup>179</sup> Statements from other advocacy groups expressed similar sentiments about the political and educational power of the case’s record.<sup>180</sup> As the president of the Gay and Lesbian Alliance Against Defamation explained, the plaintiffs’ “legal team gave a blueprint for winning in and outside of court by opting for a trial and using it as a platform for the stories of gay and lesbian couples.”<sup>181</sup>

Earlier instances of civil-rights litigation similarly demonstrate the role of record building in mobilization outside of court. In the early 1960s, the Department of Justice (DOJ) launched a series of lawsuits against Southern localities

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176. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010). When the Supreme Court held all prohibitions on same-sex marriage unconstitutional, it echoed this language by noting that “sexual orientation is both a normal expression of human sexuality and immutable.” *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015).

177. Press Release, Lambda Legal, *Lambda Legal Applauds Perry v. Schwarzenegger Ruling Striking Down Prop 8* (Aug. 4, 2010), [https://www.lambdalegal.org/news/ca\\_20100804\\_perry-ruling-striking-down](https://www.lambdalegal.org/news/ca_20100804_perry-ruling-striking-down) [<https://perma.cc/7G6L-XCEX>].

178. *Id.*

179. *Id.*

180. *See, e.g.*, Press Release, National Center for Lesbian Rights, *Federal Judge: Prop 8 Unconstitutional* (Aug. 4, 2010), <https://www.nclrights.org/about-us/press-release/federal-judge-prop-8-unconstitutional> [<https://perma.cc/HZA9-WGS8>] (“The plaintiffs . . . laid out a well-crafted, meticulous case, backed by the most respected historians, psychologists, economists, and political scientists . . . Using the Prop 8 proponents’ own outrageous and inflammatory words . . . [a]nd through the deeply moving testimony of the plaintiffs and other members of our community, they proved beyond question that denying same-sex couples the right to marry causes great harm to LGBTQ people and their children.”); Press Release, API Equality-Northern California, *Asians and Pacific Islanders Applaud Federal Court’s Ruling Against Proposition 8* (Aug. 4, 2010), <https://apienc.org/2010/08/04/asians-and-pacific-islanders-applaud-federal-courts-ruling-against-proposition-8> [<https://perma.cc/7LRM-CQWJ>] (“[T]he evidence and legal arguments showed that Proposition 8 harms loving gay and lesbian couple[s] and their families, while helping no one.”).

181. *Impact of Same-Sex Marriage Ruling Weighed*, WASH. POST (Aug. 8, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/08/06/AR2010080605222.html> [<https://perma.cc/69SB-P52N>].



for their failure to register Black voters. The lawsuits largely failed, but the records they compiled proved central to the subsequent passage of the Voting Rights Act (VRA). To be sure, the extralegal effects would have differed had these cases been successful: judicial victories not only enshrine but also validate information placed on the record. Nonetheless, according to DOJ attorney Brian K. Landsberg, these cases “graphically exposed the practices used to deny the right to vote.”<sup>182</sup> Violations of Black citizens’ voting rights were hardly hidden, but the cases highlighted their precise mechanisms and motivations. For example, they demonstrated that Black voting rights were not denied by “aversive racist registrars” but by “well-meaning” officials, underscoring the need for a prophylactic federal solution.<sup>183</sup>

The records produced by these lawsuits proved critical to the passage of the VRA. They provided “accretions of evidence” that activists and legislators used to build “political will” for a new voting-rights law.<sup>184</sup> Assistant Attorney General for Civil Rights John Doar argued that the litigation campaign served to “slowly, steadily . . . teach the country that no matter how educated a black person was in Mississippi, it was very unlikely that he would get a chance to vote.”<sup>185</sup> When Congress enacted the VRA, it utilized these case records as “a factual predicate” that “exposed to the nation the extent of the racial discrimination in voting.”<sup>186</sup>

Record building is influenced by earlier phases of litigation. The record that plaintiffs assemble is often based in part on evidence accrued through discovery, so the breadth of discovery directly influences the breadth of the information that can be transmitted through a judicial opinion or transcript. Record building is also linked to claiming, as judicial opinions can validate the same narratives that plaintiffs stress through their pleadings. In *Perry*, for example, the plaintiffs underscored the normalcy of same-sex relationships in both pleadings and expert examinations.<sup>187</sup> The court’s extensive analysis of this argument provided

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182. BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 3 (2007).

183. *Id.* at 169.

184. *Id.* at 5–9.

185. *Id.* at 152.

186. *Id.* at 149–51. In addition to mobilizing support for action on voting rights, the case records also shaped the specific solutions that Congress embraced. Voting Rights Act (VRA) prohibitions on devices like literacy tests directly reflected practices exposed by the Department of Justice (DOJ) litigation. *Id.* at 152–53; see also Cristina M. Rodríguez, *From Litigation, Legislation*, 117 *YALE L.J.* 1132, 1145–46 (2008) (reviewing LANDSBERG, *supra* note 182) (discussing how DOJ litigation “highlighted the need for congressional action and federal supervision” and “shaped the remedies crafted to respond to the specific violations uncovered”).

187. See *supra* notes 172–177 and accompanying text.

something akin to official approval, with supporters of same-sex marriage pointing to the opinion – including its sheer length – as conclusive on the question of same-sex normalcy.<sup>188</sup>

As with other aspects of litigation, the capacity of record building to generate indirect effects is shaped and constrained by procedural rules and norms. For one, the fact that courts are not required to issue written opinions can inhibit the dissemination of evidentiary records, and record building has diminished as the push for settlement has encouraged courts to resolve disputes without handing down decisions.<sup>189</sup> Procedural tools have been key to this trend, with the Federal Rules of Civil Procedure allowing judges to “consider and take appropriate action” with respect to “settling the case.”<sup>190</sup> Increasing reliance on settlement has drawn criticism on public-accountability grounds, as judges acting in their “managerial” capacity “frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions.”<sup>191</sup> These systemic critiques also implicate social movement litigation, as fewer trials and opinions means the loss of potential sources of indirect effects. Moreover, settlements often involve strict nondisclosure agreements<sup>192</sup> which may impede litigants’ broader ability to use court cases as political rallying points.<sup>193</sup>

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188. See, e.g., *Equality for Gay Couples*, DENV. POST (June 6, 2016, 6:03 PM), <https://www.denverpost.com/2016/06/06/equality-for-gay-couples> [<https://perma.cc/GPJ4-SSS9>] (“The judge’s decision, which weighed in at 136 pages, relied heavily on the evidence produced at trial and was unequivocal in its conclusion.”).

189. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (critiquing the encouragement of settlements).

190. FED. R. CIV. P. 16(c)(2); see also Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (noting the “prosettlement position” of Rule 16).

191. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982); see also Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 U. MIA. L. REV. 173, 192 (2003) (“[I]t is increasingly rare for state-empowered actors to be required to reason in public about their decisions to validate one side of a dispute.”); Arthur R. Miller, *The Pre-trial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1004–05 (2003) (“[M]anagement often occurs beyond public scrutiny, is largely undocumented by written records or formal opinions, and generally escapes appellate review.”).

192. See Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 386–87 (1999).

193. On the silencing effect of settlements with nondisclosure agreements, see, for example, Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/75UY-2JMC>].

As this Section has demonstrated, judicial opinions and records can further movement activism out of court by enshrining evidence, validating activists' narratives, and providing formal sources of information in extralegal campaigns. The extent to which record building is a valuable movement tool depends on other aspects of the litigation process, such as claiming and discovery, as well as distinct procedural trends like the advent of managerial judging.

### III. THE CASE OF EAST RAMAPO

The preceding Part offered a model for understanding the relationship between litigation procedure and extralegal activism. This Part applies that model to a case study of *NAACP, Spring Valley Branch v. East Ramapo Central School District*.<sup>194</sup> The East Ramapo case is a particularly apt way to examine the indirect effects of litigation. From the start, activists understood that even if a judge ruled in their favor, the lawsuit would provide only minimal direct benefits. Drawing on original interviews and contemporaneous reporting, this Part offers insight into how activists instead leveraged the litigation process itself—claiming, discovery, and record building—in their efforts outside of court. In so doing, it demonstrates how procedural rules and norms, from pleading standards and discovery guidelines to opinion-writing, mediate legal mobilization. By using an in-depth case study, this Part also illustrates the contingency of indirect effects. Distinct elements of litigation can generate political resources, but as this story shows, their capacity to do so depends on contextual factors from the personalities involved to the presence of local media.<sup>195</sup>

#### A. Background: A District in Crisis

East Ramapo Central School District, in Rockland County, New York, is less than thirty miles north of Manhattan. Through the 1980s, the district was a diverse, desirable destination for parents.<sup>196</sup> Of approximately 9,000 public-school students,<sup>197</sup> fifty-four percent were white, thirty-four percent were Black,

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194. 462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd sub nom.* Clerveaux v. E. Ramapo Cent. Sch. Dist., 984 F.3d 213 (2d Cir. 2021).

195. See McCann, *supra* note 15, at 461–62 (arguing that case studies enable attention to “complex webs” of context “that both constrain and facilitate”).

196. Gene Rondinaro, *If You're Thinking of Living in Pomona*, N.Y. TIMES (Jan. 5, 1986), <https://www.nytimes.com/1986/01/05/realestate/if-you-re-thinking-of-living-in-pomona.html> [<https://perma.cc/7WPV-2N9P>] (describing East Ramapo as “one of the better districts in the state”).

197. J.J. Goldberg, *ADL May Oppose Separate School District in N.Y. for Chasidic Village*, JEWISH ADVOC., Aug. 3, 1989, at 3.

five percent were Hispanic, and seven percent were Asian.<sup>198</sup> About an equal number of children living in the district attended private schools.<sup>199</sup>

Over the course of three decades, two demographic trends transformed East Ramapo. First, the district saw the flight of middle-class white residents alongside a growing nonwhite population.<sup>200</sup> By 2006, Black and Hispanic students made up fifty-eight percent and twenty-three percent of the schools, respectively.<sup>201</sup> By 2009, ninety-three percent of East Ramapo public-school students were nonwhite.<sup>202</sup> The district's programmatic offerings reflected these changes, as East Ramapo increasingly served low-income students whose parents lacked higher educations or did not speak English. Bilingual classrooms and services for students whose schooling had been interrupted became central initiatives, and parents praised the schools through the 1990s.<sup>203</sup> In 1997, East Ramapo boasted an eighty-eight percent college-matriculation rate and SAT scores above the state average,<sup>204</sup> and in 2005, one of the district's two high schools ranked 328th on *Newsweek's* list of America's top schools.<sup>205</sup>

The district's second demographic change was an influx of strictly Orthodox, or Haredi, Jewish families.<sup>206</sup> These highly observant communities had long

198. *Diversity in the Classroom: East Ramapo Central School District (Spring Valley)*, N.Y. TIMES (Jan. 29, 2012), <https://www.nytimes.com/interactive/projects/immigration/enrollment/new-york/rockland/east-ramapo-central-school-district-spring-valley> [https://perma.cc/2LC9-EC8D].

199. Goldberg, *supra* note 197.

200. Gary Stern & Mareesa Nicosia, *East Ramapo: A District in Crisis*, J. NEWS (Nov. 19, 2014, 12:37 PM ET), <https://www.lohud.com/story/news/education/2014/09/17/east-ramapo-district-crisis/15775703> [https://perma.cc/K4ZR-734Q].

201. *Diversity in the Classroom*, *supra* note 198.

202. Uriel Heilman, *In Rockland County, Non-Orthodox Try to Create Alternative to Hasidic Dominance*, JEWISH TEL. AGENCY (Feb. 19, 2015, 5:35 PM), <https://www.jta.org/2015/02/19/united-states/in-rockland-county-non-orthodox-try-to-create-alternative-to-hasidic-dominance> [https://perma.cc/Y237-83VZ].

203. Telephone Interview with Steve White (July 29, 2020); Cheryl Platzman Weinstock, *Easy City Access in a Ramapos Setting*, N.Y. TIMES (Mar. 2, 1997), <https://www.nytimes.com/1997/03/02/realestate/easy-city-access-in-a-ramapos-setting.html> [https://perma.cc/FG4F-RXK4].

204. Weinstock, *supra* note 203.

205. *The Complete List of the 1,000 Top U.S. Schools*, NEWSWEEK (May 5, 2005, 8:00 PM EDT), <https://www.newsweek.com/complete-list-1000-top-us-schools-119131> [https://perma.cc/AUM4-2MCX].

206. A diverse array of subgroups make up the Orthodox Jewish community. For one, strictly Orthodox Jews are typically distinguished from modern Orthodox Jews. Saul J. Berman, *The Ideology of Modern Orthodoxy*, SH'MA 6 (Feb. 2001), <https://www.bjpa.org/content/upload/bjpa/berm/Berman31.pdf> [https://perma.cc/UCT7-WQFL]. In East Ramapo and else-

been centered in Brooklyn, but rising costs led them to migrate to suburbs like Rockland, a trend that accelerated in the late 1970s.<sup>207</sup> By 1997, 35,000 Orthodox Jews lived in Monsey, an East Ramapo village with a total population of 94,000; it became the area with the third most Orthodox Jews per capita in the world, after Israel and Brooklyn.<sup>208</sup>

While secular white families moved out, the Haredi families that replaced them almost universally sent their children to private religious schools.<sup>209</sup> The remaining public-school population was segregated along lines of race and class: as of 2020, only three percent of East Ramapo's students were white, and close to ninety percent were considered "economically disadvantaged" by New York State.<sup>210</sup> By comparison, in the adjacent, majority-white Clarkstown Central School District, only seventeen percent of students were economically disadvantaged.<sup>211</sup>

The growth of the Haredi community generated a clash over public-school governance. Although religious families sent their children to private schools, their taxes funded public schools, and they constituted a growing portion of the population. By 1995, a majority of school-age children living in the district attended private schools, and Haredi families began to lament that their taxes funded public-school programs from which they did not benefit.<sup>212</sup> With its

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where, strictly Orthodox Jews are often referred to as "Hasidic" or "Ultra Orthodox." However, the former describes only one sect, while the latter is considered a pejorative by some members of the Orthodox community. As such, this Note uses the terms "strictly Orthodox" and "Haredi," or the more general term "Orthodox" where appropriate. See Avi Shafran, *Stop Otherizing Haredi Jews*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/opinion/haredi-jews-ultra-orthodox.html> [<https://perma.cc/9BYU-5DLH>].

207. Julia Campbell, *Rockland: A Private School Frontier*, N.Y. TIMES (Feb. 12, 1995), <https://www.nytimes.com/1995/02/12/nyregion/rockland-a-private-school-frontier.html> [<https://perma.cc/NR92-3MPG>].

208. Joseph Berger, *Growing Pains for a Rural Hasidic Enclave*, N.Y. TIMES (Jan. 13, 1997), <https://www.nytimes.com/1997/01/13/nyregion/growing-pains-for-a-rural-hasidic-enclave.html> [<https://perma.cc/AE87-DFED>].

209. Stern & Nicosia, *supra* note 200.

210. *East Ramapo CSD (Spring Valley) Enrollment (2019-20)*, N.Y. STATE EDUC. DEP'T, <https://data.nysed.gov/enrollment.php?year=2020&instid=800000039112> [<https://perma.cc/TNC4-GGZ3>].

211. *Clarkstown CSD Enrollment (2019-20)*, N.Y. STATE EDUC. DEP'T, <https://data.nysed.gov/enrollment.php?year=2020&instid=800000039375> [<https://perma.cc/K9LA-HBFE>].

212. A local rabbi and talk-radio host explained, "Taxes are absolutely out of line. . . . And then we see that we are paying for cheerleader uniforms and all kinds of things we really have no interest in." Campbell, *supra* note 207.

growing population, the Haredi community used two institutions to assert control over public-school taxes and spending.<sup>213</sup> The first was the school budget, which must be passed by a popular vote in New York school districts.<sup>214</sup> Between 2000 and 2009, voters rejected six out of ten budgets, while the statewide budget-rejection rate was less than ten percent.<sup>215</sup> The second was the School Board itself. By the late 1990s, the Haredi community elected four Orthodox candidates to the nine-member Board.<sup>216</sup> Like the budgets, Board politics were tightly linked to complaints about high taxes.<sup>217</sup>

A détente developed between the public- and private-school communities. Given the at-large structure of School Board elections, in which the entire electorate voted for each seat, the Haredi community likely could have attained a Board majority, but it refrained from doing so. Public-school officials and Haredi leaders reportedly reached a “quid pro quo” by which the district would provide as many resources as legally possible to private-school students, and religious voters would not reject budgets nor take over the Board.<sup>218</sup> Though several budgets failed in the early 2000s,<sup>219</sup> the truce remained intact until 2005, when Orthodox candidates gained a majority on the School Board for the first time.<sup>220</sup>

The Board began making “incremental” budget cuts until it embarked on a series of drastic changes in 2009.<sup>221</sup> The Board sought to funnel more resources

213. On Haredi political cohesion, see Josh Nathan-Kazis, *The Mechanics of a Hasidic Bloc Vote*, FORWARD (Sept. 10, 2013), <https://forward.com/news/breaking-news/183675/the-mechanics-of-a-hasidic-bloc-vote> [<https://perma.cc/SS7Z-M28U>].

214. N.Y. EDUC. LAW §§ 2012, 2021, 2022 (McKinney 2022); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622, 633 (1969) (striking down disenfranchisement of private-school parents from school-budget and board elections).

215. See Off. of Educ. Mgmt. Servs., *Budget Vote Results*, N.Y. STATE EDUC. DEP’T, <http://www.p12.nysed.gov/mgtserv/votingresults> [<https://perma.cc/N5TB-TESE>].

216. Weinstock, *supra* note 203.

217. See Yisroel Epstein, Letter to the Editor, *Orthodox Jews Deserve Voice on School Board*, N.Y. TIMES, Jan. 18, 1997, <https://www.nytimes.com/1997/01/18/opinion/1-orthodox-jews-deserve-voice-on-school-board-234028.html> [<https://perma.cc/V2QQ-PLV2>] (“[Orthodox Jews] pay full taxes on education . . . Why should they not serve on the board?”).

218. Ben Calhoun, *A Not-So-Simple Majority*, THIS AM. LIFE (Sept. 12, 2014), <https://www.thisamericanlife.org/534/transcript> [<https://perma.cc/WV4B-JPUM>]. Under New York State law, school districts are required to provide certain resources to private-school students, including transportation services and textbooks – but they may elect to provide more. See, e.g., N.Y. EDUC. LAW §§ 3635, 701.3 (McKinney 2022).

219. Budgets were defeated in East Ramapo in 2000, 2004, and 2005. See Off. of Educ. Mgmt. Servs., *supra* note 215.

220. *East Ramapo Timeline: 2005-Present*, J. NEWS (Nov. 17, 2014, 5:46 PM EST), <https://www.lohud.com/story/news/education/2014/11/17/east-ramapo-timeline/19190165> [<https://perma.cc/9ZLA-2ZS4>].

221. Calhoun, *supra* note 218; see Telephone Interview with Steve White, *supra* note 203.

to private schools without raising taxes, targeting public-school programs to do so. Between 2009 and 2014, the Board eliminated nearly 250 staff—including teachers, guidance counselors, and social workers—as well as field-trip busing and summer-school programs. It pared back athletics, extracurriculars, course offerings, and custodial services. Kindergarten was reduced to half-days; high-school students found themselves without enough courses to fill the day and saw their schools become dilapidated.<sup>222</sup> The changes signaled, according to Deputy Superintendent Joe Farmer, “a declaration of war” by the Board on its own students.<sup>223</sup> Budgets increasingly failed: between 2010 and 2020, voters rejected seven out of eleven budgets, giving East Ramapo the worst budget-approval record in the state.<sup>224</sup> While these cuts would have severely impacted any district, they were particularly acute given East Ramapo’s large percentage of high-need students. Children who did not speak English or whose parents lacked college educations suffered disparately from the elimination of school staff and programs.<sup>225</sup> From 1997 to 2017, graduation rates in East Ramapo plummeted.<sup>226</sup> As

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222. See Kate Taylor, *East Ramapo School Board Is Criticized by New York State Monitor*, N.Y. TIMES (Nov. 17, 2014), <https://www.nytimes.com/2014/11/18/nyregion/east-ramapo-school-board-is-criticized-by-new-york-city-monitor.html> [<https://perma.cc/T2GK-4NL7>]; NAACP v. E. Ramapo Cent. Sch. Dist., 462 F. Supp. 3d 368, 414-15 (S.D.N.Y. 2020).
223. Peter Applebome, *Board’s Hiring Sets Off a School War*, N.Y. TIMES (Dec. 6, 2009), <https://www.nytimes.com/2009/12/07/nyregion/07towns.html> [<https://perma.cc/V7E9-T8G4>].
224. See Off. of Educ. Mgmt. Servs., *supra* note 215; Nancy Cutler, *East Ramapo Board Enacts Contingency Plan, For Now; Accepts Wortham’s Resignation*, J. NEWS (July 1, 2020, 8:42 AM EST), <https://www.lohud.com/story/news/local/rockland/2020/07/01/east-ramapo-enacts-contingency-budget-now-oks-wortham-resignation/3286113001> [<https://perma.cc/Y4FQ-EE5D>].
225. Letter from Timothy C. J. Blanchard, Dir., N.Y. Off. for Civ. Rts., U.S. Dep’t of Educ., to Willie Trotman, President, Spring Valley NAACP (Oct. 27, 2015) (on file with author); Dennis M. Walcott, Monica George-Fields & John W. Sipple, *Opportunity Deferred: A Report on the East Ramapo Central School District*, N.Y. STATE EDUC. DEP’T 20-21 (2015), <https://www.regents.nysed.gov/common/regents/files/East%20Ramapo%20Report%20Pub.pdf> [<https://perma.cc/7XTN-AWXV>].
226. In 1997, eighty-eight percent of East Ramapo students went to college, and the district’s drop-out rate was between one and two percent. Weinstock, *supra* note 203; *The New York State School District Report Card for East Ramapo Central School District (Spring Valley)*, N.Y. STATE EDUC. DEP’T 6 (Mar. 6, 2000), <https://data.nysed.gov/files/reportcards/archive/1998-99/500402060000.pdf> [<https://perma.cc/7VYH-NCXD>]. By 2017, the overall graduation rate had dropped to fifty-six percent. Kimberly Redmond, *Rockland HS Graduation Rates Tick Up, While ELL Rates Stay Low*, J. NEWS (Feb. 1, 2019, 8:59 AM ET), <https://www.lohud.com/story/news/local/rockland/clarkstown/2019/01/30/rockland-hs-graduation-rates-tick-up-while-ell-rates-stay-low/2721827002> [<https://perma.cc/5CU4-K3RF>].

a state-appointed monitor observed, East Ramapo was “a school district in crisis.”<sup>227</sup>

Advocates for public-school students pushed back against the Board’s drastic cuts, though their efforts yielded mixed results. Willie Trotman, president of the local NAACP chapter, attempted to set up a mediation between the Board and public-school advocates, but the Board refused.<sup>228</sup> Direct appeals by students proved similarly unavailing. Olivia Castor, who graduated from East Ramapo’s Spring Valley High School in 2013, created a presentation for the Board about how curricular reductions created gaps in students’ schedules. Castor recalled, “[T]he board told me that I had fabricated the schedules.”<sup>229</sup> Student protests directed at the Board continued for years.<sup>230</sup> Oscar Cohen, the co-chair of the local NAACP’s education committee, formed Rockland Clergy for Social Justice, an interfaith group of religious leaders, to advocate for public-school students.<sup>231</sup> Steve White, who had run for School Board in 2008 and lost to Orthodox candidate Aron Wieder,<sup>232</sup> created an email newsletter called Power of Ten as an advocacy “mouthpiece.”<sup>233</sup> Meanwhile, other grassroots organizations sought to spread awareness and mobilize voters.<sup>234</sup> But the pressure created by these groups did not convince the Board to reinstate public-school programs.

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227. Henry M. Greenberg, *East Ramapo: A School District in Crisis*, N.Y. STATE EDUC. DEP’T (Nov. 17, 2014), <http://www.p12.nysed.gov/docs/east-ramapo-fiscal-monitor-presentation.pdf> [<https://perma.cc/5ZRG-XAWB>].

228. Telephone Interview with Willie Trotman, President, Spring Valley NAACP (July 23, 2020).

229. Telephone Interview with Olivia Castor (Aug. 14, 2020).

230. See Kimberly Redmond & Michael D’Onofrio, *East Ramapo Students Rally Demanding Changes*, J. NEWS (May 22, 2016, 6:29 AM ET), <https://www.lohud.com/story/news/local/rockland/ramapo/2016/05/20/east-ramapo-school-district-rally/84606486> [<https://perma.cc/48VY-S97S>].

231. Telephone Interview with Oscar Cohen, Co-chair, Educ. Comm., Spring Valley NAACP (July 22, 2020).

232. *Official Results*, E. RAMAPO CENT. SCH. DIST. (May 20, 2008), <https://www.ercsd.org/site/handlers/filedownload.ashx?moduleinstanceid=47&dataid=559&FileName=Official-Vote-Results---05-20-08.pdf> [<https://perma.cc/M7BF-L5HZ>].

233. Telephone Interview with Steve White, *supra* note 203.

234. *Id.*; see, e.g., STRONG E. RAMAPO, <http://www.strongeamap.org> [<https://perma.cc/3YJC-HPYF>].



As the Board proved intractable, some residents turned to legal action. In 2012, public-school parents, students, and taxpayers filed a class-action lawsuit—*Montesa v. Schwartz*—against several Board members.<sup>235</sup> The plaintiffs invoked a variety of claims,<sup>236</sup> but most of their causes of action were dismissed for failure to state a claim or lack of standing.<sup>237</sup> The failure of *Montesa* left activists dejected, with Steve White calling the case’s collapse “upsetting” and “discouraging.”<sup>238</sup>

Public-school advocates pursued administrative and legislative avenues as well. The NAACP filed a complaint with the federal Department of Education’s Office of Civil Rights (OCR). The resulting investigation, concluded in 2015, found that the district appeared to favor private-school students through its funding patterns.<sup>239</sup> Rather than issue a statement of violation, OCR entered into a voluntary-resolution agreement with the district. For Cohen, the agreement was only “a small win,” as it did not express the district’s culpability or address the budget cuts plaguing the public schools.<sup>240</sup> Meanwhile, many advocates coalesced around attaining a state-appointed monitor with the power to veto Board decisions. Students, parents, and other residents contacted state legislators and traveled to Albany numerous times to lobby for such a monitor.<sup>241</sup> These efforts achieved their most tangible victory in 2014, when the New York State Education Department appointed a monitor “to address the district’s serious fiscal issues.”<sup>242</sup> While the monitor issued a scathing report about the district’s “draconian spending cuts” and its “disturbing” tendency “to favor the interests of private school students,” he lacked veto power to check the Board’s

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235. Complaint, *Montesa v. Schwartz*, No. 12 Civ. 6057, 2016 U.S. Dist. LEXIS 80822 (S.D.N.Y. June 20, 2016).

236. The plaintiffs alleged that the Board had violated the First Amendment, the Equal Protection Clause, and seven other state and federal laws. *Id.* at 64-75. For an in-depth discussion of the case, see Eric Grossfeld, *Poverty of the Mind: East Ramapo’s Educational Emergency*, 11 ALB. GOV’T L. REV. 425, 453-58 (2018).

237. 836 F.3d 176, 193-94 (2d Cir. 2016). While some of the taxpayer-plaintiffs’ claims remained viable, they were soon withdrawn in exchange for a promise by the defendants not to seek attorney’s fees. Grossfeld, *supra* note 236, at 454.

238. Telephone Interview with Steve White, *supra* note 203.

239. Letter from Timothy C. J. Blanchard, *supra* note 225, at 7, 9.

240. Telephone Interview with Oscar Cohen, *supra* note 231; Letter from Timothy C. J. Blanchard, *supra* note 225, at 7, 9; Voluntary Resolution Agreement, Off. for Civ. Rts., U.S. Dep’t of Educ. (Sept. 8, 2015) (on file with author).

241. Telephone Interview with Steve White, *supra* note 203; Telephone Interview with Olivia Castor, *supra* note 229.

242. Joseph Spector, *It’s Official: East Ramapo to Get a Fiscal Monitor*, J. NEWS (June 10, 2014, 5:46 PM ET), <https://www.lohud.com/story/news/politics/politics-on-the-hudson/2014/06/10/official-east-ramapo-get-fiscal-monitor/10300073> [<https://perma.cc/74GY-255C>].

decisions.<sup>243</sup> Advocates returned to Albany seeking a monitor with veto power, but a bill to establish one failed in the Senate as the “specter of anti-Semitism” clouded the debate.<sup>244</sup>

After 2015, the district’s retrenchment subsided. State grants enabled the restoration of some essential positions and programs.<sup>245</sup> While these changes improved the district’s ability to educate its public-school students, not all terminated services and employees were restored, even as public-school enrollment increased.<sup>246</sup> Moreover, budgetary stopgaps did not address the district’s fundamental governance problems. According to Willie Trotman, activists remained in a state of “desperation . . . We were just on a wing and a prayer.”<sup>247</sup>

As activists’ political efforts foundered, some turned again to legal action. Over the course of several years, members of the local NAACP had developed a relationship with the New York Civil Liberties Union (NYCLU). As early as 2011, the civil-liberties group publicly expressed concern about the School Board’s policies.<sup>248</sup> NYCLU staff began regularly meeting with NAACP officers to provide informal advice on their legal and administrative options.<sup>249</sup> In 2016, NYCLU attorneys proposed to the local NAACP that East Ramapo residents could sue the district not over its programmatic and budgetary decisions, but over the process for electing Board members.<sup>250</sup> At the time, East Ramapo utilized at-large

243. Greenberg, *supra* note 227, at 29, 48.

244. Kate Taylor, *Bid to Impose Monitor on East Ramapo School Board Meets Resistance*, N.Y. TIMES (May 18, 2015), <https://www.nytimes.com/2015/05/19/nyregion/bid-to-impose-monitor-on-east-ramapo-school-board-meets-resistance.html> [<https://perma.cc/97H3-NE2Q>]; Joseph Spector, *Criticism Follows Failed East Ramapo Monitor Bill*, J. NEWS (June 27, 2015, 4:02 PM ET), <https://www.lohud.com/story/news/education/2015/06/26/criticism-follows-failed-east-ramapo-monitor-bill/29343887> [<https://perma.cc/79MG-5SB5>].

245. NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 415-16 (S.D.N.Y. 2020); Jane Lerner, *East Ramapo Seeks to Restore Kindergarten, Art, Music in Budget*, J. NEWS (Mar. 10, 2016, 5:29 PM ET), <https://www.lohud.com/story/news/education/2016/03/10/east-ramapo-kindergarten-music/81595226> [<https://perma.cc/5BWV-KNEG>]; Robert Brum, *\$3M E. Ramapo Plan OK; Full-Day K Begins Oct. 6*, J. NEWS (Sept. 27, 2016, 5:34 PM ET), <https://www.lohud.com/story/news/education/2016/09/26/east-ramapo-state-oks-districts-3-million-plan/91128834> [<https://perma.cc/E2VE-LAPF>].

246. *Spring Valley Branch*, 462 F. Supp. 3d at 415-16; *see also* Walcott et al., *supra* note 225, at 23-25 (calling for additional state funding to remedy “the actual cuts to the District’s public school academic and support programs over the past decade”).

247. Telephone Interview with Willie Trotman, *supra* note 228.

248. Josh Nathan-Kazis, *In N.Y. Town, Orthodox and Locals Vie for School Control*, FORWARD (Apr. 27, 2011), <https://forward.com/news/137312/in-ny-town-orthodox-and-locals-vie-for-school-cont> [<https://perma.cc/K95N-HHYF>].

249. Telephone Interview with Oscar Cohen, *supra* note 231.

250. *Id.*; Telephone Interview with Perry Grossman, Senior Staff Atty., NYCLU (Aug. 6, 2020).

elections, allowing the entire electorate to vote for each seat.<sup>251</sup> Such a system enabled a cohesive majority—like the Haredi community—to dominate the Board. By challenging this system as diluting minority electoral strength under the VRA, residents could seek to convert the district to one in which voters were divided into geographic wards, each with the opportunity to elect its own member.

NYCLU attorneys with deep experience in voting-rights litigation saw East Ramapo as a paradigmatic case of vote dilution, and thus presented the option of a VRA lawsuit to local activists.<sup>252</sup> For their part, activists had previously contemplated the benefits of a ward-based system, but the district's electoral system had never been the focus of their efforts.<sup>253</sup> From their perspective, the decision to pursue a voting-rights case was not straightforward. For one, targeting electoral procedures was an indirect way of addressing the most salient problems facing the schools. The choice between an at-large electoral system and a ward-based one was abstract compared to budget cuts and curricular offerings. Litigation, as a result, had the potential to distort and redirect activists' aims. Perhaps more importantly, even a successful vote-dilution lawsuit would only result in the creation of a few minority-majority wards without giving public-school parents control of the nine-member Board.<sup>254</sup> Oscar Cohen remembered NYCLU attorneys explaining, "You wouldn't get a majority, it's not going to change the power structure."<sup>255</sup> According to Willie Trotman, the attorneys stressed, "The best we can do is three to four wards, if we win."<sup>256</sup> This limitation left some local residents uncertain of the value of litigation. Steve White recalled, "I had to be convinced because . . . three or four seats, it's not a majority and what are you actually going to achieve?"<sup>257</sup> Ana Maeda-Gonzalez, a public-school parent and

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251. See *Spring Valley Branch*, 462 F. Supp. 3d at 376.

252. Telephone Interview with Perry Grossman, *supra* note 250 (calling East Ramapo a "standard vote-dilution case"). Election-law professor Richard Pildes called a vote-dilution lawsuit in East Ramapo "entirely predictable . . . given the circumstances that seem to exist." Jan Ransom, *East Ramapo School Elections Violate Voting Rights, Suit Claims*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/nyregion/aclu-files-suit-against-east-ramapo-school-board-votng-rights.html> [<https://perma.cc/ULY5-AAFS>].

253. Telephone Interview with Oscar Cohen, *supra* note 231.

254. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1080 (1991) (noting that vote-dilution cases do not "challeng[e] majority rule").

255. Telephone Interview with Oscar Cohen, *supra* note 231.

256. Telephone Interview with Willie Trotman, *supra* note 228.

257. Telephone Interview with Steve White, *supra* note 203.

PTA president, felt similarly: if “public schools are only getting three or four seats out of the nine . . . it’s not doing much.”<sup>258</sup>

What, then, was the point of pursuing a voting-rights case? Because such lawsuits can result in the creation of additional minority-majority electoral wards, they are traditionally justified in terms of the benefits of increased representation.<sup>259</sup> Benefits like greater political influence were readily apparent to NYCLU staff members like voting-rights attorney Perry Grossman.<sup>260</sup> They also resonated with activists who welcomed the prospect of having more than “zero percent influence”<sup>261</sup> on the Board, as well as the “transparency”<sup>262</sup> that could accompany genuine representation. Trotman firmly believed that “three [seats] on any given day for the kids of East Ramapo is better than zero.”<sup>263</sup>

But given the intractability of the Board majority, activists also focused on other potential upshots of litigation. Cohen and Trotman, for example, both intuitively understood that a lawsuit could aid in the broader campaign for East Ramapo’s public-school students. Trotman expected that the case, if successful, would offer a tangible win after a string of defeats: victory would “give[] us motivation as well as inspiration.”<sup>264</sup> Cohen likewise felt that legal action might “lessen the sense of futility” among public-school advocates.<sup>265</sup> While acknowledging the limits of a vote-dilution case, Cohen and Trotman embraced the idea. In November 2017, NYCLU – working with attorneys from Latham & Watkins –

258. Telephone Interview with Ana Maeda-Gonzalez (Aug. 12, 2020).

259. For discussions of some of these benefits, see, for example, Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1330-31 (2016) (policy influence); Matt A. Barreto, Gary M. Segura & Nathan D. Woods, *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004) (political engagement); Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 387 (1990) (governmental transparency); and Guinier, *supra* note 254, at 1104-08 (role models). Despite these purported benefits, the value of descriptive representation is hotly contested. See, e.g., Guinier, *supra* note 254, at 1079 (arguing that a focus on descriptive representation “stifles rather than empowers black political participation”).

260. Telephone Interview with Perry Grossman, *supra* note 250 (discussing “political influence benefits”). Prior to joining NYCLU, Grossman authored an article describing some of these benefits. See Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 569, 605-06 (2017).

261. Telephone Interview with Steve White, *supra* note 203; see also Telephone Interview with Perry Grossman, *supra* note 250 (discussing “political influence benefits”).

262. Telephone Interview with Olivia Castor, *supra* note 229; see also Telephone Interview with Perry Grossman, *supra* note 250 (“[E]ven in a circumstance where the other members of the board are completely recalcitrant . . . minority-preferred candidates are able to have access to the books and records.”).

263. Telephone Interview with Willie Trotman, *supra* note 228.

264. *Id.*

265. Telephone Interview with Oscar Cohen, *supra* note 231.

filed suit against the district on behalf of the local NAACP and seven Black and Latino voters, alleging that East Ramapo's at-large electoral scheme diluted minority-voting strength in violation of Section 2 of the VRA.<sup>266</sup>

For proponents of litigation, the indirect benefits they anticipated depended largely on a positive outcome in the case. Whether they looked to the mobilizing force of winning in court or to the tangible effects of new minority-majority wards, key participants in the *Spring Valley Branch* litigation initially concentrated on the court order that they hoped to achieve. However, as the case progressed, additional benefits revealed themselves, rooted not in judicial victory but in the litigation process itself.

*B. Claiming: "21st Century Jim Crow Education"*

The claiming process enabled East Ramapo activists to tell a story about the district that centered on racial inequality. By raising claims under the VRA, a civil-rights statute, the plaintiffs positioned race as the primary frame for understanding East Ramapo. This function of claiming is apparent when *Spring Valley Branch* is contrasted with *Montesa*, the 2012 class action against the School Board's members. *Montesa* raised a wide range of claims, many of which were race neutral. The plaintiffs alleged, for example, that Board members had not only deprived students of "a sound basic education"<sup>267</sup> but also committed fraud and breached their fiduciary duties in the process.<sup>268</sup> The lawsuit also highlighted issues that were long obvious to observers: the underfunding of East Ramapo's schools and the role of religion in district politics.<sup>269</sup> While the plaintiffs also discussed East Ramapo's racial dynamics,<sup>270</sup> race was not the case's sole or even primary frame. By contrast, *Spring Valley Branch* did not directly implicate religion or students' educational rights, but it did bring race to center

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266. Complaint at 2, NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020) (No. 17-cv-08943); *Lawsuit: East Ramapo School Board Elections Violate Voting Rights of Black, Latino Residents*, N.Y. C.L. UNION (Nov. 16, 2017), <https://www.nyclu.org/en/press-releases/lawsuit-east-ramapo-school-board-elections-violate-voting-rights-black-latino> [<https://perma.cc/BJ43-CD4H>].

267. Complaint, *supra* note 235, at 67-68.

268. *Id.* at 68-69, 73-75.

269. *See id.* at 6 ("Plaintiffs allege that the defendants . . . have engaged in numerous schemes to siphon off public money to support private religious institutions in various yeshivas, forcing a large cut in instructional programming in the public schools . . .").

270. *See, e.g., id.* at 66 (alleging that the School Board members had "deliberately segregated the East Ramapo School District on the basis of race, color, and national origin").

stage.<sup>271</sup> The plaintiffs stressed that as a result of the district’s voting system, the Black and Latino communities were “alienated” from the School Board and faced “a severe denial of equal educational opportunity.”<sup>272</sup> Whereas *Montesa* evoked broad issues of educational adequacy and public malfeasance, *Spring Valley Branch* distilled the story to one of racial stratification.

This claiming decision shaped the rhetoric that activists adopted in their political campaigns. As Olivia Castor explains, despite the many vantage points from which East Ramapo can be viewed – class, race, religion, educational policy – the case examined the district “through the lens of race.”<sup>273</sup> For Steve White, the lawsuit played a clarifying role, as it “really brought into the light . . . how race works in East Ramapo” and allowed residents to learn “how race impacts educational opportunities of children.”<sup>274</sup> Willie Trotman, who had attended segregated schools in Florida, underscored the central role of race by calling the case “our *Brown*.”<sup>275</sup> Outside of court, local NAACP branches and NYCLU continued to lobby for governance reform in East Ramapo, including by demanding a monitor with veto power.<sup>276</sup> In these advocacy efforts, the coalition described East Ramapo as a “system of 21st Century Jim Crow education,” drawing on the race-centric framing of the lawsuit.<sup>277</sup>

The decision to frame *Spring Valley Branch* as a case about race – and the impact of that decision on activists out of court – did not occur in a vacuum. It was itself shaped by the rules and norms of procedure that governed the lawsuit. Contrasting the case to *Montesa* is once again instructive. *Montesa* involved a broad range of novel legal claims related to both the role of religion in public life and the educational rights of students. Courts, employing the plausibility-pleading standard and other procedural doctrines like standing, largely rejected these claims.<sup>278</sup> *Spring Valley Branch*, in contrast, advanced a safer claim. While electoral systems were hardly front-of-mind for most East Ramapo residents, the vote-dilution claim that NYCLU brought was tried and true. According to a

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271. In fact, the *Spring Valley Branch* complaint did not mention religion at all. See Complaint, *supra* note 266.

272. *Id.* at 3.

273. Telephone Interview with Olivia Castor, *supra* note 229.

274. Telephone Interview with Steve White, *supra* note 203.

275. Telephone Interview with Willie Trotman, *supra* note 228.

276. Letter from Willie J. Trotman, President, Spring Valley NAACP; Wilbur T. Aldridge, Mid-Hudson Reg’l Dir., NAACP; Dr. Hazel N. Dukes, President, NYS Conf., NAACP & Donna Lieberman, Exec. Dir., NYCLU, to Betty Rosa, Comm’r, N.Y. State Educ. Dep’t (Jan. 25, 2021), [https://www.nyclu.org/sites/default/files/field\\_documents/20210125-signonletter-rosa-eastramapo\\_o.pdf](https://www.nyclu.org/sites/default/files/field_documents/20210125-signonletter-rosa-eastramapo_o.pdf) [<https://perma.cc/5FBC-2LKJ>].

277. *Id.*

278. *Montesa v. Schwartz*, 836 F.3d 176, 201 (2d Cir. 2016).

2008 study, over half of the several hundred cases brought under Section 2 of the VRA since the 1980s challenged at-large electoral districts, and they succeeded at a higher rate than cases involving other voting-rights claims.<sup>279</sup> *Spring Valley Branch* fit squarely into this model. In an era of plausibility pleading, it is unsurprising that East Ramapo activists opted for a legal theory that was “already . . . recognized as plausible.”<sup>280</sup>

Bringing a single voting-rights claim thus enabled the *Spring Valley Branch* lawsuit to remain viable rather than face dismissal before trial. Doing so provided narrative clarity, offering activists language for discussing East Ramapo outside of court. Even if *Montesa* had succeeded, the wide range of legal claims advanced in that case would have provided activists with little guidance when trying to explain the core problem in East Ramapo. *Spring Valley Branch*, in contrast, suggested Jim Crow as a powerful reference point for activists demanding political action. The analogy to Jim Crow came into view most clearly once the lawsuit allowed race to assume primacy over religion, class, or fiscal mismanagement as the most significant fault line in the district. Several concerns, including procedural rules, had pushed the plaintiffs to rely on a single statutory right. That choice ensured that East Ramapo became, above all else, a story about race.<sup>281</sup>

### C. Discovery: “What They’re Saying Is Actually True”

In April 2018, the district court confirmed that the *Spring Valley Branch* plaintiffs had put forth a plausible claim by denying the school district’s motion to dismiss.<sup>282</sup> Thus, the plaintiffs were permitted to proceed to discovery, a phase of litigation that offered further support to activists’ extralegal efforts.

For one, discovery forced the defendants to produce communications between Board members, confirming activists’ suspicions about the Board’s actions

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279. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 11–12, 54 (2008).

280. Ralph, *supra* note 77, at 612.

281. The power of a race-centric narrative in East Ramapo was bolstered by an event that the plaintiffs and their lawyers did not anticipate. On the same day that the district court handed down its decision in *Spring Valley Branch*, George Floyd was killed by a police officer in Minneapolis, Minnesota, setting off nationwide racial-justice protests throughout the country that drew tens of millions of participants. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/F99Z-GCVV].

282. Minute Entry for Oral Ruling on Apr. 13, 2018, NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020) (No. 17-cv-08943).

and motivations.<sup>283</sup> In 2015, the Board had appointed Sabrina Charles-Pierre, a Black public-school parent, to fill a vacancy. Charles-Pierre was later reelected without facing opposition, but some activists viewed her installation as an effort by the Board to deflect scrutiny by diversifying its membership.<sup>284</sup> During discovery, the plaintiffs obtained messages suggesting as much. Following Charles-Pierre's appointment, former Board member Yonah Rothman wrote in a WhatsApp group, "If private school really wanted [Charles-Pierre's] seat she would have lost the election like the rest of them."<sup>285</sup> In 2016, Board president Harry Grossman wrote in a Facebook message to Charles-Pierre, "If there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you."<sup>286</sup> Grossman stressed that the "Orthodox community could have just voted you out."<sup>287</sup>

Other messages revealed the slating process by which Haredi leaders regulated which candidates ran for School Board. Potential candidates were expected to receive approval from Yehuda Oshry, an influential rabbi who "decided" which members of the Haredi community ran.<sup>288</sup> If these revelations were not explosive on their own, they set up dramatic confrontations when Board members were asked about them during trial. While testifying, Board members like Grossman evaded questions about these messages, leading the judge to call him "one of the more incredible witnesses I have encountered."<sup>289</sup>

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283. See NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, No. 17-cv-08943, 2018 WL 11260468, at \*5-7 (S.D.N.Y. Apr. 27, 2018).

284. Steve Lieberman, *East Ramapo Board of Education Appoints a New Trustee to Vacant Seat*, J. NEWS (Oct. 22, 2015, 6:20 PM ET), <https://www.lohud.com/story/news/local/rockland/2015/10/22/east-ramapo-board-education-appoints-new-trustee-vacant-seat/74233892> [<https://perma.cc/4RH2-42PE>].

285. NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 394 (S.D.N.Y. 2020).

286. Sophie Grosserode, 'Orthodox Community Could Have Just Voted You Out': *East Ramapo School Board President*, J. NEWS (Feb. 24, 2020, 5:14 PM ET), <https://www.lohud.com/story/news/local/rockland/2020/02/21/east-ramapo-voting-rights-trial-scrutinizes-board-president/4834074002> [<https://perma.cc/7ZS3-U8UR>].

287. *Id.*

288. Ari Feldman, *East Ramapo Trial Judge Accuses Board Member of Lying on the Stand*, FORWARD (Feb. 20, 2020), <https://forward.com/news/440221/east-ramapo-trial-judge-lying-on-stand> [<https://perma.cc/4KGG-VGJM>]; Thomas C. Zambito, *WhatsApp Chat Reveals Behind-the-Scenes Effort by Orthodox Jewish Religious Leaders, NYCLU Says*, J. NEWS (Feb. 18, 2020, 7:38 PM ET), <https://www.lohud.com/story/news/local/rockland/2020/02/18/whatsapp-chats-reveal-orthodox-jewish-leaders-efforts-nyclu-says/4800194002> [<https://perma.cc/T5Z8-HYQY>]; *Spring Valley Branch*, 462 F. Supp. 3d at 404.

289. *Spring Valley Branch*, 462 F. Supp. 3d at 396. The judge publicly doubted Grossman's credibility well before the decision was announced. See Feldman, *supra* note 288.



Activists recognized the extralegal significance of the information obtained through discovery. Regardless of the case's outcome, the messages provided grist for political arguments about the necessity of reform in the district. Maeda-Gonzalez pointed out the educational function of this information, as it revealed "so much dirt" about Board politics.<sup>290</sup> Trotman also underscored the evidence's strategic value. Prior to the case, he explained that the Board and its allies could argue that "all [we] do is complain."<sup>291</sup> Discovery provided "hard evidence" that was "deep" and "devastating" to the Board, and activists could "take [this evidence] to people and say, 'You know what? This is real.'"<sup>292</sup> Castor echoed that the evidence served as "a powerful way to say, actually, these people aren't crazy. . . . What they're saying is actually true."<sup>293</sup> NYCLU attorney Perry Grossman acknowledged that, beyond the classic benefits of vote-dilution litigation, the case highlighted how voting-rights lawsuits include a "valuable fact finding aspect."<sup>294</sup> Particularly in communities like East Ramapo with minimal transparency, "all of that information coming to light, all that discovery, makes it possible to develop a long term solution" to the district's governance dilemmas.<sup>295</sup> As NYCLU and local activists continued to push for such a solution, they frequently cited the *Spring Valley Branch* trial as revealing "Jim Crow education" in East Ramapo by surfacing the Board's lack of credibility, deception, and pursuit of "cover-ups."<sup>296</sup> Information exposed by the case, activists argued, reflected "exactly why a Monitor with veto power [was] needed."<sup>297</sup>

Procedural rules influenced the extralegal effects of discovery in *Spring Valley Branch*. As the preceding Part explained, the law of pleading helps determine which claims survive and thus which parties are entitled to discovery. Moreover, the information available during discovery is linked to the substance of the claims pled. Since discovery requests must be "relevant to any party's claim or defense,"<sup>298</sup> certain claims can, by their nature, broaden the bounds of discovery.

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290. Telephone Interview with Ana Maeda-Gonzalez, *supra* note 258.

291. Telephone Interview with Willie Trotman, *supra* note 228.

292. *Id.*

293. Telephone Interview with Olivia Castor, *supra* note 229.

294. Telephone Interview with Perry Grossman, *supra* note 250.

295. *Id.*

296. Johanna Miller, Sebastian Krueger & Billy Easton, *Private Privilege, Public Pain: The Rise of 21st Century Jim Crow Education in East Ramapo Schools*, N.Y. C.L. UNION 14-16 (2021), [https://www.nyclu.org/sites/default/files/field\\_documents/20210914\\_nyclu\\_eramapo\\_report.pdf](https://www.nyclu.org/sites/default/files/field_documents/20210914_nyclu_eramapo_report.pdf) [<https://perma.cc/Q57Z-ZB9R>].

297. *East Ramapo Underground*, FACEBOOK (Feb. 11, 2020), <https://www.facebook.com/EastRamapoUnderground/posts/pfbidoBdVKSc1onAWJsdLV8ptaGpoRdJFtxYvV8iufuV LN6c8SYLbSvTsMe7u6678ZGtVql> [<https://perma.cc/AK96-XCG8>].

298. FED. R. CIV. P. 26(b)(1).

Such was the case in *Spring Valley Branch*, where the plaintiffs' vote-dilution claim required not only statistical evidence about voting patterns but also a totality-of-the-circumstances inquiry into race relations in East Ramapo. As a result, the plaintiffs were able to obtain a wide range of contextual information, such as Board members' internal communications. To the extent that pleading rules influenced the plaintiffs' decision to pursue a voting-rights claim, they also influenced the materials that were unearthed during discovery.

Claiming and discovery – and the rules regulating them – thus work in tandem to generate indirect effects. This relationship is further demonstrated by the rules governing discovery itself. A plaintiff's discovery requests must be not only relevant but also “proportional to the needs of the case” by not imposing an undue burden on defendants.<sup>299</sup> These requirements can, in turn, place limits on the breadth of discovery in civil-rights lawsuits. However, the vote-dilution claim in *Spring Valley Branch* proved capacious enough to overcome proportionality concerns. While the defendants objected to the plaintiffs' requests for their internal communications, a magistrate judge found that such documents could be “highly relevant” to the plaintiffs' claims and that their production would not be “unduly burdensome” to the defendants.<sup>300</sup> This was particularly true given the plaintiffs' need to demonstrate contextual factors, like the existence of a private, all-white slating process.<sup>301</sup> It is entirely possible that under a less robust claim, or a more exacting proportionality inquiry, such information would have been unavailable. *Spring Valley Branch* therefore demonstrates that when movement litigants have access to discovery, they can turn up concrete evidence that vindicates their narratives about their adversaries' misdeeds. Such vindication proves useful both in and out of court.

#### D. Record Building: “This Is What the Judge Found”

Over the course of a two-month trial, the plaintiffs compiled a record consisting of the information they obtained through discovery, witness testimony, and other evidence. On May 25, 2020, the district court ruled in favor of the

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299. *Id.*

300. NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, No. 17-cv-08943, 2018 WL 11260468, at \*2-3 (S.D.N.Y. Apr. 27, 2018).

301. *See id.* The existence of such a slating process is not strictly required under the VRA. Rather, it is one of several factors included in a “totality of the circumstances” analysis prescribed by the Supreme Court in vote-dilution cases. *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). These factors are drawn from the Senate Judiciary Committee's report on the 1982 VRA amendments. *See S. REP. NO. 97-417*, at 28-29 (1982).

plaintiffs, handing down an opinion that memorialized this record.<sup>302</sup> While some of the discovery revelations were publicized earlier through news reports during the trial,<sup>303</sup> the opinion became a resource to activists in their political efforts.

For one, the opinion reinforced the race-centric framing that the plaintiffs adopted by pursuing a civil-rights claim. The posture of the case led the court to cut through alternative, race-neutral framings, such as divisions over policy and educational preferences. The court pointed out that in East Ramapo's "unique community," there was "nearly perfect concordance between race and the populations of public and private schools that cannot be ignored."<sup>304</sup> It was, in short, "all but impossible to untangle race and policy."<sup>305</sup> The court further confirmed the racialized nature of politics in the district more broadly, finding "ample evidence of the Board's lack of responsiveness to particularized needs of the black and Latino communities."<sup>306</sup>

Beyond emphasizing the centrality of race, the opinion also validated activists' narratives while challenging the good faith of their political opponents. The court validated the stories of public-school advocates like Olivia Castor, who had been accused of lying by School Board members. Castor testified at trial about the impact of budget cuts on students, leading the court to accept her as a credible witness and call her "an impressive and thoughtful young woman."<sup>307</sup> Castor lamented that "people of color have to get their legitimacy" from institutions like courts, but nonetheless concluded that "putting things on the record and showing that things happened the way we said it happened is powerful."<sup>308</sup> At the same time, the court assailed the credibility of Board members who testified. When Board members were confronted with questions about their internal affairs and communications, the court noted that they "outright lied or disingenuously claimed lack of memory."<sup>309</sup>

The *Spring Valley Branch* opinion thus enshrined the record of the case, in the process clarifying the critical role of race in East Ramapo and affirming activists' experiences and complaints. In turn, activists came to see value in the opinion aside from its legal order. According to Oscar Cohen, the lawsuit offered

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302. NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 417 (S.D.N.Y. 2020).

303. See *supra* notes 285-287 and accompanying text.

304. *Spring Valley Branch*, 462 F. Supp. at 394-95.

305. *Id.* at 395.

306. *Id.* at 413.

307. *Id.*

308. Telephone Interview with Olivia Castor, *supra* note 229.

309. *Spring Valley Branch*, 462 F. Supp. 3d. at 416.

“leverage” in the campaign for a monitor with veto power, as activists could point to the opinion itself: “This is what was said in the transcripts, these are the lies, this is what the judge found.”<sup>310</sup> As a NYCLU newsletter noted, the case “illuminated some jarring evidence of the extent to which the white community went to maintain its power.”<sup>311</sup> Public-school advocates seized on this evidence, citing the decision in their pursuit of a monitor with veto power. A broad coalition of local organizations called on the state to “[e]mpower[] the monitors,” pointing to *Spring Valley Branch* as providing “mountains of public evidence that civil rights violations are ongoing in this district.”<sup>312</sup>

In February 2021, state lawmakers from Rockland County responded by introducing a bill to give East Ramapo’s monitors the authority to override Board decisions.<sup>313</sup> In doing so, they echoed local activists by using the *Spring Valley Branch* opinion as a rallying point. Assemblyman Kenneth Zebrowski, who sponsored the bill, asserted that the decision showed “unequivocally that the students of East Ramapo are being discriminated against and are not receiving the education they deserve.”<sup>314</sup> Zebrowski reportedly cited the case when seeking votes for the bill in Albany, explaining that it validated activists’ concerns: “[i]t reads like a litany of the things that the public school parents have been saying for all these years.”<sup>315</sup> Zebrowski’s cosponsor, Senator Elijah Reichlin-Melnick, was himself an NAACP member and had campaigned on “fighting for educational equity for the students of East Ramapo.”<sup>316</sup> Like Zebrowski, Reichlin-

310. Telephone Interview with Oscar Cohen, *supra* note 231.

311. *Fixing a Broken Election*, NYCLU NEWS 2 (2020), [https://www.nyclu.org/sites/default/files/field\\_documents/final\\_nyclu\\_spring\\_newsletter\\_2020.pdf](https://www.nyclu.org/sites/default/files/field_documents/final_nyclu_spring_newsletter_2020.pdf) [<https://perma.cc/XW5S-HJSP>].

312. Letter from Willie J. Trotman et al., *supra* note 276.

313. See Nancy Cutler, *New Push to Give East Ramapo Monitors Veto Power: What to Know*, J. NEWS (Feb. 19, 2021, 9:59 AM ET), <https://www.lohud.com/story/news/local/rockland/2021/02/18/bill-gives-east-ramapo-monitors-power-veto-board-decisions/4491472001> [<https://perma.cc/AWY2-H3R5>].

314. *Id.*

315. Thomas C. Zambito & Jon Campbell, *Controversial East Ramapo School Monitor Bill Heads to Cuomo’s Desk. What’s at Stake*, J. NEWS (June 23, 2021, 10:10 AM ET), <https://www.lohud.com/story/news/local/rockland/2021/06/23/focus-shifts-cuomo-after-lawmakers-back-east-ramapo-monitor-bill/5297841001> [<https://perma.cc/B8WJ-WM4W>]; see also Nancy Cutler & Thomas C. Zambito, *East Ramapo School Board Faces Major Changes Under Stricter Proposed Laws*, J. NEWS (May 25, 2021, 7:55 AM ET), <https://www.lohud.com/story/news/local/rockland/2021/05/25/new-york-legislation-takes-aim-east-ramapo-schools-woes/5181971001> [<https://perma.cc/9ZVJ-DE4N>] (“The decisions and comments by the judges echo what public school advocates have said for years.” (quoting Zebrowski)).

316. Elijah Reichlin-Melnick, FACEBOOK (June 18, 2020), <https://www.facebook.com/ElijahForSenate/posts/pfbido8SMucuntT3rzfA42GCYvH2WxbBvUmNNL8mQjNlyLqx41xwnEARUTW2dPNxADGczJl> [<https://perma.cc/94JQ-NX4S>].

Melnick highlighted *Spring Valley Branch* as an episode that revealed deep defects in the district and made newly empowered monitors necessary.<sup>317</sup> The bill's official justification referenced the opinion's evidentiary force, including how the case "confirmed in great detail discrimination" against students of color and "highlighted many glaring and disturbing examples of instances where the district was unresponsive to the public school community."<sup>318</sup> In June 2021, the New York State Legislature passed the bill and the Governor signed it into law.<sup>319</sup>

The East Ramapo litigation thus demonstrates the indirect effects that derive from judicial record building and opinions. These effects do not emerge in isolation, as record building interacts with other phases of litigation to generate them. In this case, the narrative validated by the court was a product of the plaintiffs' claims. For example, the *Spring Valley Branch* opinion included evidence of the School Board's unresponsiveness to families of color because that issue was linked to the totality-of-the-circumstances inquiry associated with vote-dilution litigation.<sup>320</sup> Moreover, the trial record was built in part through discovery. The materials obtained through discovery served as the basis for the court's conclusion that some Board members lacked credibility, as their testimony clashed with the documents they produced.<sup>321</sup>

*Spring Valley Branch* also highlights how procedural rules and norms can shape the indirect effects of judicial opinions. While the opinion in *Spring Valley Branch* ultimately became a document of political value to activists, its very existence was not inevitable. Procedural mechanisms enable courts to encourage parties to settle their disputes rather than proceed to trial and judgment.<sup>322</sup> It is thus no surprise that "most cases settle."<sup>323</sup> This possibility was very real in East Ramapo: as NYCLU attorney Perry Grossman explained, the plaintiffs "would

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317. Press Release, Elijah Reichlin-Melnick, Zebrowski and Reichlin-Melnick Pass Bill to Strengthen East Ramapo Oversight Powers (June 10, 2021), <https://www.nysenate.gov/newsroom/press-releases/elijah-reichlin-melnick/zebrowski-and-reichlin-melnick-pass-bill-strengthen> [https://perma.cc/8TGV-YC39].

318. *Senate Bill S6052B*, N.Y. STATE SENATE (2021), <https://www.nysenate.gov/legislation/bills/2021/S6052> [https://perma.cc/9MHN-CJG7].

319. *Id.*; Thomas C. Zambito & Nancy Cutler, *Cuomo Signs East Ramapo Monitor Bill in Victory for District's Public School Advocates*, J. NEWS (June 30, 2021, 6:57 PM ET), <https://www.lohud.com/story/news/education/2021/06/30/east-ramapo-monitors-veto-power-cuomo-signs-bill/7810716002> [https://perma.cc/33GV-SMAN].

320. See NAACP, *Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 413 (S.D.N.Y. 2020) ("The Board has ignored concerns and numerous requests from the NAACP and others in the public school community.").

321. See *id.* at 403-04 & n.50 (noting that multiple Board members "testified unconvincingly" in relation to text messages produced during discovery).

322. See *supra* Section II.C.

323. Galanter & Cahill, *supra* note 190, at 1339-40.

have settled the case on day one,” but the defendants declined.<sup>324</sup> Indeed, the district court chided East Ramapo’s Board members for interfering with settlement efforts.<sup>325</sup> But for the defendants’ unusually recalcitrant posture, it is plausible that the lawsuit would have produced no judicial opinion. *Spring Valley Branch* thus demonstrates the role of procedure in shaping litigation’s indirect effects through its status as an outlier. In the era of settlement, the case is a reminder of how rare it is for a lawsuit to generate an opinion that activists can wield out of court as a source of both information and validation.

### E. Aftermath

In holding for the plaintiffs, the district court ordered East Ramapo to cease at-large elections and establish a system of nine wards. Echoing what activists knew from the beginning, the court recognized that this change would not necessarily empower the public-school community to enact its preferred policies. The court anticipated that three or four majority-minority wards could be created.<sup>326</sup> Such a change, it acknowledged, “may or may not change the way schools in the District are run,” though it would help voters of color “have their voices heard.”<sup>327</sup> The Second Circuit rejected an appeal by the school district, thereby affirming the district court’s order to establish ward-based elections.<sup>328</sup> In February 2021, the district held its first elections under the new system.<sup>329</sup> As expected, public-school advocates did not take control of the Board, winning three seats.<sup>330</sup>

The *Spring Valley Branch* decision was thus no panacea, but as the preceding Sections have shown, the litigation process offered activists significant political

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324. East Ramapo Underground, *Statement from Perry Grossman*, FACEBOOK (July 30, 2020), <https://www.facebook.com/EastRamapoUnderground/photos/statement-from-perry-grossman-nyaclu-attorney-for-the-naacp-the-east-ramapo-board/3251928084864502> [<https://perma.cc/BL6A-8A7M>]; see also Telephone Interview with Perry Grossman, *supra* note 250 (“I said hey, let’s settle the case on day one.”).

325. *Spring Valley Branch*, 462 F. Supp. 3d at 411, 416.

326. *Id.* at 379.

327. *Id.* at 418.

328. *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 244 (2d Cir. 2021).

329. Thomas C. Zambito, *Troubled East Ramapo School District Wraps up Voting; Results Due in About a Week*, J. NEWS (Feb. 2, 2021, 6:01 AM ET), <https://www.lohud.com/story/news/local/rockland/2021/02/02/historic-east-ramapo-schools-vote-ends-Tuesday-results-week-later/4344160001> [<https://perma.cc/HL93-DG42>].

330. Beth Fertig, *After Judge Steps In, East Ramapo School Board Election Gives Greater Voice to Black and Brown Parents*, GOTHAMIST (Feb. 12, 2021), <https://gothamist.com/news/after-judge-steps-east-ramapo-school-board-election-gives-greater-voice-black-and-brown-parents> [<https://perma.cc/6PE6-7ALZ>].

resources as they lobbied for a monitor with veto power. Like the lawsuit itself, the monitors were not a comprehensive solution to East Ramapo's problems. Advocates recognized that monitors with veto power "alone" would not be "enough to end such an insidious saga of malfeasance and mismanagement."<sup>331</sup> Building on the "court drama" of *Spring Valley Branch*, NYCLU subsequently issued a report calling for further policy changes, such as reforms to the school-district budgeting process.<sup>332</sup> Such reforms have not come to pass, and public-school advocates have reiterated their demands for state action while highlighting the district's educational deficiencies.<sup>333</sup> The district faces further pressure from new state regulations requiring it to oversee the educational quality of scores of private schools within its boundaries.<sup>334</sup> At the same time, the district's fiscal status is precarious, and budget votes continue to fail.<sup>335</sup> As local, state, and federal officials debate if and how to fund or reform East Ramapo, *Spring Valley Branch* remains a focal point.<sup>336</sup>

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331. Donna Lieberman, *East Ramapo's Racist School System: Albany Must Save the District's Children*, N.Y. DAILY NEWS (Sept. 14, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-albany-must-fix-the-racist-disgrace-that-is-east-ramapo-20210914-wts7puaoxrhsfi4gazyk2lhqm-story.html> [https://perma.cc/3DHK-4D9Y].

332. Miller et al., *supra* note 296, at 14-16, 31-32.

333. See *After Eight Years of State Interventions, East Ramapo Drop-Out Rate 4x County Average*, N.Y. C.L. UNION (June 1, 2022), <https://www.nyclu.org/en/press-releases/after-eight-years-state-interventions-east-ramapo-drop-out-rate-4x-county-average> [https://perma.cc/XF22-5QWT].

334. Nancy Cutler, *NY Regents Boost Private School Education Oversight; What Districts Face*, J. NEWS (Sept. 13, 2022, 4:33 PM ET), <https://www.lohud.com/story/news/local/rockland/2022/09/13/new-york-regents-panel-yeshiva-private-school-substantial-equivalency-rules/7661276001> [https://perma.cc/KZT4-F62U]. The regulations came on the heels of revelations about low educational standards in private religious schools in New York City. See Eliza Shapiro & Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush with Public Money*, N.Y. TIMES (Sept. 12, 2022), <https://www.nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html> [https://perma.cc/NE8D-J8YQ].

335. See Nancy Cutler, *East Ramapo's 'Fiscal Cliff' Looms. Can the District Fix Its Budget Before It's Too Late?*, J. NEWS (Oct. 3, 2022, 5:04 AM ET), <https://www.lohud.com/story/news/education/2022/10/03/east-ramapo-schools-40m-deficit-budget-losses/69511987007> [https://perma.cc/49BT-XXZZ]; Nancy Cutler, *East Ramapo Budget Fails; Second-Try Plans Pass in Mount Vernon, Mahopac, Garrison, Hastings*, J. NEWS (June 22, 2022, 11:40 AM ET), <https://www.lohud.com/story/news/education/2022/06/22/school-budget-fails-east-ramapo-only-district-new-york/7688456001> [https://perma.cc/UN8F-NXUS].

336. See, e.g., *Legislator James Foley*, FACEBOOK (Apr. 8, 2021), [https://www.facebook.com/permalink.php?story\\_fbid=pfbido25WDBjw1rcrGyx1cYDN11EgVusbS1axWdZ7SZuLNKnM9BJPykt7wkD4sPM9xKSqQEl&id=2279991885599243](https://www.facebook.com/permalink.php?story_fbid=pfbido25WDBjw1rcrGyx1cYDN11EgVusbS1axWdZ7SZuLNKnM9BJPykt7wkD4sPM9xKSqQEl&id=2279991885599243) [https://perma.cc/8MRV-R5FT] (objecting to the "lack of adequate oversight" of federal grants received by East Ramapo after the School Board's "racist intentions" were "revealed during the past legal action taken by the NAACP").

## CONCLUSION

Social movement activists and critical legal scholars have long expressed skepticism about the value of litigation.<sup>337</sup> Others have pushed back, defending rights-based advocacy as one potent movement-building tool among many.<sup>338</sup> The argument continues to this day and has become interwoven with broader concerns about the role of judicial politics in our society.<sup>339</sup> Amid this dispute, sociolegal scholars have embraced legal mobilization theory to offer empirically grounded models of how law shapes social movements in practice.<sup>340</sup> When does litigation help to inspire and motivate activists? And when does it foster demobilization, cooptation, and backlash?

This Note argues that the terms of the debate remain incomplete: a full accounting of litigation's indirect effects must contemplate procedure. While law students often learn that procedure and substance are two sides of the same coin,<sup>341</sup> this wisdom has yet to penetrate the study of law and social movements. The focus of sociolegal scholars remains largely on legal decisions or the general act of litigation. But, as this Note has shown, the phases of the litigation process can significantly impact social movements. Claiming can frame a movement's goals and unite activists around a common cause. Discovery can reveal wrongdoing and provide grist for political arguments. Record building can memorialize litigants' experiences and offer a ready source of information in campaigns outside the courthouse. These benefits are not inevitable but rather contingent in part on the norms and rules of procedure. Attending to the anatomy of social movement litigation brings into focus the sources of indirect effects—and the benefits and pitfalls that await activists when they decide to go to court.

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337. See sources cited *supra* notes 6–9.

338. See sources cited *supra* note 10.

339. See, e.g., JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 167–68 (2021) (characterizing “overreliance on courts” to vindicate rights as a threat to self-governance and pluralistic democracy); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1711 (2021) (arguing that critiques of the Supreme Court as “undemocratic . . . go to the heart of the function of a constitutional court in a democracy”).

340. See Cummings, *supra* note 8, at 242.

341. See KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 11 (2008) (noting that upon scrutiny, the “distinction” between substance and procedure “tends to disappear”).