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Before Losing

Douglas NeJaime

ABSTRACT. *Winning Through Losing*, which I published almost fifteen years ago, focused on how social-movement actors can leverage litigation loss for productive internal and external effects. At the time, LGBTQ-movement lawyers, who provided some of the primary examples of winning through losing, were approaching litigation with caution and trying to avoid losses in court. Despite this careful orientation toward litigation, winning through losing can at times be invoked to insulate litigation decisions from critique. If even losing litigation can be used in ways to advance a social movement's aims, then the costs of litigating may appear minimal. On this view, there is little at stake in decisions regarding whether and how to litigate.

This invocation of *Winning Through Losing* is misguided. Examining contemporary LGBTQ-movement litigation challenging bans on gender-affirming care for minors, this Essay shows how the concept of winning through losing only makes sense within a less juriscentric and more multidimensional approach to law and social change. Whereas much of the original article focused on the role of advocates *after litigation loss*, this Essay explores the circumstances surrounding *United States v. Skrmetti* to shed light on how advocates should think about the prospect of losing *before litigating*. The analysis of *Skrmetti* reveals key features of the legal and political context that shape advocates' ex ante evaluation of the effects of a potential litigation loss. These include the concrete legal consequences of a negative decision, the opportunities for effective advocacy in nonjudicial arenas in the wake of a legal defeat, and the meanings that a loss in court could create both within the movement and outside of it. Advocates must consider these features in deciding whether to litigate and, if litigation is pursued, how to litigate. Even though the decision of *whether* to litigate is not completely within movement advocates' control, judgments about *how* to litigate can still be interrogated. Decisions about where to sue, what claims to assert, and whether to appeal adverse judgments can expand or limit a lawsuit's reach—win or lose.

INTRODUCTION

I published *Winning Through Losing* almost fifteen years ago, in 2011.[1] At the time, LGBTQ-movement advocates were fighting for marriage equality. They were litigating in state courts, making state-law claims to both marital and

1. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

nonmarital rights and recognition for same-sex couples.[2] They were carefully orchestrating federal litigation challenging the Federal Defense of Marriage Act.[3] Because these federal lawsuits were seeking to compel the federal government to recognize same-sex couples' valid state-law marriages, favorable results would be limited—immediately affecting only states that already recognized same-sex couples' marriages.[4] LGBTQ-movement advocates were studiously avoiding federal litigation challenging state bans on marriage for same-sex couples, worried about seeking too much, too quickly, from the Supreme Court.

Yet they were also contending with a federal lawsuit that sought a nationwide ruling on marriage equality. Famed private-firm attorneys David Boies and Ted Olson had challenged California's constitutional ban on same-sex marriage in federal court under the Federal Constitution.[5] Unable to stop that lawsuit's march to the Supreme Court, LGBTQ-movement lawyers sought to slow it down and limit its reach.[6] They attempted to intervene in the district-court proceedings and advocated for a full trial rather than resolution at the preliminary-injunction stage. At the appellate level, they tried to frame the main question narrowly: whether California, which provided the state-law rights and obligations of marriage to same-sex couples through a domestic-partnership scheme, could withhold the label "marriage."[7] Even a Supreme Court decision resolving that question would directly affect only the handful of states that already offered civil unions and domestic partnerships to same-sex couples. At the time I published *Winning Through Losing*, therefore, LGBTQ-movement lawyers were approaching litigation with caution. Above all, they were trying to avoid losses in court.

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2. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 678-82 (2012). For an illuminating firsthand account of the first marriage lawsuit to yield statewide marriage equality, see Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 8-27 (2005). Bonauto discusses the various factors, including relevant legal, political, and cultural developments, that led advocates to file a marriage lawsuit in Massachusetts. *Id.*

3. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by*, United States v. Windsor, 570 U.S. 744, 769-75 (2013).

4. NeJaime, *supra* note 2, at 685-86.

5. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 929-30 (N.D. Cal. 2010), *aff'd sub nom.*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated for lack of standing sub nom.*, Hollingsworth v. Perry, 568 U.S. 1066 (2012).

6. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1299-1302 (2010).

7. Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184, 198-99 (2013).

It is against this backdrop that I focused on how social-movement actors can, and do, leverage litigation loss for productive internal and external effects.[8] LGBTQ-movement lawyers seeking marriage equality supplied some of my primary examples of winning through losing. These lawyers viewed litigation cautiously and often consciously avoided going to court.[9] They approached litigation as one tool among many, to be used carefully in connection with tactics in other arenas. Cognizant of courts' limitations and the importance of change emanating from other venues, LGBTQ-movement lawyers attempted to use a loss in court to speak constructively to nonjudicial actors.[10]

Despite this thoughtful orientation toward litigation taken by the lawyers at the center of my account, at times commentators invoke the concept of winning through losing in ways that can insulate decisions about whether to litigate from critique and instead support a less cautious approach to court-based tactics.[11] If even losing litigation can be used to advance a social movement's aims, then the costs of litigating may appear minimal. On this view, there is little at stake in the decision of whether to go to court in the first place. Movements, on this account, win if they win *and* win if they lose.

This invocation of *Winning Through Losing* is misguided. Deciding whether to litigate is not a costless exercise. Losing litigation can and does negatively impact social movements. The concept of winning through losing only makes sense within a less court-centered and more multidimensional approach to law and social change. To show how, this Essay turns to a contemporary example of LGBTQ-movement litigation: challenges to bans on gender-affirming care for minors. Whereas much of my original article focused on the role of advocates *after losing litigation*, the litigation culminating in the Supreme Court's recent decision in *United States v. Skrmetti*[12] sheds light on how advocates think—and should think—about the prospect of losing *before litigating*.

This Essay proceeds in three Parts. In Part I, I return to my original article, emphasizing the qualified nature of my claim—that advocates *may*, in some circumstances, turn litigation loss into productive ends. I point out how a failure to appreciate the limited nature of my claim produces a juriscentric account that is at odds with the account of movement lawyering at the center of *Winning*

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8. *See generally* NeJaime, *supra* note 1 (describing how advocates used litigation losses to construct organizational identity, mobilize constituents, and appeal to other state actors and the public).

9. Cummings & NeJaime, *supra* note 6, at 1241.

10. NeJaime, *supra* note 1, at 969.

11. *See infra* Section I.B.

12. 145 S. Ct. 1816 (2025).

Through Losing and that shields advocates' decisions about litigation from criticism.

In Part II, I draw on *Skrmetti* to identify and examine key features of the legal and political context that shape advocates' ex ante evaluation of the effects of a potential litigation loss. These include the concrete legal consequences of a negative decision, the opportunities for effective advocacy in nonjudicial arenas in the wake of a legal defeat, and the meanings that a loss in court could create both within the movement and outside of it. Advocates must consider these features in deciding whether to litigate and, if litigation is pursued, how to litigate.

Part III complicates the decision of *whether* to litigate by observing the lack of control that movement advocates face. Although scrutiny of litigation decisions should incorporate this observation, judgments about *how* to litigate can still be interrogated, as those largely remain in advocates' control. Decisions about where to sue, what claims to assert, and whether to appeal adverse judgments can expand or limit a lawsuit's reach — win or lose. To illustrate, I draw on state-court litigation challenging bans on gender-affirming care for minors, which is an inherently more limited approach than that taken in *Skrmetti* and one that remains open after that defeat.

Ultimately, winning through losing describes neither a simple reaction to loss in court nor a straightforward tool equally available in all settings. Instead, it describes a limited but possible response to litigation loss that advocates should, and typically do, consider as part of the analysis of whether and how to litigate in the first place. From this perspective, the prospect of winning through losing should not insulate advocates' decisions about whether and how to litigate from scrutiny. Although I do not offer an assessment of the wisdom of any particular lawsuit, appreciating how winning through losing is contingent on several factors — many of which can be identified and assessed ex ante — contributes to a more clear-eyed assessment of litigation choices.

I. WINNING THROUGH LOSING

In this Part, I return to my original article, describing the concept of winning through losing and emphasizing the qualified nature of my claim — that advocates *may*, in some cases, cultivate positive effects from a loss in court. That is, advocates do not inevitably or necessarily win through losing. I then show how some commentators have obscured this feature of winning through losing in ways that insulate decisions about whether and how to litigate from scrutiny. This misuse of the concept runs counter to the account of law and social change and the model of movement lawyering at the core of *Winning Through Losing*.

A. Theorizing Litigation Loss

In *Winning Through Losing*, I offered a framework within which to evaluate the benefits and drawbacks of court-centered strategies for social change. The framework drew from sociolegal scholarship on the turn to law by social movements and the indirect effects of litigation. Scholars of legal mobilization had identified and elaborated the constructive role of litigation beyond court-ordered relief.[13] They had shown how the process of litigating, as well as achieving a victory in court, can produce "radiating" effects[14]—mobilizing citizens, framing grievances, and pressuring elites both inside and outside the government.

Scholarship in this vein was criticized by, and in turn criticized, work by legal scholars and political scientists more skeptical of court-based strategies. Most famously, Gerald N. Rosenberg described litigation as a "hollow hope."[15] On his view, litigation is not only unlikely to produce reform directly through enforceable judgments, but also unlikely to generate positive indirect effects, such as mobilizing constituents, influencing public opinion, or motivating legislators.[16]

Putting these competing literatures in productive conversation rather than in conflict, *Winning Through Losing* showed how advocates deploy litigation loss in ways that work within the legal-mobilization framework but draw on insights from more pessimistic accounts of court-based change. Advocates, I showed, attempted to seize on the specific limitations of court-based strategies to advance their movement agendas.[17]

I identified internal movement effects that litigation loss may generate: loss can be used to construct organizational identity and mobilize constituents.[18] I also examined potential external effects: loss can be used to convince actors in other arenas, such as legislatures and the executive branch, to act, and to persuade the public to respond to a countermajoritarian judiciary.[19] Looking at social movements on both the left and the right, I supplied concrete examples of how advocates have, on some occasions, turned loss into new opportunities, ways of speaking, and strategies for change.

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13. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK 5-12 (1994).
14. Marc Galanter, *The Radiating Effects of Courts, in* EMPIRICAL THEORIES ABOUT COURTS 121, 139-42 (Keith O. Boyum & Lynn Mather eds., Quid Pro Books 2015) (1983).
15. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 429 (2d ed. 2008).
16. NeJaime, *supra* note 1, at 950-51.
17. *Id.* at 960.
18. *Id.* at 969.
19. *Id.*

For example, in the wake of the Supreme Court's decision in *Bowers v. Hardwick* upholding antisodomy laws against constitutional challenge, LGBTQ-movement lawyers successfully turned to state courts and state legislatures to strike down and repeal such laws.[20] And after the California Supreme Court's decision recognizing same-sex couples' right to marry, Christian Right advocates successfully mobilized voters to amend the state constitution to exclude same-sex couples from marriage.[21] These advocates used losses in court to speak to constituents, pressure nonjudicial state actors, and message to the public.

My argument was not that litigation loss inevitably yields beneficial indirect effects. Instead, my argument was that "[l]oss *may* yield . . . indirect effects."[22] In terms of internal effects, I argued that "[l]itigation loss *may* raise consciousness, mobilize constituents, build resolve, and raise funds."[23] In terms of external effects, I argued that "litigation loss . . . *may* prompt a shift to a more legislative or administrative strategy while also providing a useful way to communicate the need for action in these venues."[24] As Catherine Albiston pointed out in an illuminating response to my article, "the key words in NeJaime's argument, are 'may,' 'might,' 'can,' and the like."[25] Many of the scholars who have invoked and applied the concept of winning through losing have correctly characterized the claim as qualified.[26] Advocates, too, have written about winning through losing on these terms.[27]

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20. *Id.* at 989-94.

21. *Id.* at 1002-11.

22. *Id.* at 945 (emphasis added).

23. *Id.* at 983 (emphasis added).

24. *Id.* at 998 (emphasis added).

25. Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 70 (2011).

26. *See, e.g.*, Brandon Weiss, *An Affirmative Approach to the Supreme Court's Major Questions Doctrine &* Chevron *Skepticism*, 72 U. KAN. L. REV. 541, 545 (2024) ("[C]ampaigns 'win by losing' in court, if post-decision backlash *can* be channeled toward furthering progress in the political arena." (emphasis added)); Gregory Briker, *The Anatomy of Social Movement Litigation*, 132 YALE L.J. 2304, 2315 (2023) ("[E]ven judicial defeat *can* have positive indirect effects on social movements." (emphasis added)); Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORN. L. REV. 1187, 1235 (2023) ("[C]ourt losses *may* serve an important function mobilizing social movements, particularly where litigation is just one front in a broader movement battle." (emphasis added)).

27. Chloe N. Kempf, *Why Did So Many Do So Little? Movement Building and Climate Change Litigation in the Time of* Juliana v. United States, 99 TEX. L. REV. 1005, 1035 (2021) ("[L]itigation losses *can* result in many positive outcomes, especially in the hands of skilled litigators and activists." (emphasis added)); Melissa E. Crow, *Impact Litigation Reconsidered: Navigating the Challenges of Movement Lawyering at the Border and Beyond*, 31 CLINICAL L. REV. 107, 152 (2024) ("Even an unsuccessful lawsuit *may* provide critical leverage to achieve other types of progress

B. The Role of Litigation in Winning Through Losing

But not all invocations of winning through losing have been so careful. Some scholars have simply not emphasized the limited nature of my argument.[28] Others have cited the article in claiming that losing "can be (more) effective" than winning.[29] Going further, another scholar characterizes *Winning Through Losing* as "arguing that litigation is *always* good for social movements, even when activist plaintiffs lose."[30] These tenuous appeals to the concept of winning through losing can insulate court-based strategies from criticism. If even losing litigation can promote a movement's ends—perhaps more effectively than winning—then litigation appears as an unmitigated good. On this reading, little is at stake in the decision as to whether and how to litigate in the first place.

If this were my argument, which it is not, then winning through losing would rely on and contribute to a "stereotyped vision of the naïve rights-crusading public interest lawyer"[31]—a vision that historically shaped prominent critiques of social-change litigation. If this were my argument, then winning through losing would begin from the premise that social-movement lawyers prioritize litigation over other, more promising tactics—a premise that has animated critics of contemporary public-interest lawyers.[32] If this were my argument, then winning through losing would support a juriscentric model, in which advocates put their faith in courts over other institutions and avenues of change.

By contrast, litigation and courts play much more nuanced roles in my account of winning through losing. Given my attention to how advocates frame litigation loss to make change in nonjudicial arenas, winning through losing is

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that could ultimately shift public consciousness." (emphasis added)); Daina Bray & Thomas M. Poston, *The Methane Majors: Climate Change and Animal Agriculture in U.S. Courts*, 49 COLUM. J. ENV'T L. 145, 159-60 (2024) ("[C]limate litigation *may* have beneficial 'indirect impacts' even when courts ultimately reject plaintiffs' claims." (emphasis added)).

28. *See, e.g.*, Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 32-33 (2023) ("[L]itigation loss increases the likelihood that state courts, other public officials, and the general public will be receptive to a social movement group's message and position."); Kip M. Hustace, *Counting Is Hard! A Theory of Doctrinal Expansion*, 28 LEWIS & CLARK L. REV. 51, 75 (2024) ("[L]oss triggers a range of claimant responses, from movement restructuring to deeper engagement in grassroots politics and legal reform.").

29. Kris van der Pas, *Strategic Litigation*, *in* REDRESSING FUNDAMENTAL RIGHTS VIOLATIONS BY THE EU 209, 219 n.63 (Melanie Fink ed., 2024). *But see* Albiston, *supra* note 25, at 70 ("Nothing about NeJaime's argument suggests that the benefits of loss outweigh the benefits of victory.").

30. D Dangaran, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 HARV. J.L. & GENDER 161, 172 n.64 (2021) (emphasis added).

31. Cummings & NeJaime, *supra* note 6, at 1317.

32. *Id.* at 1244; *see also id.* at 1317 (arguing that "the scholarly focus on litigation as the social reform vehicle-of-choice for movement lawyers is outmoded").

at odds with a juriscentric view of social change. In the LGBTQ-rights work I used to illustrate winning through losing, social-movement advocates did not bring cases regardless of whether they expected to lose. Indeed, these lawyers were skeptical of litigation, *even if they believed they would win*. They made calculated decisions about whether to pursue their aims through litigation, and they viewed litigation as deeply connected to nonlitigation strategies.

Lawyers, in my account, approached litigation as just one component of what Scott L. Cummings and I labeled multidimensional advocacy — "advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)."[33] In an article published the year before *Winning Through Losing*, we supplied a case study of California's path to marriage equality that challenged key assumptions of the popular "backlash thesis" about the counterproductive effects of *winning* litigation. We showed that, in California, LGBTQ-movement lawyers "did not give litigation tactical priority," but instead "generally sought to *avoid* affirmative litigation in favor of a legislative and public education approach — with litigation used defensively to block challenges to successfully enacted bills."[34] Of course, none of this meant that LGBTQ-movement advocates did not use litigation as a critical tool for social change. They simply did not view litigation as the primary mode of social change or as disconnected from other tactics.

In theorizing winning through losing, I argued that this "multidimensional-advocacy framework is central to an appreciation of the function of litigation loss."[35] Social-movement lawyers, I observed, "work closely with nonlawyer advocates to construct and implement a coherent strategy across a number of institutional fronts."[36] Because they "understand courts' limitations and constraints and appreciate the importance of policy formation emanating from nonjudicial channels," they "view litigation as an essential, but partial, strategy."[37] Although advocates hope to avoid losses in court, they are prepared to "use losses to shape strategies in other venues."[38] Through this lens, winning through losing describes a potential dynamic that advocates operating across multiple institutional settings and levels of government seek to cultivate when the careful decision to litigate results in a judicial defeat.

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33. *Id.* at 1242.

34. *Id.* at 1241.

35. NeJaime, *supra* note 1, at 969.

36. *Id.* at 1005.

37. *Id.* at 969.

38. *Id.*

In sum, there are two relevant and related features of *Winning Through Losing*. First, the original article made a qualified claim, arguing that litigation loss *may* have positive indirect effects for a movement. Second, the original article decentered litigation, situating court-based tactics as simply one part of a broader movement strategy and relating court-based activity to contestation in other arenas. With these two features in view, we can see, first, that winning through losing is not inevitable and, second, that the prospect of winning through losing depends in part on nonlitigation strategies.

Part II examines the *Skrmetti*[39] litigation from this perspective, identifying aspects of the legal and political context that sophisticated advocates should consider in evaluating the effects of a potential litigation loss. This evaluation should occur *before litigation*, shaping the decision of whether to litigate in the first place and how to litigate if one decides to pursue litigation. Advocates should then continue to assess the effects of a potential loss throughout the litigation and make key decisions—such as whether to appeal—in light of that assessment.

II. *SKRMETTI* AND THE PROSPECT OF LOSING: DECIDING WHETHER AND HOW TO LITIGATE

Today, LGBTQ-movement advocates confront a growing array of anti-LGBTQ laws and regulations at both the state and federal levels. The trans community in particular is under attack. Since taking office, President Trump has issued a series of executive orders undermining trans equality.[40] State lawmakers across the country have limited the rights of their trans residents.[41] Among these restrictions, healthcare has been a particularly popular target. In seeking to cut off federal funding for gender-affirming care for minors as well as research about such care, the President has purported to "protect[] children from chemical and surgical mutilation."[42] And at the state level, more than half of the states now

39. United States v. Skrmetti, 145 S. Ct. 1816 (2025).

40. *See, e.g.*, Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 30, 2025) (stating the White House's commitment to "defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male"); Exec. Order No. 14,183, 90 Fed. Reg. 8757, 8757 (Feb. 3, 2025) ("[E]xpressing a false 'gender identity' divergent from an individual's sex cannot satisfy the rigorous standards necessary for military service.").

41. *See, e.g.*, IOWA CODE §§ 216.6–.10 (2025) (removing antidiscrimination protections based on gender identity); WYO. STAT. ANN. §§ 9-27-101 to -103 (2025) (prohibiting transgender individuals from using restrooms and other multi-user facilities in state-owned buildings that correspond to their gender identity).

42. Exec. Order No. 14,187, 90 Fed. Reg. 8771 (Jan. 28, 2025).

ban gender-affirming care for minors.[43] Lawyers at major LGBTQ-legal organizations have challenged many of these laws. The Supreme Court took up one such challenge in *Skrmetti*,[44] a case initiated by the ACLU's LGBTQ & HIV Project, in collaboration with the ACLU of Tennessee and Lambda Legal. The Biden Administration also joined the challengers.

While the case was pending at the Court, the lead ACLU lawyer, Chase Strangio, spoke with *New York Magazine*'s Irin Carmon: "[T]his fight has been a fight that almost every lawyer in every big LGBT org has been working on for the last four years. It's a collective effort on behalf of our community."[45] For Strangio, "win or lose, that work will continue."[46] At the time, most observers assumed that the ACLU would lose—that the Court would reject the challenge and uphold Tennessee's ban on gender-affirming care for minors. As Ian Millhiser wrote in *Vox* after oral argument, "The biggest question in *Skrmetti* . . . is likely to be *how* the Court finds a way to uphold Tennessee's law, rather than *whether* the Court does so."[47]

Carmon considered, from the perspective of trans advocates like Strangio, what might happen "if they lose."[48] In doing so, she turned to *Winning Through Losing*, writing that the article shows "the political gains that can counterintuitively come when a movement faces defeat in court. The clarity of a loss can generate new energy and strategies."[49] Carmon wisely noted that a defeat "can"—not will—generate political gains and movement energy.[50] Still, she did not offer insights about how we know whether a loss can have these productive effects. Nor did she relate winning through losing to the assessment of whether and how to litigate in the first place. Pointing to the prospect of winning through losing *after* the decisions to litigate and to pursue a Supreme Court ruling have been made may simply justify those decisions, regardless of the outcome. In this

43. *See Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Sep. 11, 2025), https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans [https://perma.cc/PQ7Q-PV3Q].

44. *Skrmetti*, 145 S. Ct. 1816.

45. Irin Carmon, *The Trans Rights Showdown at the Supreme Court*, N.Y. MAG. (Nov. 26, 2024), https://nymag.com/intelligencer/article/trans-minors-healthcare-supreme-court-anti-discrimination-law.html [https://perma.cc/6FU2-UH5H].

46. *Id.*

47. Ian Millhiser, *The Horrifying Implications of Today's Supreme Court Argument on Trans Rights*, VOX (Dec. 4, 2024, 3:40 PM EST), https://www.vox.com/scotus/389737/supreme-court-transgender-us-skrmetti-health-care-tennessee [https://perma.cc/F8HM-5XEW].

48. Carmon, *supra* note 45.

49. *Id.*

50. *Id.*

sense, the invocation of *Winning Through Losing* may work to shield the decision to pursue *Skrmetti* from critique.

The ACLU did, in fact, lose. In a 6-3 ruling, the Court upheld Tennessee's ban on gender-affirming care for minors.[51] By situating the Court's decision within the broader legal and political context in which the *Skrmetti* litigation unfolded, this Part identifies considerations that should inform an assessment of litigation loss before and throughout litigation. More specifically, I explain how concerns about the negative impact of a litigation loss should shape an evaluation of whether to litigate in the first place and how to litigate if one decides to go to court. Although I address the substance of the Court's decision in *Skrmetti*, I emphasize how advocates might assess the prospect of losing *before* the Court's decision—when lawyers decided to litigate in the first place and eventually to seek Supreme Court review. These decision points are key to the ex ante assessment of loss that advocates undertake. I do not offer a final judgment on the *Skrmetti* litigation but instead point to three important features of the legal and political context that stand out as relevant to these critical decision points.

A. Material Legal Consequences

The first feature of the legal and political context that shapes advocates' ex ante assessment of a potential loss is perhaps the most obvious: a loss's concrete material impact. Drawing on the labor movement, Catherine L. Fisk and Diana S. Reddy responded to my work on winning through losing by describing "losing through losing"[52]—the prospect that a litigation loss can significantly harm a movement. They attended specifically to the "material consequences"[53] of a court's decision—that is, "what a court's judgment concretely yields."[54] A litigation loss obviously impairs the legal rights of the litigants themselves and others harmed by the challenged law. It also affects individuals who would challenge other laws based on doctrinal paths that the decision rejects or narrows.

Advocates approaching *Skrmetti* clearly had to grapple with the direct effects and scope of a potential adverse ruling. *Skrmetti* was filed in federal court and asserted federal constitutional claims. It eventually reached the Supreme Court

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51. United States v. Skrmetti, 145 S. Ct. 1816, 1837 (2025).

52. Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 132 (2020); *see also* Scott L. Cummings & Andrew Elmore, *Mobilizable Labor Law*, 99 IND. L.J. 127, 192 n.409 (2023) (highlighting the prospect of winning through losing but describing losing through losing as a "familiar concept").

53. Fisk & Reddy, *supra* note 52, at 133.

54. *Id.* at 94.

after opponents of the law sought review of the Sixth Circuit's adverse ruling. The Court's decision has vast geographical and doctrinal reach.

With *Skrmetti*, laws in other states restricting gender-affirming care for minors are now understood as permissible.[55] And federal and state lawmakers who have yet to restrict gender-affirming care for minors are authorized to do so. In fact, not long after the Court's decision, New Hampshire lawmakers gave final passage to bills banning such care for the first time in the state.[56] Advocates consider these kinds of direct consequences when deciding whether to litigate in federal court and whether to seek Supreme Court review.

The *Skrmetti* loss also reaches beyond the specific issue of bans on gender-affirming care for minors. The decision closes certain doctrinal paths to challenge other laws that restrict the rights of trans people.[57] Of course, advocates cannot know beforehand exactly which paths might be closed. But they can anticipate the possibilities. The central issues the Court considered were whether the Tennessee law constitutes sex-based discrimination or otherwise impermissible discrimination against trans people. An adverse ruling on these questions can have far-reaching effects.

The Court found that the healthcare ban did not discriminate based on sex or transgender status. Instead, the Court analyzed the law as drawing distinctions based only on medical use and age that merited the most deferential form of equal-protection review.[58] First, the Court held that the Tennessee law did not restrict the use of puberty blockers or hormones based on sex but rather based on medical purpose. Any boy or girl could access puberty blockers or hormones

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55. To be sure, after *Skrmetti*, advocates are not without options to legally challenge bans on gender-affirming care for minors. They can assert parental rights claims in federal court under the Federal Constitution — claims that the Court did not consider in *Skrmetti*. *See* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147, 181-89 (2025) (analyzing such parental-rights claims and their reception by lower federal courts). But returning to the federal courts seems particularly unwise at this point. Already, two federal appellate courts have rejected parental rights claims after *Skrmetti*. *See* Brandt v. Griffin, 147 F.4th 867, 887-88 (8th Cir. 2025); Poe v. Drummond, No. 23-5110, 2025 WL 2238038, at *11-12 (10th Cir. Aug. 6, 2025). Advocates can still challenge state and local bans in state courts under state law — a prospect to which I return in Part III.

56. *N.H. Lawmakers Give Final OK to Bills Banning Transgender Health Care for Minors*, N.H. PUB. RADIO (June 26, 2025, 5:22 PM EDT), https://www.nhpr.org/nh-news/2025-06-26/nh-lawmakers-give-final-ok-to-bills-banning-transgender-health-care-for-minors [https://perma.cc/CZ23-TAUA].

57. For a compelling analysis of some of the doctrinal paths that *Skrmetti* leaves open for trans claimants, see generally Jessica Clarke, *Skrmetti*'s Shell Game (Aug. 16, 2025) (unpublished manuscript), https://ssrn.com/abstract=5394647 [https://perma.cc/Y3EB-MTU7].

58. United States v. Skrmetti, 145 S. Ct. 1816, 1829 (2025).

for certain medical conditions, but no boy or girl could access puberty blockers or hormones for gender dysphoria.[59]

Second, the Court held that the Tennessee law did not discriminate based on transgender status. In doing so, the Court relied on a largely discredited 1974 decision, *Geduldig v. Aiello*.[60] There, the Court had held that a state insurance program that excluded pregnancy from coverage did not discriminate based on sex. The insurance program, the Court reasoned, distinguished between "pregnant women and nonpregnant persons."[61] Because women were included in both groups, there was no sex-based discrimination.[62]

In *Skrmetti*, the Court reasoned that the Tennessee law "divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions."[63] The Court admitted that "only transgender individuals seek puberty blockers and hormones for the excluded diagnoses"—that is, "gender dysphoria, gender identity disorder, and gender incongruence."[64] But "the second group," the Court insisted, "encompasses both transgender and nontransgender individuals."[65] Accordingly, "there is a 'lack of identity' between transgender status and the excluded medical diagnoses."[66]

The Court's refusal to find that the Tennessee law discriminates based on sex or transgender status can insulate other laws from meaningful constitutional scrutiny. Most obviously, the Court's reasoning might authorize bans on gender-affirming care *for adults*. Lawmakers could draw the same distinction based on medical use without running afoul of equal-protection principles. Federal and state legislators have already begun targeting gender-affirming care for adults, though doing so through funding measures and health-insurance exclusions rather than outright bans.[67] These types of measures, as well as more drastic ones, now seem presumptively constitutional.

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59. *See id.* at 1830-31.

60. 417 U.S. 484 (1974).

61. *Id.* at 496 n.20.

62. *Id.*

63. *Skrmetti*, 145 S. Ct. at 1833.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See* Devan Cole & John Fritze, *From Sports to Birth Certificates, Supreme Court to Confront More Anti-Transgender Policies*, CNN (June 29, 2025, 5:00 AM EDT), https://www.cnn.com/2025/06/29/politics/transgender-issues-supreme-court [https://perma.cc/49VB-6JPH] ("[O]ther restrictions on access to health care for trans Americans

Skrmetti can reach not only constitutional but also statutory claims. Consider the Eleventh Circuit's approach to the exclusion of "sex change surgery" in a Georgia county's health insurance plan covering employees.[68] Before *Skrmetti*, a three-judge panel had found that the exclusion constituted impermissible sex discrimination under Title VII.[69] After *Skrmetti*, the Eleventh Circuit sitting *en banc* upheld the policy, with the dissenting judge from the three-judge panel writing for the majority.[70] Finding that "[t]he Supreme Court's reasoning in *Skrmetti* applies equally here," the court held that the policy does not constitute discrimination based on sex because "[t]he County's policy does not pay for a sex change operation for anyone regardless of their biological sex."[71] The court also held that "the County's plan does not facially discriminate based on transgender status," observing that "the Supreme Court rejected a very similar argument in *Skrmetti*."[72] Instead, "[l]ike the law at issue in *Skrmetti*," the court explained, "the County's policy is a 'classification based on medical use'" and thus is permissible under Title VII.[73] Other federal courts may similarly follow *Skrmetti* to uphold exclusions of gender-affirming care from insurance on both constitutional and statutory grounds.

Before pursuing a case like *Skrmetti*, sophisticated advocates would assess the possibility of a negative decision authorizing additional discriminatory laws, not simply those of the kind at issue in the case. That is, movement lawyers typically consider how losing a particular lawsuit could hamper other court-based strategies and doctrinal arguments. As Gwendolyn Leachman found in her study of marriage-equality litigation:

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have garnered less attention, including ones impacting adults."); Grace Abels, *House Republicans Quietly Expanded Their Proposed Medicaid Ban to Include Trans Adults*, POYNTER (June 3, 2025), https://www.poynter.org/fact-checking/2025/medicaid-ban-transgender-adults-gender-affirming-care [https://perma.cc/4C2H-7TGL]; Anna Claire Vollers, *More States Pass Laws Restricting Transgender People's Bathroom Use*, STATELINE (June 26, 2025, 3:33 PM), https://stateline.org/2025/06/26/more-states-pass-laws-restricting-transgender-peoples-bathroom-use [https://perma.cc/ZX54-NKUX].

68. *See* Lange v. Houston County, No. 19-cv-00392, 2025 WL 2602633 (11th Cir. Sep. 9, 2025).

69. *See* Lange v. Houston County, 101 F.4th 793, 798-99 (11th Cir. 2024).

70. *Contrast Lange*, 101 F.4th at 801 (Brasher, J., dissenting), *with Lange*, 2025 WL 2602633, at *1 (Brasher, J., writing for the majority).

71. *Lange*, 2025 WL 2602633, at *4; *id.* at *9 (Rosenbaum, J., concurring) (explaining that "with deep regret," "I haven't found a meaningful way to distinguish Houston County's healthcare plan . . . from the law at issue in *Skrmetti*. So *Skrmetti* requires me to conclude that the plan doesn't classify by sex").

72. *Id.* at *4.

73. *Id.* at *5 (quoting United States v. Skrmetti, 145 S. Ct. 1816, 1833 (2025)).

> The threat in bringing marriage arguments was not just that they could lose, and block possibilities for same-sex marriage in a particular state. It was also that a negative precedent on marriage could later be used against LGBT rights groups litigating other issues for the community collectively. Many noted how prior litigation losses on marriage had in the past (and could in the future) spill over into domestic partnership and parenting/family issues.[74]

Lawyers who had a historical perspective on the movement appreciated, as one lawyer told Leachman, "how the losses get used against us in other cases."[75] For example, after the Supreme Court upheld antisodomy laws in *Bowers*, advocates struggled to argue that discrimination against gays and lesbians was constitutionally impermissible. As the D.C. Circuit concluded the year after *Bowers* was decided, "[i]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious."[76] These lessons resonated in working toward marriage equality. Because "losses could be used so broadly against LGBT rights groups—as past experience demonstrated," advocates saw an "urgent need for cautious, incremental strategies."[77]

We can observe this danger in the *Skrmetti* litigation. The trans community is facing a wave of discriminatory laws—from bans on open military service to restrictions on access to public bathrooms.[78] Advocates will struggle to challenge these laws successfully in the face of *Skrmetti*. A future ruling on the constitutionality of laws that explicitly classify based on transgender status could make such challenges even more daunting.[79] Because the Court held that Tennessee's law did not discriminate based on transgender status, it did not decide whether laws that classify on that basis should be subject to heightened scrutiny for equal-protection purposes. Justice Barrett, however, wrote a concurring opinion solely to make clear that, in her view, "[t]he Equal Protection Clause does not

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74. Gwendolyn Leachman, *Fighting Chance: Conflicts over Risk in Social Change Litigation*, 42 CARDOZO L. REV. 1825, 1866 (2021).

75. *Id.* at 1867 (quoting an advocate).

76. Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

77. Leachman, *supra* note 74, at 1867.

78. *See* Cole & Fritze, *supra* note 67; Elizabeth Wolfe, *Promoted One Day and "Not Fit for Duty" the Next: Transgender Military Personnel Grapple with Dismissals as Forced Separations Are Set to Begin*, CNN (June 6, 2025, 7:00 AM ET), https://www.cnn.com/2025/06/06/us/transgender-military-ban-separation-deadline [https://perma.cc/3KS4-MB2Z].

79. After *Skrmetti*, the Court announced that it would consider laws banning trans girls from girls' sports, raising the prospect that it may soon decide that question. *See* Little v. Hecox, No. 24-38, 2025 WL 1829165 (U.S. July 3, 2025) (mem.); West Virginia v. B.P.J., No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025) (mem.).

demand heightened judicial scrutiny of laws that classify based on transgender status."[80] She engaged in extensive reasoning to explain her conclusion[81]—reasoning that lower courts might rely on when confronting the same question.[82] In Barrett's view, rational-basis review is appropriate, thus giving "legislatures flexibility" in "other areas of legitimate regulatory policy" relating to transgender status—from "access to restrooms to eligibility for boys' and girls' sports teams."[83] Given the hopes expressed by some observers that Barrett might be more open to claims of trans discrimination than some of her colleagues in the Court's conservative supermajority,[84] it is particularly noteworthy that she wrote separately solely to make clear her view that laws that turn on transgender status are presumptively constitutional.

Before appealing *Skrmetti* to the Supreme Court, lawyers had to consider the possibility that the Court would weaken the case for heightened scrutiny for laws that discriminate based on gender identity. Now, given Justice Barrett's position, with which both Justices Thomas and Alito expressly agreed,[85] it is difficult to imagine that the Court would strike down even laws that explicitly discriminate against trans people. Lower-court decisions finding that trans persons constitute a quasi-suspect class are suddenly on shakier ground.[86] With *Skrmetti* erecting new barriers to challenging discriminatory measures, legislators may be

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80. United States v. Skrmetti, 145 S. Ct. 1816, 1855 (2025) (Barrett, J., concurring).

81. *See id.* at 1851-55.

82. *Cf.* Sexuality & Gender All. v. Critchfield, No. 23-cv-00315, 2025 WL 2256884, at *5-6 (D. Idaho Aug. 7, 2025) (treating transgender status as a quasi-suspect classification based on circuit precedent but noting that "the scrutiny appropriately applied to transgender status is rapidly changing" and observing that "[t]he various concurrences and dissents in [*Skrmetti*] make clear how specific justices would analyze whether transgender status represents a suspect class").

83. *Skrmetti*, 145 S. Ct. at 1852-53, 1855.

84. *See, e.g.*, Erin Reed, *Amy Coney Barrett Surprised by History of Cross-Dressing Laws Targeting Trans People*, ADVOCATE (Dec. 5, 2024, 5:40 PM EST), https://www.advocate.com/amy-coney-barrett-skrmetti-transgender [https://perma.cc/G7RQ-ZC9P] ("Attorneys working on other LGBTQ+-related cases have privately shared intrigue over Justice Barrett's questioning, with one expressing 'surprising hope' about her potential stance on the case.").

85. Justice Thomas joined Justice Barrett's concurrence. *Skrmetti*, 145 S. Ct. at 1849. Justice Alito wrote separately. *Id.* at 1860 (Alito, J., concurring in part and concurring in judgment) ("In my view, transgender status does not qualify under our precedents as a suspect or 'quasi-suspect' class.").

86. An example of such a lower-court decision is *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). After *Skrmetti*, a federal district court declined to view the *Skrmetti* decision as "abrogat[ing]" Ninth Circuit precedent treating transgender status as a quasi-suspect classification, but observed that "the issue of transgender status as a suspect or quasi-suspect class is likely changing—and will hopefully be addressed by the Supreme Court in its upcoming term." Jones v. Critchfield, No. 25-cv-00413, 2025 WL 2430468, at *6 (D. Idaho Aug. 23, 2025).

emboldened to pass more such laws. Unsurprisingly, in *Skrmetti*'s wake, lawmakers in some states have sought to further restrict trans equality.[87]

Moreover, the effects of the loss in *Skrmetti* may be felt not only within the LGBTQ movement, but also outside of it. Clearly, the litigation raised the possibility of significantly limiting sex-discrimination claims not just on behalf of trans plaintiffs but more generally. Presenting the Court with sex-equality claims ran the risk of eroding longstanding legal principles against sex discrimination and setting back the adjacent women's-rights movement. As legal scholar Naomi Schoenbaum bluntly put it after oral argument in *Skrmetti*, "The Supreme Court Case over Trans Youth Could Also Decimate Women's Equality."[88] Yet, when asked whether the ACLU had consulted with women's-rights groups before pursuing *Skrmetti*, the organization's executive director, Anthony Romero, responded, "I don't play 'Mother May I?' with a group of sister organizations."[89]

The Court's decision did significant damage to equal-protection law. The Court ruled that "mere reference to sex" is not enough to trigger heightened scrutiny for equal-protection purposes,[90] and reasoned that so long as a "law does not prohibit conduct for one sex that it permits for the other," it does not discriminate based on sex.[91] This position flies in the face of key sex-equality precedents.[92] As Justice Sotomayor explained in dissent, even if "not every legislative mention of sex triggers intermediate scrutiny," the Tennessee law "defines an entire category of prohibited conduct based on inconsistency with sex."[93] "[I]t is hard to imagine a law that prohibits conduct 'inconsistent with' sex that could avoid intermediate scrutiny," she reasoned.[94] After the decision, Schoenbaum explained that, "[b]y carving out an exception to the rule that any law that

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87. *See* Sarah Michels, *NC Bill Against Revenge Porn Loses Dem Support Once GOP Adds Unrelated Anti-Trans Items*, CAROLINA PUB. PRESS (June 25, 2025), https://carolinapublicpress.org/71355/anti-trans-measures-nc-revenge-porn-bill [https://perma.cc/AX8G-DQZS].

88. Naomi Schoenbaum, *The Supreme Court Case over Trans Youth Could Also Decimate Women's Equality*, POLITICO (Dec. 24, 2024, 10:00 AM EST), https://www.politico.com/news/magazine/2024/12/24/supreme-court-trans-youth-womens-equality-00195710 [https://perma.cc/J2X8-GDJF].

89. Nicholas Confessore, *How the Transgender Rights Movement Bet on the Supreme Court and Lost*, N.Y. TIMES MAG. (June 19, 2025), https://www.nytimes.com/2025/06/19/magazine/scotus-transgender-care-tennessee-skrmetti.html [https://perma.cc/Y5SU-Z2Y5].

90. *Skrmetti*, 145 S. Ct. at 1829.

91. *Id.* at 1831.

92. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 555 (1996).

93. *Skrmetti*, 145 S. Ct. at 1878 (Sotomayor, J., dissenting).

94. *Id.*

draws sex-based lines is subject to exacting scrutiny, *Skrmetti* opens the door to a judge's discretion about whether a sex-based rule even merits a close look."[95]

As we saw, *Skrmetti* also breathed new life into *Geduldig*.[96] As Schoenbaum declared, "The Supreme Court Just Revived One of the Worst Anti-Woman Rulings of All Time."[97] Constitutional scholar Leah Litman observed that "[i]f the Republican appointees plan to revive this older case, they will take the law and the country back to a time when the government used the existence of 'biological differences' between men and women to excuse all kinds of discrimination against women."[98] Again, this potential retrenchment runs counter to decades of sex-equality jurisprudence. As Justice Sotomayor observed in dissent, "In no sense [do] the biological differences between the sexes relieve courts of the obligation to examine the sex classification with a careful constitutional eye."[99] Indeed, the Court's 1993 decision in *United States v. Virginia*, Cary Franklin explains, "makes clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not 'real' differences are involved."[100]

Given the geographical and doctrinal reach of *Skrmetti*, the negative consequences of the loss are substantial. As a formal legal matter, the decision may be viewed to authorize not only bans on gender-affirming care for minors, but also other forms of trans discrimination. More broadly, the decision weakened longstanding sex-equality principles. These possibilities must inform the initial decision of *whether* to litigate in the first place—that is, whether to file a lawsuit challenging the Tennessee law.

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95. Naomi Schoenbaum, *The Supreme Court Just Revived One of the Worst Anti-Woman Rulings of All Time*, SLATE (June 25, 2025, 2:03 PM), https://slate.com/news-and-politics/2025/06/supreme-court-worst-ruling-ever-skrmetti.html [https://perma.cc/D5TU-EVK9].

96. Justice Alito also had approvingly cited *Geduldig* in dicta in *Dobbs v. Jackson Women's Health Organization*. 597 U.S. 215, 236 (2022).

97. Schoenbaum, *supra* note 95.

98. Leah Litman, *The Archaic Sex-Discrimination Case the Supreme Court Is Reviving*, ATLANTIC (June 24, 2025), https://www.theatlantic.com/ideas/archive/2025/06/supreme-court-sex-discrimination-skrmetti/683296 [https://perma.cc/CN48-6NRU].

99. *Skrmetti*, 145 S. Ct. at 1879 (Sotomayor, J., dissenting).

100. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 146 (2010). *Skrmetti* threatens to extend *Geduldig*'s reach beyond constitutional doctrine by importing its logic into the Title VII context. When the Eleventh Circuit upheld the exclusion of "sex change surgery" from an employer-provided health insurance policy under Title VII, a concurring judge observed: "*Skrmetti*'s determination that the law there didn't discriminate by sex or transgender status, even under Title VII's understanding of discriminatory classifications, effectively imports the reasoning of *Geduldig* [], into Title VII jurisprudence." *See* Lange v. Houston County, No. 19-cv-00392, 2025 WL 2602633, at *9 (11th Cir. Sep. 9, 2025) (Rosenbaum, J., concurring) (citation omitted). This was particularly troubling given that "Congress expressly amended Title VII to reject the holding and reasoning of *Geduldig*, overriding the Supreme Court's extension of that case to the statute." *Id.*

If advocates decide to litigate, these possibilities also must inform decisions about *how* to litigate—whether to file in federal or state court, whether to bring state or federal claims, and whether to appeal, including to the Supreme Court. If a state court rejects a state constitutional challenge to a state law, the decision's doctrinal reach is limited. It only directly affects the laws in that state. If the Sixth Circuit's decision in *Skrmetti* had not been appealed to the Supreme Court, the decision's doctrinal reach would be limited to the states within its jurisdiction. A Supreme Court ruling on a federal constitutional challenge to a state law resolves much more—giving more to those who win and taking more from those who lose.

B. The Political Opportunity Structure

The second feature of the legal and political context that is relevant to an ex ante assessment of litigation loss concerns the relative openness of nonjudicial arenas, including legislatures and the executive branch. Advocates make decisions about whether and how to litigate in the context of what social-movement theorists call the "political opportunity structure"— "the political environment in which a movement operates and with which it interacts."[101] The political opportunity structure accounts for "the degree of openness of the formal political structure to advocacy efforts, the nature of alignments between powerful 'elites,' actual alliances between movements and these elites, and the state's ability and inclination to repress a movement."[102]

Through the lens of the political opportunity structure, decisions about litigation are made in light of the openness of other venues, including the legislative and executive branches. *Skrmetti* arose at a time when opportunities in other arenas were limited. In some ways, this makes litigation more attractive, as other avenues for change are relatively closed. Yet this feature also may make it more difficult to leverage a litigation loss productively—as government officials in other branches appear unlikely to counter a negative judicial decision.

To assess the opportunities and constraints that would exist after a loss, advocates must consider the possibilities for countering an adverse ruling in other venues. As Albiston hypothesized, winning through losing would likely be more possible "under conditions of divided government when opposing factions control courts and legislatures."[103] In these circumstances, "alternative strategies such as legislative-override campaigns are more likely to arise and be

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101. MARK WOLFSON, THE FIGHT AGAINST BIG TOBACCO: THE MOVEMENT, THE STATE AND THE PUBLIC'S HEALTH 5 (2001).

102. *Id.*

103. Albiston, *supra* note 25, at 72.

successful."[104] For example, in *Winning Through Losing*, I drew on the example of the Lilly Ledbetter Fair Pay Act, the first piece of legislation signed by President Obama after his inauguration.[105] The legislative and executive branches, newly in Democratic control, countered a Roberts Court decision rejecting an equal-pay claim under Title VII and narrowing the circumstances in which such claims could be brought.[106]

In contrast, Albiston explained, "when one party controls all three branches of government, not only are shifts to other venues less likely to be successful, but losses can be much more damaging because they solidify legal policy against the movement far into the future."[107] In Tennessee, where *Skrmetti* arose, the legislative and executive branches are tightly controlled by Republicans opposed to trans equality. Rather than act to counter the Court's decision, the state's governor, attorney general, and legislative leaders praised the ruling.[108] The same is true in many of the states that enacted similar bans on gender-affirming care for minors. In these states, Republicans tend to control both the legislature and the executive branch. They are unlikely to be persuaded that they should undo discrimination that has been expressly authorized by the Supreme Court. In fact, they may be emboldened to enact additional discriminatory measures. Again, New Hampshire lawmakers advanced a ban on gender-affirming care for minors in *Skrmetti*'s wake.[109]

The situation at the federal level is equally dismal for trans advocates. Today, Republicans control both Congress and the presidency. This was not true at the time that the *Skrmetti* litigation was initiated or the petition for certiorari was filed. Advocates may not know which party will control the other branches of government at the time of an eventual judicial decision, but they can consider the likelihood of various electoral outcomes as they assess the dangers of a judicial defeat. For years, the Republican Party has pushed federal, state, and local measures restricting trans rights.[110] President Trump has taken many steps to

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104. *Id.*

105. *See* NeJaime, *supra* note 1, at 999.

106. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (rejecting Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)).

107. Albiston, *supra* note 25, at 73.

108. *See* Sydney Keller, *Leaders React to Supreme Court Upholding Tennessee's Gender-Affirming Care Ban for Minors*, FOX17 (July 9, 2025, 7:47 AM ET), https://fox17.com/news/local/supreme-court-upholding-tennessees-gender-affirming-care-ban-for-minor [https://perma.cc/FGB4-5GYC].

109. *See supra* note 56.

110. *See, e.g.*, Sam Gringlas, *Republicans Seek More State Laws on Transgender People, Putting Democrats on the Spot*, NAT'L PUB. RADIO (May 10, 2025), https://www.npr.org/2025/05/10/nx-s1-

restrict trans equality.[111] Congress has also pursued measures that discriminate against the trans community.[112] Under these conditions, the possibility of leveraging a Supreme Court loss in legislative or administrative arenas at the federal level appears vanishingly small. In *Skrmetti*'s wake, Attorney General Pamela Bondi "applaud[ed]" the decision, vowed that the "Department of Justice will continue [to] fight to protect America's children," and "encourage[d]" other states to follow Tennessee's lead.[113]

Skrmetti also comes at a particularly fraught time for the alliance between trans advocates and the Democratic Party. Although Democratic leaders may have been more openly supportive at the outset of the *Skrmetti* litigation, Democratic strategists have urged the party to scale back its support for trans rights to better reflect the views of the median voter.[114] Indeed, three governors seen to be leading contenders for the 2028 Democratic presidential nomination "said they were not issuing any statements on the decision."[115] With presumably sympathetic political leaders refusing to speak, advocates will struggle to cultivate effective responses to the Court's ruling.

Ultimately, when litigation loss confirms the prevailing views of the dominant political party and the minority party's sympathies seem to be waning, the prospects of meaningfully using the loss to pursue change in nonjudicial arenas seem dim. This point informs an assessment of the negative effects of a litigation loss that advocates must consider before proceeding in court. Again, advocates may not know the exact balance of power in advance of a court's decision, but they can consider the likely possibilities.

5377402/republicans-democrats-transgender-sports-legislatures [https://perma.cc/2K5B-HK6P]; Dave Lawler & Erica Pandey, *Trump Win Emboldens GOP's Anti-Trans Blitz*, AXIOS (Nov. 21, 2024), https://www.axios.com/2024/11/21/trump-anti-trans-bathroom-laws-gop [https://perma.cc/W9T3-REUC]; Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 16, 2023), https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html [https://perma.cc/N5EJ-77HC].

111. *See, e.g.*, Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 30, 2025) (declaring that "women are biologically female, and men are biologically male"); Exec. Order No. 14,183, 90 Fed. Reg. 8757, 8757 (Feb. 3, 2025) (declaring that transgender servicemembers "cannot satisfy the rigorous standards necessary for military service").

112. *See, e.g.*, Stop the Invasion of Women's Spaces Act, H.R. 1017, 119th Cong. (2025); Protection of Women and Girls in Sports Act of 2025, S. 9, 119th Cong. (2025).

113. Pamela Bondi (@AGPamBondi), X (June 18, 2025, 11:41 AM) https://x.com/AGPamBondi/status/1935362210638729531 [https://perma.cc/ETU7-VEE6].

114. *See* Kellen Browning, *Democrats' Wary Response to Transgender Ruling Shows the Party's Retreat*, N.Y. TIMES (June 18, 2025), https://www.nytimes.com/2025/06/18/us/politics/democrats-supreme-court-transgender-ruling.html [https://perma.cc/RL3U-XWBS].

115. *Id.*

These possibilities should inform decisions not only about whether to litigate, but also about how to litigate. In the face of a hostile federal government, federal litigation asserting federal constitutional claims may become less attractive, while state-court litigation asserting state constitutional claims may become more attractive. Advocates can choose among states based on the composition of the state courts as well as the balance of power in the state legislative and executive branches. The dynamics across these arenas should shape advocates' assessments of how they might leverage a judicial victory and mitigate a judicial defeat.

C. Meaning-Making

The third feature of the legal and political context concerns the broader cultural and ideological landscape in which the litigation loss takes place. Scholars of legal mobilization describe law's constitutive effects, which include the meanings that litigation, including litigation loss, can create.[116] In a related literature, sociolegal scholars have examined legal consciousness, understanding how legal frames can shape everyday experiences in ways that can lead individuals to contest, or accept, their discriminatory treatment.[117] This work takes cues from social-movement theory that focuses on framing, in which movement actors engage in "conscious strategic efforts . . . to fashion shared understandings of the world and of themselves that legitimate and motivate collective action."[118] A court decision can validate some frames and impede others.[119]

The decision in *Skrmetti* comes at a moment when anti-LGBTQ attitudes, and anti-trans attitudes in particular, are rampant.[120] Lawmakers at federal and

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116. *See, e.g.*, MCCANN, *supra* note 13, at 2-3, 10-11; NeJaime, *supra* note 1, at 944, 947, 965, 970, 998.

117. *See, e.g.*, Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 27 (2005); Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 684-86 (2003).

118. *See, e.g.*, Doug McAdam, John D. McCarthy & Mayer N. Zald, *Introduction: Opportunities, Mobilizing Structures, and Framing Processes—Toward a Synthetic, Comparative Perspective on Social Movements*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 1, 6 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996).

119. *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, 1753 (2006).

120. *See, e.g.*, *Americans Have Grown More Supportive of Restrictions for Trans People in Recent Years*, PEW RSCH. (Feb. 26, 2025), https://www.pewresearch.org/short-reads/2025/02/26/americans-have-grown-more-supportive-of-restrictions-for-trans-people-in-recent-years [https://perma.cc/ME3D-BRJ2]; Geoff Mulvihill, *Most LGBTQ+ Adults Feel Americans Don't*

state levels seem eager to enact more and more policies that harm trans people. Even as support for trans rights has grown in some quarters, public support for major priorities of the LGBTQ movement is relatively low, or at least unstable. Polling after the 2024 election found Americans divided on the wisdom of laws like the one at issue in *Skrmetti*, banning gender-affirming care for minors.[121] Indeed, support for such laws slightly *increased* among both Republicans and Democrats from 2022 to 2024.[122]

Under these conditions, an adverse ruling may consolidate and legitimate anti-trans sentiment. As Albiston contemplated, "[L]osing a case can delegitimize [a group's] cause, marking it as beyond the protections and recognition of the law."[123] As a lawyer told Leachman in the marriage-equality context, the risk is that a negative "decision is taken as . . . 'gay people don't deserve the same treatment,' even though, well, it was 'just about marriage.'"[124]

Although movement actors will work to frame a loss as "oppression," rather than "the proper exercise of authority," they do not in fact have "control over how a particular issue is framed."[125] According to Albiston, "dominant cultural ideologies generally paint disfavored minorities in a negative light."[126] Against this backdrop, and in light of some Democratic leaders' silence in *Skrmetti*'s wake, advocates representing the relatively small trans community might struggle to cultivate public outrage against the Court's decision.

At a minimum, extensive work must be done to shape public and elite views about the underlying issues. Historically, the LGBTQ movement has emphasized the importance of social and cultural change alongside political and legal advocacy.[127] Strategic litigation can serve public-education aims. As the legal director of a major LGBTQ-legal organization put it during the campaign for marriage equality, litigation was "part of a bigger strategy of changing the narrative of gay people."[128] But these aims need not be met by far-reaching litigation that seeks Supreme Court review. Instead, as Cummings and I showed in California,

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Accept Transgender People, Poll Finds, PBS NEWS (May 30, 2025, 2:17 PM EDT), https://www.pbs.org/newshour/nation/most-lgbtq-adults-feel-americans-dont-accept-transgender-people-poll-finds [https://perma.cc/RPQ2-6LWK].

121. *Challenges to Democracy: The 2024 Election in Focus*, PRRI 56 (Oct. 16, 2024) https://prri.org/wp-content/uploads/2025/05/PRRI-Oct-2024-AVS-Draft_B-1.pdf [https://perma.cc/7RDY-95WU].

122. *Id.* at 56-57.

123. Albiston, *supra* note 25, at 70.

124. Leachman, *supra* note 74, at 1866.

125. Albiston, *supra* note 25, at 70, 73.

126. *Id.* at 73.

127. *See* Leachman, *supra* note 74, at 1863.

128. Cummings & NeJaime, *supra* note 6, at 1315 (quoting Jon Davidson).

lawyers "assert[ed] relatively modest legal claims" to *nonmarital* rights that "replac[ed] abstract legal concepts with powerful stories of real human suffering."[129]

Today, trans advocates may see a need for incremental strategies that serve public-education aims. Mara Keisling, who founded the National Center for Transgender Equality more than two decades ago, fears that activists "lost credibility with many Americans once they started accusing people of bigotry over sports."[130] Another longtime trans advocate worries that with this all-or-nothing strategy, potential allies are made to "feel stupid or condescended to."[131] Keisling urged advocates to "focus first on measures that reinforced the fundamental humanity of transgender people, such as hate-crime protections."[132]

Internal movement research appears to support this approach, emphasizing the importance of messaging that "takes into account that most Americans do not know a lot about life as a transgender person, and reinforces the basic idea that transgender people want what everyone else wants: fairness, respect and love."[133] This more incremental approach would shape decisions about whether and how to litigate. Advocates would likely pursue more modest claims over more ambitious ones. And they would likely prioritize issues with wider appeal over those seen as more controversial.

Judicial decisions shape and reshape frames not only outside but also inside a movement. Strangio himself expressly acknowledged the constitutive effects of legal mobilization, including when litigation results in defeat. In speaking to legal journalist Chris Geidner before the Court decided *Skrmetti*, he explained:

> I am just of the view that the fight itself is critical. It's empowering. And I don't proclaim to know the outcome of anything at the outset of the fight. . . . [T]he possibility of litigation, even if we can't be successful 100% of the time, which nothing is successful 100% of the time, we need to be able to show people . . . that we're trying in all sorts of different ways. So I am certainly not of the view that everything is going to turn

129. *Id.* at 1314.

130. Jeremy W. Peters, *Transgender Activists Question the Movement's Confrontational Approach*, N.Y. TIMES (Nov. 26, 2024), https://www.nytimes.com/2024/11/26/us/politics/transgender-activists-rights.html [https://perma.cc/52CL-45RZ].

131. *Id.* (quoting Rodrigo Heng-Lehtinen).

132. *Id.*

133. *Id.*

> out great in the courts, but I am of the view that we are absolutely going to put our best case forward every single time.[134]

On this account, even litigation loss can be "empowering" to aggrieved movement members. Loss may also empower the specific litigating organization. An organization like the ACLU can show its commitment to stand up for its constituents, even against hostile courts.[135]

At the same time, a decision determining that discrimination is permissible can disempower movement constituents and fuel feelings of resignation. In their analysis of the labor movement's encounter with law, Fisk and Reddy observe that "a legal loss can cause hopelessness."[136] As Duncan Hosie argues, "repeated confrontation with an obdurate Court" may have "long-term demobilizing effect[s]."[137] More practically, losses may make fundraising and organizing more challenging.

In the end, defeats in court create meanings, which movement advocates struggle to control. Even when advocates draw on a litigation loss to mobilize constituents and express solidarity, external actors may use the result in court to shore up popular and elite sentiment opposing the movement's aims. Under these conditions, a litigation loss may be used to confirm, rather than challenge, a group's subordination.

This possibility must be considered by advocates when they decide *whether* to litigate in the first place and, once they pursue litigation, *how* to litigate. A state-court decision adjudicating state-law claims will likely attract much less attention than a U.S. Supreme Court decision adjudicating federal claims. If advocates prevail in state court, the constitutive effects may be relatively limited. For example, community members in other states may be unaware of or unmoved by a decision in a distant state invalidating a state law. At the same time, if advocates lose in state court, the risks of demobilization may also be relatively limited. Again, community members in other states may be unaware of or

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134. Chris Geidner, *Meet Two Lawyers Leading the Fight for Trans People's Lives Against Trump's Anti-Trans Attacks*, LAW DORK (Feb. 4, 2025), https://www.lawdork.com/p/trump-anti-trans-orders-lawyers-strangio-minter [https://perma.cc/QYN8-SL6U].

135. *Cf.* NeJaime, *supra* note 1, at 978-83 (explaining how a Christian-Right organization used litigation loss to build organizational identity within a movement by situating itself as standing up to a hostile culture, including the judiciary).

136. Fisk & Reddy, *supra* note 52, at 95.

137. Duncan Hosie, *Resistance Through Restraint: Liberal Cause Lawyering in an Age of Conservative Judicial Hegemony*, 111 CORN. L. REV. (forthcoming 2026) (manuscript at 56), https://ssrn.com/abstract=5236271 [https://perma.cc/WBV7-JGB7].

undeterred by the decision.[138] In this sense, the more likely a judicial defeat seems, the more appealing a state-court challenge may become.

III. COMPLICATING LITIGATION DECISIONS

These considerations — material legal consequences, strategic opportunities outside courts, and constitutive effects — should shape the assessment of potential litigation loss. This assessment of litigation loss is part of the broader assessment of *whether* to litigate in the first place. But none of this is to suggest that the decision whether to litigate is straightforward. These decisions are not made in isolation. In this Part, I complicate the decision of whether to litigate by identifying some of the limits on advocates' control over litigation. More specifically, I consider how advocates can be drawn into litigation. Given that litigation may occur even when advocates think it is unwise, I consider how advocates might respond through decisions about *how* to litigate. If advocates who are skeptical of pursuing litigation nonetheless decide to do so, they can attempt to limit the litigation's reach in various ways — by deciding where to file suit, what claims to make, and more generally how to proceed after initiating litigation. Such decisions can limit the effects of a potential loss — or win.

A. The Legal Mobilization Dilemma

Up to now, I have largely focused on features of the legal and political context that shape advocates' assessment of potential loss as they consider whether and how to litigate. But advocates do not make decisions in a vacuum. They respond not only to the tactics of their adversaries, who may draw them into court, but also to the decisions of their allies, who may decide to litigate on their own. Even the most cautious movement lawyers may be pressured into litigating.

The ACLU's decision of whether to challenge gender-affirming care bans in court was shaped by the actions of their adversaries. Today, conservative organizations have every reason to pursue litigation in the federal courts and to bring their claims to a sympathetic Supreme Court.[139] Critics of the ACLU's lawsuit,

138. For advocates, it may be more difficult to leverage a state-court victory and easier to minimize a state-court defeat. *Cf.* NeJaime, *supra* note 1, at 973 (explaining how state-court "decisions that garner only minor interest on a more general level or from mainstream media may enjoy substantial publicity within more specialized press targeted at movement members").

139. *See, e.g.*, Ed Whelan, *Excellent Alito Opinion in* Mahmoud v. Taylor, NAT'L REV. (June 27, 2025, 12:05 PM), https://www.nationalreview.com/bench-memos/excellent-alito-opinion-in-mahmoud-v-taylor [https://perma.cc/4QTM-KLPL] ("From the perspective of legal conservatives, the Supreme Court today finished off one of its four best Terms since the 1930s.

Strangio remarked in *Skrmetti*'s aftermath, "ignore[] the fact that it was a right-wing, billion-dollar movement that thrust these fights into the political and judicial spheres."[140] In this sense, the conservative push to enact and defend anti-trans laws shaped the ACLU's decisions.

It is not just opponents who may exert pressure on advocates to litigate. The prospect of lawsuits by allies, both inside and outside the movement, shapes the decision whether to litigate. The ACLU is one of many legal organizations representing the interests of trans people. In addition to trans-specific organizations, other national LGBTQ-movement organizations, such as GLAD Law, the National Center for LGBTQ Rights (NCLR), and Lambda Legal, devote significant resources to trans advocacy. The explosion of state laws restricting access to gender-affirming care meant that these organizations and others faced a growing array of potential clients and lawsuits. Lawyers around the country stepped in to represent trans clients suing to invalidate anti-trans laws. In fact, Lambda Legal was co-counsel in *Skrmetti*,[141] and lawyers from GLAD Law and NCLR challenged bans on gender-affirming care for minors in other states.[142]

It is reasonable for an organization of the ACLU's size and stature to take a leading role in these challenges. Of course, such a role may serve the ACLU's own organizational ends—confirming its leadership on these issues and supporting its fundraising. But ACLU lawyers may also feel an obligation to defend their trans constituents. As Strangio put it, "We are right on the law, and people deserve to feel that their rights are being defended in every possible way."[143] According to the ACLU's Romero, "We are responding to demands for justice of people who walk into our front door."[144] This "client-service" perspective,[145] in which the focus is on legal advocacy on behalf of individual clients injured by the law, sounds more like the perspective of a private-firm lawyer than the head of an impact-litigation organization. But if other organizations are willing to litigate on behalf of the trans community and challenge these unjust laws, the ACLU likely feels a responsibility—and pressure—to do the same.

Of course, litigation is just one of many ways to advocate on behalf of a community. As compared to other venues, the hostile political climate in many states

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The other three Terms in the top four were last year, the year before, and the year before that.").

140. Melissa Gira Grant, *What Everyone Is Getting Wrong About SCOTUS's Trans Rights Ruling*, New Republic (June 26, 2025), https://newrepublic.com/article/197261/supreme-court-skrmetti-transgender-ruling-everyone-wrong [https://perma.cc/CB2W-RVPL].

141. United States v. Skrmetti, 145 S. Ct. 1816, 1823 (2025).

142. *See, e.g.*, Doe v. Ladapo, 737 F. Supp. 3d 1240, 1251 (N.D. Fla. 2024).

143. Geidner, *supra* note 134.

144. Confessore, *supra* note 89.

145. Leachman, *supra* note 74, at 1873 (describing private firms taking on marriage-equality cases).

likely made courts more attractive. Courts' distinctive qualities appeal to groups struggling to have their voices heard in politics.[146] Courts are relatively open and accessible; they must address questions properly presented and provide reasons for their decisions. These distinctive features not only aid movements, but also provide opportunities for some movement actors or allies to challenge and upend the decisions of other movement actors *not to litigate*.[147] From this perspective, declining to litigate, even in the face of likely defeat, may sacrifice strategic control. Other movement actors or allies may litigate instead. The more skeptical advocates would not only have their decision to avoid litigation upended, but they would also lack control over how the litigation proceeds.

As I argued in *The Legal Mobilization Dilemma*, published the year after *Winning Through Losing*, successful legal mobilization increases the likelihood that individuals will go to court, even against the advice of key movement leaders, in ways that jeopardize movement strategy.[148] As I showed, "litigation poses a threat when tactical disagreement arises," as a "single movement member can initiate a lawsuit that threatens to bind the entire movement."[149] The LGBTQ movement's "sustained and successful legal mobilization may make litigation an especially appealing and powerful option through which to contest movement strategy,"[150] as previous legal victories make subsequent lawsuits more attractive.

In *Bostock v. Clayton County*, a case in which the ACLU also represented a trans plaintiff, the Supreme Court ruled that Title VII's prohibition on employment discrimination "because of sex" prohibits discrimination against transgender employees.[151] This successful appeal to the Court made other challenges to trans discrimination appear more promising. If "sex" includes "gender identity" for purposes of Title VII, other statutes that use "sex" might also cover trans people. If "sex" includes "gender identity" for purposes of Title VII, constitutional proscriptions on sex discrimination might also cover trans people. Under these conditions, further litigation is appealing.

Given the seemingly straightforward doctrinal leap from *Bostock* to other forms of trans discrimination and given that *Bostock* was decided by a conservative Supreme Court, it may be easy to discount the long-term consequences of

146. Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1944 (2021).

147. NeJaime, *supra* note 2, at 665.

148. *Id.*

149. *Id.* at 666.

150. *Id.*

151. 590 U.S. 644, 662 (2020).

bringing claims before an increasingly conservative federal judiciary.[152] As Leachman documented in the context of marriage-equality litigation, nonmovement lawyers, such as lawyers at private firms, failed to fully contemplate the consequences of losing. As one private-firm attorney put it, "Everyone on the team thought we were going to win. . . . So I don't know if people really had deep thoughts about what a loss meant."[153] These attorneys, Leachman concluded, showed little appreciation for the broader consequences of a litigation loss for the movement and its long-term prospects. Instead, they justified their "involvement in marriage equality cases by focusing on the opportunity to win, rather than 'what a loss meant' outside their individual cases."[154]

Bostock supplied an attractive logic in *Skrmetti*—a way to show that the Tennessee law constituted discrimination based on sex.[155] But the Court rejected the appeal to its earlier precedent, concluding that, "[u]nder the logic of *Bostock*, . . . sex is simply not a but-for cause of [the Tennessee law's] operation."[156] *Bostock* provided an argument in favor of litigating *Skrmetti* to the Supreme Court. Yet there was always reason to worry about a decision limiting such an important precedent.[157] In the absence of clarification from the Court, lower courts, as well as lawmakers and agencies, could interpret *Bostock* broadly. But in *Skrmetti*'s wake, arguments for expansive application of *Bostock* face new challenges.

Courts have begun to interpret *Skrmetti* not simply to limit the reach of *Bostock*'s logic in the equal-protection context, but also to constrain its application in the Title VII context itself. For example, the Eleventh Circuit relied on

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152. *See* Hosie, *supra* note 137, at 4 (pointing out that "the occasional liberal victory at the Supreme Court provides just enough positive reinforcement to sustain faith in traditional advocacy methods and in federal courts as sources of relief").

153. Leachman, *supra* note 74, at 1875.

154. *Id.*

155. United States v. Skrmetti, 145 S. Ct. 1816, 1834 (2025) ("Applying *Bostock*'s reasoning, they argue that SB1 discriminates on the basis of sex because it intentionally penalizes members of one sex for traits and actions that it tolerates in another.").

156. *Id.* at 1835. Although the Court did not decide "whether *Bostock*'s reasoning reaches beyond the Title VII context," *id.* at 1834, some of the Justices wrote concurring opinions asserting that *Bostock*'s reasoning should not apply to *constitutional* claims of sex discrimination. Justice Thomas could find "no reason to import *Bostock*'s Title VII analysis into the Equal Protection Clause." *Id.* at 1838 (Thomas, J., concurring). Given that "[t]he Equal Protection Clause does not contain the same wording as Title VII," Justice Alito similarly opined that *Bostock*'s reasoning should not apply "when determining whether a law classifies based on sex for Equal Protection Clause purposes." *Id.* at 1855, 1859 (Alito, J., concurring in part and concurring in judgment).

157. *See* Hosie, *supra* note 137, at 5 (arguing that "preserving hard-fought victories can be as consequential as pursuing new gains").

Skrmetti's interpretation of *Bostock* to hold that an employer's insurance policy excluding "sex change surgery" did not discriminate based on sex or transgender status under Title VII.[158] A concurring judge made clear her view that "*Skrmetti* incorrectly applies *Bostock*'s test,"[159] but, as the majority explained, "*Skrmetti*'s holding about the meaning of *Bostock* is binding on us unless and until the Supreme Court says otherwise. As lower court judges, we cannot shut our ears when the Supreme Court tells us how to apply its precedents."[160]

None of this means that the decision to litigate *Skrmetti* and to rely on *Bostock* was wrong. The point here is that successful resort to courts — as exemplified by *Bostock* — can make additional court-based strategies more attractive. A precedent as groundbreaking as *Bostock* would be appealing to anyone contemplating challenges to anti-trans laws. Movement lawyers must then make decisions about whether to litigate in light of the increased likelihood of litigation by others. If lawyers around the country were going to pursue lawsuits based on *Bostock*, the ACLU, which had litigated that earlier case, might have reasonably believed its experienced litigators were better situated to handle such lawsuits.

B. Controlling How to Litigate

The decision whether to litigate, we have seen, is not solely within the control of any particular movement advocate or organization. Not only a movement's opponents, but also other movement actors or allies may draw an organization into litigation. Yet this does not mean that advocates' litigation decisions should be immune from scrutiny. Even if some advocates' strategy *not to litigate* is upended, those advocates can respond in ways that mitigate the negative consequences of litigation, including a loss. Accordingly, like the decisions about whether to litigate, decisions about *how* to litigate are shaped by the broader legal and political context.

For several years, LGBTQ-movement advocates litigated marriage claims in carefully circumscribed ways. Their challenges to the Federal Defense of Marriage Act raised relatively limited claims in federal court. Their full-throated marriage-equality claims arose in state court and presented only state constitutional claims.[161] They had decided not to pursue federal litigation seeking to

158. *See* Lange v. Houston County, No. 5:19-cv-00392-MTT, 2025 WL 2602633, at *5 (11th Cir. Sep. 9, 2025) ("The Court said point blank: 'Under the reasoning of *Bostock*, neither [the plaintiff's] sex *nor his transgender status* is the but-for cause of his inability to obtain' the prohibited treatment." (alteration in original)).

159. *Id.* at *9 (Rosenbaum, J., concurring).

160. *Id.* at *6.

161. *See* NeJaime, *supra* note 2, at 683-85.

block state laws excluding same-sex couples from marriage and sought to convince others not to file such suits. Eventually, though, their persuasion failed. When it did, movement lawyers used an array of tactics—from intervention to amicus participation—to slow down and limit federal litigation they viewed as premature or ill-advised.[162]

As the marriage-equality example shows, decisions about *how* to litigate are often as important as decisions about *whether* to litigate in the first place. Advocates must determine where to file suit (e.g., in federal or state court), what claims to bring (e.g., federal or state claims, constitutional or statutory claims), and how to proceed (e.g., whether to appeal an adverse judgment, whether to petition for certiorari). These decisions shape the consequences of the results in court, win or lose.

With bans on gender-affirming care for minors, LGBTQ-movement advocates faced important choices. Although they could simply not have challenged such bans in court, this path would become increasingly untenable as other lawyers decided to strike out on their own. As they did with marriage equality, they could have discouraged federal lawsuits asserting federal constitutional claims. Of course, as with marriage equality, movement lawyers may nonetheless have been drawn into federal litigation as other lawyers initiated lawsuits.

Even then, advocates would face choices about which claims to pursue and whether to appeal adverse rulings. A Supreme Court decision is not inevitable.[163] Consider recent developments in litigation involving laws that prevent trans women and girls from competing in women's and girls' sports. After *Skrmetti*, the Supreme Court granted certiorari in a case challenging Idaho's law, leading LGBTQ advocates to prepare for another defeat in the Court's upcoming term. Eventually, though, the ACLU notified the Court that its client, a trans woman, "has voluntarily dismissed with prejudice her claims against petitioners in the district court."[164] The client, the ACLU explained to the Court, has "decided to permanently withdraw and refrain from playing any women's sports" and "has firmly committed not to try out for or participate in any school-sponsored women's sports."[165] Claiming that the client's "unequivocal abandonment of her claims against petitioners renders this case moot," the ACLU urged the Court to vacate the Ninth Circuit's decision in her favor and "remand with instructions to

162. *See id.* at 697-98; Cummings & NeJaime, *supra* note 6, at 1300-02, 1310-12; *cf.* Hosie, *supra* note 137, at 20 (urging progressive cause lawyers to "prioritize making [ideologically salient cases] unsuitable for Supreme Court review").

163. *See* Hosie, *supra* note 137, at 5 (urging progressive cause lawyers to engage in "a calculated disengagement from the Supreme Court and federal appeals courts aimed at denying these bodies vehicles to further develop conservative constitutional doctrine").

164. Suggestion of Mootness at 1, Little v. Hecox, No. 24-38 (U.S. Sep. 2, 2025), 2025 WL 2597331.

165. *Id*. at 4.

dismiss the case."[166] If the Court agrees, the ACLU may avoid a nationwide ruling on the constitutionality of laws of this kind as well as the more far-reaching question of whether trans status constitutes a quasi-suspect classification.[167]

Under this approach, rules that advocates view as unjust would persist. But, as Hosie argues in urging a strategy of "[r]esistance through restraint," declining to litigate in hostile federal courts can "prevent[] or delay[] the nationwide constitutionalization of those unjust rules through Supreme Court affirmation — or worse, nationwide constitutionalization paired with rollbacks of existing protections."[168]

As with marriage equality, movement lawyers dealing with bans on gender-affirming care for minors could have pursued more limited legal challenges by filing suits only in state court under state law.[169] State constitutions are documents of independent force and can provide protections that go beyond the Federal Constitution. In interpreting a state constitution, state courts can apply interpretive methods that are not currently favored by federal judges. Moreover, lawsuits in state courts raising only state-law claims are insulated from review by the Supreme Court.[170] This might mitigate or minimize some of the negative effects of a loss — while also diminishing the positive impact of a win.

The same organizations that brought *Skrmetti* also pursued state-court litigation limited to state-law claims. In Ohio, a state appellate court struck down the state's ban on gender-affirming care for minors based on the state constitution.[171] The court began with "the principle that '[t]he Ohio Constitution is a document of independent force,' which means that 'state courts are unrestricted in according greater civil liberties and protections to individuals and groups' under our own state's constitution."[172] The Ohio Constitution offered a distinctive path for challenging the state's ban on gender-affirming care for minors. It

166. *Id*. at 5.

167. Of course, the Court has also granted certiorari in another case involving trans girls' participation in sports. *See* West Virginia v. B.P.J., No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025) (mem).

168. Hosie, *supra* note 137, at 17.

169. Obviously, advocates would still need to select more hospitable state courts, as some state courts would be as hostile as the U.S. Supreme Court. *See* Aaron Mendelson, *How Republicans Flipped America's State Supreme Courts*, CTR. FOR PUB. INTEGRITY (July 24, 2023), https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts [https://perma.cc/R78B-EYZE].

170. *See* Murdock v. Memphis, 87 U.S. 590, 638 (1874) (holding that the Court lacked jurisdiction to review state-court interpretation of state law).

171. Moe v. Yost, No. 24AP-483, 2025 WL 844497, at *19 (Ohio Ct. App. Mar. 18, 2025), *appeal accepted*, 263 N.E.3d 360 (Ohio 2025) (unpublished table decision).

172. *Moe*, 2025 WL 844497, at *11.

includes a Health Care Freedom Amendment, passed through a 2011 ballot initiative, that, among other things, prevents the state from "prohibit[ing] the purchase or sale of health care."[173] Under this provision, the court concluded, "[I]t is the constitutional right of Ohio citizens to be free to decide whether they receive health care services recommended by medical professionals and widely accepted by the professional medical community as the appropriate treatment protocols for an appropriately diagnosed medical condition."[174] Accordingly, regardless of what the U.S. Constitution would require, the Ohio Constitution provided state residents with a right to access gender-affirming care, including for minors.

Even without this distinctive state-constitutional provision, the appellate court found the Ohio law unconstitutional. Under the state constitution's Due Course of Law Clause, which is analogous to the Federal Due Process Clause,[175] parents enjoy a fundamental right to "make decisions concerning the care, custody, and control of their children."[176] Parents in Ohio argued that the ban violated this fundamental right. (Interestingly, the Supreme Court had not granted certiorari on this issue in *Skrmetti*.) The trial court had rejected the parental-rights claim. On appeal, the state urged the court to apply a narrow and restrictive approach to the "history and tradition" inquiry that shapes fundamental-rights analysis—one that tracked recent Supreme Court jurisprudence, and namely the Court's analysis in *Dobbs v. Jackson Women's Health Organization*.[177] Just as the *Dobbs* Court had defined the right at stake at the most specific level,[178] here the parents would need "to show a right to a *particular* treatment or a *particular* provider."[179]

In interpreting the state constitution, however, the Ohio courts were "not bound to walk in lockstep with the federal courts."[180] The appellate court

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173. OHIO CONST. art. I, § 21.

174. *Moe*, 2025 WL 844497, at *17.

175. OHIO CONST. art. I, § 16.

176. *Moe*, 2025 WL 844497, at *23.

177. 597 U.S. 215 (2022).

178. *See, e.g.*, *id.* at 231 (framing the right at issue narrowly as a "right to abortion" rather than more broadly as, for example, a "right to privacy").

179. *Moe*, 2025 WL 844497, at *23. As Reva Siegel has argued, this approach to history and tradition purports to guard against values-based judging but instead "serves to veil rather than to constrain the interpreter's values." Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs' *Method (and Originalism) in the Defense of Segregation*, YALE L.J.F. 99, 107 (2023); *see also* Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 566 (2024) (arguing that "[a]n appeal to facts about the past in constitutional argument can directly or indirectly express values").

180. *Moe*, 2025 WL 844497, at *11 (quoting State v. Smith, 165 N.E.2d 1123, 1130 (Ohio 2020)).

adopted a more capacious approach to fundamental rights, refusing to frame the right at stake in terms of the specific medical procedure at issue.[181] As it explained, "if this right was narrowly defined as the right to seek a specific medical treatment that is 'deeply rooted in this Nation's history and tradition,' the entirety of modern medicine would fall outside of the scope of a parent's right to control their children's health care, as no such medical treatment could be shown to be deeply rooted in our nation's history and tradition."[182] Only through reasoning at a higher level of generality could the parental right at stake truly be meaningful. As the court concluded, "a minor's access to puberty blockers and hormone therapy to treat gender dysphoria—as recommended by an independent medical provider and given with the informed consent of their parents, assent of the minor, and in accordance with the prevailing standards of care—is the type of medical decision parents have a fundamental interest in making on behalf of their children."[183]

At the time of this writing, it is unclear what the Ohio Supreme Court will do with the state's ban on gender-affirming care for minors. Meanwhile, in Montana, advocates challenging that state's ban in state court already achieved a favorable ruling from the state supreme court—a court that also featured prominently in *Winning Through Losing*. There, I charted Montana Supreme Court decisions after *Bowers* striking down the state's antisodomy law and ordering access to benefits for same-sex couples.[184] In *Gryczan v. State*, Lambda Legal and the ACLU challenged Montana's antisodomy statute on state constitutional grounds.[185] The Montana Supreme Court distinguished the Montana Constitution's explicit protection for privacy from the Federal Constitution's implicit protection and emphasized "that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution."[186] The decision, of course, was not reviewable by the Supreme Court.

The *Gryczan* decision created an important precedent for eventual litigation over domestic-partner benefits. In *Snetsinger v. Montana University System*, Lambda Legal and the ACLU challenged the lack of health-insurance coverage for university employees' same-sex partners.[187] Once again, the Montana Supreme Court ruled in the plaintiffs' favor, observing that the Montana

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181. *Id.* at *23.

182. *Id.* at *24 (citation omitted).

183. *Id.* at *25.

184. *See* NeJaime, *supra* note 1, at 991-93.

185. 942 P.2d 112, 115 (Mont. 1997).

186. *Id.* at 121.

187. 104 P.3d 445, 447 (Mont. 2004).

Constitution "provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution."[188]

In the current moment, the Montana state courts have been addressing a state constitutional challenge, litigated by the ACLU and Lambda Legal, to the state's ban on gender-affirming care for minors. In *Cross v. State*, the trial court granted a preliminary injunction against the law's enforcement, and the Montana Supreme Court affirmed.[189] Quoting *Gryczan*, the state supreme court remarked on the state constitution's explicit protection for privacy: "That the right to privacy is separately protected in the Montana Constitution 'reflects Montanans historical abhorrence and distrust of excessive governmental interference in their personal lives.'"[190] Relying on another state-court precedent, the court observed that "the Legislature generally has no interest in restricting 'an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so.'"[191]

When the trial court proceeded to adjudicate the merits, it granted summary judgment to the plaintiffs. In ruling that the ban impermissibly infringed the rights of minors in Montana, the court drew on a unique state constitutional provision guaranteeing "fundamental rights" to "persons under 18 years of age."[192] As the Montana Supreme Court had found, "minors have the *same* fundamental rights as adults" under the state constitution.[193] Quoting *Snetsinger*, the earlier domestic-partner-benefits decision, the trial court explained that "the Montana Constitution provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution."[194] Just a month before the Supreme Court subjected Tennessee's law to rational-basis review in *Skrmetti*, the state court found that the Montana law must be subjected to strict scrutiny under the state constitution. The court found that the law infringed the right to privacy, discriminated based on sex, and discriminated based on transgender status, which the court treated as a suspect

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188. *Id.* at 449 (citing Cottrill v. Cottrill Sodding Serv., 744 P.2d 895, 897 (Mont. 1987)).

189. 560 P.3d 637, 654 (Mont. 2024).

190. *Id.* at 646-47 (quoting *Gryczan*, 942 P.2d at 125).

191. *Id.* at 648 (citing Armstrong v. State, 989 P.2d 364, 380 (Mont. 1999)).

192. Order re: Cross-Motions for Summary Judgment at 34, Cross *ex rel.* Cross v. State, No. DV-23-541 (Mont. Dist. Ct. May 13, 2025) (quoting MONT. CONST. art. II, § 15), https://lambdalegal.org/wp-content/uploads/2025/05/279-Order-Re-Cross-Motions-for-Summary-Judgment.pdf [https://perma.cc/DK97-BL5T] .

193. *Id.* at 35 (emphasis added).

194. *Id.* at 39 (quoting Snetsinger v. Mont. Univ. Sys., 104 P.3d 445, 449 (Mont. 2004)).

classification.[195] The Montana Supreme Court could review the trial court's decision, but that is where any appeal stops.

Obviously, the wins in Ohio and Montana are relatively limited. They are surely more limited than a victory in *Skrmetti* would have been. They directly affect only the bans in the specific states. At the same time, a loss in Ohio or Montana would also be relatively limited—again, surely more limited than the defeat in *Skrmetti*.

CONCLUSION

The analysis of *Skrmetti* suggests that winning through losing is, and should be, considered as part of the analysis of whether and how to litigate in the first place. Clearly, this is not a straightforward assessment. Social change is a dynamic, contingent, and unpredictable process. Nothing I have said suggests that advocates face obvious or clear-cut choices. Neither outcomes nor the decisions of other actors can be known with certainty. At the same time, the prospect of winning through losing should not insulate decisions about whether and how to litigate from scrutiny and criticism.

The main point is that winning through losing is contingent on several factors—many of which advocates can, and should, identify and assess at the outset, before litigation. These factors may very well lead savvy advocates simply not to litigate in the first place. Or advocates may litigate in a relatively limited fashion, attempting to avoid federal courts, federal claims, and Supreme Court review. None of this is to suggest that court-centered strategies are "bad" and nonlitigation strategies are "good." Rather, litigation remains an important tool in movement work—a tool that sophisticated advocates deploy in connection with other tactics aimed at nonjudicial actors.[196] Only when litigation is part of such a multidimensional approach might we expect litigation loss to be put to productive use. Only then might advocates be able to leverage litigation loss in ways that motivate legislatures, the executive branch, and the public to act. In this way, winning through losing depends on an approach to law and social change that is not court centered. From this perspective, decisions regarding whether and how to litigate can always be scrutinized. They are never costless.

Anne Urowsky Professor of Law, Yale Law School. *For helpful comments, I thank Jessica Clarke, Chip Lupu, Naomi Schoenbaum, and Reva Siegel. For research*

195. *Id.* at 44.

196. *See* Cummings & NeJaime, *supra* note 6, at 1318 (observing that litigation "may well be of limited efficacy by itself, but when strategically deployed in tandem with organizing, political advocacy, and public education campaigns, it is an important tool").

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