Losers Fools & Prophets: Justice as Struggle

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Legal scholarship lavishes its attention on the successes of law reform litigators. *Brown v. Board of Education*,¹ *Roe v. Wade*,² and a host of other successful efforts to change the law have been celebrated, analyzed, and critiqued. Losing efforts, such as *Plessy v. Ferguson*,³ *Bradwell v. Illinois*,⁴ or *Minor v. Happersett*⁵—all critical test cases litigating African-Americans' and women's rights before their time—are generally ignored.⁶ Americans like winners.

The legal community likewise has tended to ignore the efforts of lawyers who might be viewed as prophets or fools. In fact, lawyers are generally "confined from molar to molecular motion," as Justice Holmes once put it,⁷ and do not indulge in tilting at windmills in the service of losing causes.

Yet virtually hopeless test cases brought to challenge unjust policies have been recurring threads in the tapestry of American law throughout our nation's history. Radical abolitionists challenged aspects of slavery in American courts in the 1840s and 1850s, to no avail.⁸ Members of the post-Civil War women's movement advocated a broad interpretation of the Fourteenth Amendment and litigated women's rights in a series of 1870s cases that were uniformly unsucces-

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¹ 347 U.S. 483 (1954).
² 410 U.S. 113 (1973).
³ 163 U.S. 537 (1896). See infra notes 277-307 and accompanying text.
⁴ 83 U.S. (16 Wall.) 130 (1872). See infra notes 237-41 and accompanying text.
⁵ 88 U.S. (21 Wall.) 162 (1874). See infra notes 242-52 and accompanying text.
⁶ There has been a recent revival of scholarly interest in *Plessy v. Ferguson*, which is the subject of a recent book by Charles A. Lofgren. CHARLES A. LOFGREN, THE PLESSY CASE (1987). However, this mini-revival pales before the mainstream interest in *Brown v. Board of Education*, which has been the theme not only of scholarly books and articles, but also of several docudramas shown on prime time television in the past five years.
ful.\textsuperscript{9} \textit{Plessy v. Ferguson} was a test case brought by several civil rights lawyers who had strong doubts about their chances for success in that period of reaction.\textsuperscript{10}

In our era, labor activists have proposed innovative theories of employee property and contract rights to avert plant closings, although courts thus far have given these theories short shrift.\textsuperscript{11} Countless lawsuits challenged the constitutionality of the U.S. war in Indochina, with meager results.\textsuperscript{12} Lawyers for Haitian refugees sought to enjoin the Coast Guard's interdiction and return of Haitians, knowing that the Supreme Court was likely to uphold the government's policy.\textsuperscript{13} Gay rights lawyers are litigating the military's policy on homosexuals, despite their unlikely prospects for success in the Supreme Court.\textsuperscript{14}

Why study these losing efforts? Of course each case or campaign has some historical significance. But more importantly, these losing cases illuminate a radical perspective on the relationship between law, politics and history.

Traditional public interest litigation relies on political action to create a favorable climate for court victory and to implement that victory. Politics is thus a necessary predicate to the courtroom drama. In many losing efforts, however, the relationship is reversed: the primary point of the cases is to inspire political action. Litigation may serve to legitimate a political movement, to publicize the issues raised by that movement, and perhaps to spur political action. These cases thus illustrate the role of law not merely in adjudicating disputes between parties, but also in educating the public.\textsuperscript{15}


\textsuperscript{10} See Otto H. Olsen, \textit{The Thin Disguise: Turning Point in Negro History A Documentary Presentation} 61, 63-64 (1967).

\textsuperscript{11} See Staughton Lynd, \textit{The Fight Against Shutdowns: Youngstown's Steel Mill Closings} (1982); \textit{see also} Local 1350 United Steel Workers v. United States Steel Corp., 492 F. Supp. 1 (N.D. Ohio 1980), aff'd, 631 F.2d 1264 (6th Cir. 1980); Charter Township of Ypsilanti v. General Motors Corp., 506 N.W.2d 556 (Mich. Ct. App. 1993). These cases are discussed \textit{infra} at Section III.D.

\textsuperscript{12} See generally Anthony A. D'Amato & Robert M. O'Neil, \textit{The Judiciary and Vietnam} 11, \textit{passim} (1972) (chronicling "the persistent reluctance of the courts to reach and decide constitutional challenges to the Indo-China War").


\textsuperscript{14} See Stephen Labaton, \textit{No Easy Path for Legal Assault on New Gay Policy}, \textit{N.Y. Times}, July 25, 1993, at A22 (describing conviction that chances of winning the military cases are not as great as in other areas, but that challenges still had to be made). Of course, the religious right has also sought to litigate very difficult cases against what they see as unjust and even murderous governmental policies, most prominently in the abortion arena.

Litigators of certain losing cases challenge the typical conception of a lawyer. Even the public-interest, law-reform variety of lawyer ordinarily aims to win her cases. The traditional lawyer seeks to win some judgment for her client, the law reform litigator to achieve some structural change through a successful court challenge. But many of the litigators in these losing efforts understood from the outset, or at least by the time they reached the Supreme Court, that winning would be difficult if not impossible. They believed they had justice and the law on their sides and hoped the courts would agree. However, the social and political contexts of these challenges made success highly improbable. They persevered because their purposes were broader than victory alone. They were speaking to the public, not just to the Court. Even more importantly, they were speaking to history.

The fundamental significance of these aspirational cases lies not in their inversion of the roles of law and politics, but in their radically different view of the meaning and nature of law. They represent a prophetic vision of law, stemming from the Old Testament prophets such as Amos who viewed justice as "a fighting challenge, a restless drive." To understand this genre of litigation one must regard law as a process of struggle rather than a collection of substantive rules or "mere norm[s]." Law, under this view, arises from the clash between the state seeking to enforce its rules and the activist communities seeking to create, extend, or preserve an alternative vision of justice.

The key prophetic legal symbol is not the traditional scales of justice, connoting the calm, detached, and neutral balancing of legal principles, but Amos's imagery of a turbulent, cascading river. The prophetic vision is dynamic; it is not a stagnant snapshot of present normative principles. The mobility of this vision allows law to move towards an imagined ideal. As Robert Cover put it, law links "a concept of a reality to an imagined alternative."

My interest in these losing cases was inspired by my participation in a quixotic effort, undertaken by the Center for Constitutional Rights in conjunction with other legal groups, to litigate U.S. mili-

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17 Id.
18 See generally Robert M. Cover, Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 9 (1983) (describing the world of law or "Nomos" as "a present world constituted by a tension between reality and vision").
19 "But let judgment run down as waters, and righteousness as a mighty stream." Amos 5:24 (King James).
20 Cover, supra note 18, at 9.
21 The Center for Constitutional Rights (CCR) was created in the 1960s by several nationally prominent civil rights lawyers and maintains offices in New York and Mississippi. The organization has litigated a broad array of civil rights, voting rights, civil liberties, and international human rights cases over the past two decades. Some of the CCR's important cases include: Eichman v. United States, 496 U.S. 310 (1990) (successfully challenging
tary and economic intervention abroad during the Reagan and Bush presidencies. These public interest lawyers challenged the U.S. government's dispatch of military advisors and aid to the El Salvadorian government,22 covert war against Nicaragua,23 prohibition of travel to Cuba,24 embargo against Nicaragua,25 invasion of Grenada,26 and, finally, President Bush's threat to use U.S. troops against Iraq without first obtaining congressional authorization.27 Many of the lawyers who worked on these cases saw themselves as the legal arm of a broader political movement to oppose U.S. intervention abroad and to support Third World revolutions.28

Our legal team employed a variety of strategies. At times we relied on narrow, legalistic arguments.29 Other challenges raised much broader claims.30 Some lawsuits requested declaratory relief not directly impinging on U.S. foreign policy.31 In other cases, we asked the

flag-burning statute); Texas v. Johnson, 491 U.S. 397 (1989) (same); Harris v. McRae, 448 U.S. 297 (1980) (challenging denial of medicaid funding to poor women for medically necessary abortions); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (establishing principle that torture committed by foreign governmental official violates international law and is actionable in U.S. courts).


28 Martha Minow has suggested that a tension exists between the role of legal advisor and the position of a comrade. Martha L. Minow, Breaking the Law: Lawyers and Clients in Struggles for Social Change, 52 U. Pitt. L. Rev. 723, 747 (1991). But see David Luban, Conscientious Lawyers for Conscientious Lawbreakers, 52 U. Pitt. L. Rev. 793, 800 (1991) (arguing that a lawyer can serve as both comrade and legal advisor). My colleagues at the CCR and I functioned as both members of and lawyers to the anti-interventionist movement and felt the same conflicts about the restraints of the legal system that our clients did.


courts to enjoin U.S. threatened or ongoing military adventures abroad.\textsuperscript{32}

We were spectacularly unsuccessful in court. With a few exceptions,\textsuperscript{33} we lost every case we litigated. We did come close to winning several major cases. A panel of the First Circuit Court of Appeals unanimously enjoined the Reagan Administration’s prohibition on travel to Cuba, but the Supreme Court reversed in a five-to-four decision.\textsuperscript{34} A district court ordered a preliminary investigation of the President, Secretary of State, and CIA Director to determine whether these individuals had violated criminal laws by aiding the contras attacking Nicaragua.\textsuperscript{35} The Ninth Circuit Court of Appeals reversed on jurisdictional grounds.\textsuperscript{36} The D.C. Circuit Court of Appeals struck down President Reagan’s pocket veto of a statute requiring a presidential certification that human rights in El Salvador had improved before U.S. aid could continue, but the case became moot while pending before the Supreme Court. In the end, judicial power was never exercised to prevent U.S. intervention against a foreign nation.

Rethinking whether these cases served any useful purpose has led me to fluctuate between self-congratulatory optimism and despair. One hundred years ago, Albion Tourgee, the lawyer who argued for Homer Plessy before the Supreme Court, agonized over the same issues. In a best-selling autobiographical novel entitled \textit{A Fool’s Errand}, Tourgee argued that an individual is often both a fool and a genius, with only history’s thin line separating the two.\textsuperscript{37} A fool differs from his fellow humans in that “he sees or believes what they do not, and consequently undertakes what they never attempt.”\textsuperscript{38} However, social acceptance of the fool’s vision alters his status: “It is success alone that

\textsuperscript{32} \textit{See}, e.g., \textit{CUSCLIN v. Reagan}, 859 F.2d 929 (D.C. Cir. 1988). \textit{See infra} notes 469-94 and accompanying text.

\textsuperscript{33} \textit{Linder v. Calero Portocarrero}, 747 F. Supp. 1452 (S.D. Fla. 1990), \textit{rev’d}, 963 F.2d 332 (11th Cir. 1992); \textit{Veterans Peace Convoy, Inc. v. Schultz}, 722 F. Supp. 1425 (S.D. Tex. 1989). The \textit{Veterans Peace Convoy, Inc.} case presented a relatively narrow issue of whether certain shipments to Nicaragua were humanitarian supplies that did not require a license. In \textit{Linder v. Calero Portocarrero} we did not sue the U.S. government, but the leaders of the contras attacking Nicaragua. The district court nevertheless dismissed the case as presenting a non-justiciable political question, but the court of appeals reversed on a fairly narrow issue. We are currently involved in pre-trial discovery.


\textsuperscript{36} \textit{Dellums v. Smith}, 797 F.2d 817 (9th Cir. 1986).

\textsuperscript{37} \textit{Albion W. Tourgee, A Fool’s Errand} (John Hope Franklin ed., 1961). Tourgee was not originally identified as the author of the book, but chose to identify the writer as merely “One of the Fools.” Tourgee’s book was one of the bestsellers of its day. \textit{Id.} at xxi (Total sales may have reached 200,000 copies, a “remarkable” figure for the 1880s.).

\textsuperscript{38} \textit{Id.} at 5.
transforms the credulity of folly into acknowledged prophetic prevision.\textsuperscript{39}

I have used the term prophetic litigation to describe the class of litigation represented by \textit{Plessy v. Ferguson} or \textit{Bradwell v. Illinois}. But perhaps a more apt description would be foolhardy litigation. This Article attempts to explore the tension between these two descriptions. This tension reflects a basic conflict between human aspiration and current reality: in psychological terms "between what one is and what one should become,"\textsuperscript{40} or in a social sense, between what our society is and what it might be. As Robert Browning put it, "Man's reach must exceed his grasp, or what's a heaven for?"\textsuperscript{41} Prophetic (or foolhardy) litigation directly straddles the fault line between our reach and our grasp.

Jack Greenberg and others in the law-reform community argue that losing cases may be often counterproductive in that they expend time and energy better spent elsewhere and result in bad legal precedents.\textsuperscript{42} Over the last decade or so, I have at times thought that these commentators may be right. My litigation experience led me to study other losing efforts in American history in search of lessons to apply to my own experience, as well as some responses to the arguments Greenberg and others have raised. The main lesson I draw is that nonfrivolous litigation that reflects and articulates the aspirations and demands of significant political or social movements should generally be pursued—even if the case is ultimately unsuccessful. Litigation is but one means to aid political and social movements and to nurture a culture of constitutional struggle. This Article examines the question of how to litigate these cases, and not merely whether to do so.

The Article starts by defining prophetic litigation and discussing generally both its importance and its contradictions. Parts I and II present a general framework gleaned primarily from an analysis of history. Part III contains narratives of prophetic litigation and prophetic litigators in American history. Part IV seeks to apply the lessons of the first three sections to the cases challenging U.S. intervention in Central America in the 1980s. This section is more cautious and ques-

\textsuperscript{39} Id. at 6.
\textsuperscript{40} VIKTOR E. FRANKL, \textit{MAN'S SEARCH FOR MEANING} 127 (1984).
\textsuperscript{41} Robert Browning, \textit{Andrea del Sarto}, in II \textit{THE OXFORD ANTHOLOGY OF ENGLISH LITERATURE} 1929, at l. 97-98 (Lionel Trilling & Harold Bloom eds., 1973). I am indebted to Victor Rabinowitz for directing me to this quotation by Robert Browning.
tioning because I believe these cases had both Kafkaesque and prophetic elements. Although I conclude that many of the losing cases I helped litigate were useful, lingering doubts still remain. This Article thus fluctuates between questioning and defending the cases it describes.

The narratives of losing cases preserve the versions of legal meaning created by groups outside the mainstream of American law. Retelling these stories is critical to "an outsider's jurisprudence,"43 which locates justice not merely in certain substantive goals, but more importantly in the history of struggle against oppression and injustice. Indeed, these "litigation narratives" are useful as one method—in addition to personal stories, speeches, and pamphlets—of depicting an outsider group's "law" and culture of struggle. This Article constitutes a part of the recent, growing tradition in legal scholarship that views narrative as essential to capture the legal meaning of cultures and groups that have been excluded from traditional histories of law.44

I

Prophetic Litigation

American political movements throughout the nineteenth and twentieth centuries have often turned to constitutional and higher-law arguments to articulate their deeply felt demands. The resulting litigation is best described as prophetic, a term I use with some reluctance. In part, my reluctance stems from the jarring juxtaposition of litigation and prophecy, for objective, legal argumentation was alien to the prophets of the Old Testament.45 Moreover, the central experience of the biblical prophets was their intense, personal engagement with God, an experience not generally shared by the litigators I discuss here.46 My reluctance to use the term "prophetic" also stems from the increasing usage of the term in modern parlance to describe

43 The expression comes from Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2323-26 (1989) (describing outsider jurisprudence as relying on narratives); see also William N. Eskridge, Gay Legal Narratives, 46 Stan. L. Rev. 607, 608-09 (1994) (discussing outsider jurisprudence). Most narrative scholarship focuses on stories about the people who make history, but are excluded from case reports. This essay focuses on another form of narrative: narratives of litigation that have been excluded from mainstream jurisprudence.


46 See Jay M. Feinman, Priests and Prophets, 31 St. Louis U. L.J. 53, 57 (1986) (reflecting upon a similar uneasiness in describing members of the Critical Legal Studies Movement as acting in a prophetic tradition).
a broad range of personalities and activities bearing only superficial resemblance to the prophetic model of the Old Testament. For example, Supreme Court justices and certain judicial decisions have been called prophetic.47 This contemporary proliferation of the term associates it with a seer who peers into the future, a usage found in Alan Barth's description of great dissenters as "prophets with honor."48

My use of the term "prophetic" does not focus on this clairvoyant aspect of prophecy, although some of the litigators I discuss in Part III were eventually vindicated by history.49 Rather, I focus on the prophet as a radical social critic, who appeals to tradition and exhorts the population to replace the present unjust reality with a just and equal future. The phrase "prophetic litigation" emphasizes the vision of justice as a continual struggle—rather than as a set of legal norms or procedures—and thus provides insight into the fundamental meaning and significance of these cases. Moreover, the cases described in Part III of this Article offer several analogies to the message and practice of the biblical prophets.

Prophetic litigation is defined by several important characteristics. First, like the Old Testament prophets, the lawyers described in Part III all harshly criticized the callousness and injustice of the social order.50 They rejected the solution of minor improvement in favor of total redemption:51 ending slavery, segregation, women's second-class citizenship, or absolute managerial rights over employees. These liti-

47 Alan Barth, Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court (1974); see also Michael J. Perry, Morality, Politics, and Law 139, 147-48 (1988). Perry's view here is somewhat more nuanced than in his early work, in that he does not claim that judges are moral prophets. Rather, he sees them as occupying an institutional position that allows them to play a "prophetic role." Id. at 147. For a view that the term "prophetic" does not aptly describe Supreme Court justices, even those visionaries on the Court, see Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 24 (1984), and Mark V. Tushnet, Legal Realism, Structural Review, and Prophecy, 8 U. Dayton L. Rev. 809, 828-30 (1985). In addition, Professor Jay Feinman's interesting and convincing article argues that the critical legal studies movement's critique of mainstream legalism can be analogized to the prophetic alternative to dogmatic religion. Feinman, supra note 46, at 54.

48 Barth, supra note 47, at 3, 8 (Dissents were, "in a true sense of the term, prophetic, foreseeing changes in the American political and economic environment.").

49 Levi A. Olan, Prophetic Faith and the Secular Age xii (1982) ("The Hebrew prophets were not soothsayers... The validity of the prophet's message did not depend upon the fulfillment of his [specific] prediction... .")

50 See Walter Brueggemann, The Prophetic Imagination (1978) (Old Testament prophets raised fundamental criticism of dominant culture); Heschel, supra note 16, at 17 ("[The] purpose of prophecy is to conquer callousness.").

51 Heschel, supra note 16, at 181 ("Others may be satisfied with improvement, the prophets insist upon redemption.").
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Gators postulated the unredeemed character of their realities and the fundamentally different orders of reality that should emerge.52

Second, these litigators were—like the Israelite prophets—deeply and passionately engaged in their communities.53 All were social activists whose litigation arose out of crucial contemporary struggles: "In a sense, the calling of the prophet may be described as that of an advocate or champion, speaking for those who are too weak to plead their own cause."54 Prophets are not detached, impartial observers of reality. The prophetic model "is characterized by the principle of solidarity."55 Indeed, the prophetic litigator's engagement and solidarity with an oppressed community distinguishes him from a judge, whose constitutional role requires more detachment from social activism.56

These litigators earned scorn in their communities as a result of their passionate criticisms of injustice. They were regarded as mad, deluded fools, a description also widely attached to the biblical prophets.57 That their voices were not heard by the elite or even a majority of Americans and that their causes were likely to be defeated in the courts did not dissuade these litigators, for a prophet's duty is to "speak to the people, 'whether they hear or refuse to hear.'"58

Third, both the prophetic litigators and the biblical prophets developed their symbols, metaphors, or legal theories for the purpose of exhorting and energizing the population. The prophets' "prominent theme [was] exhortation, not mere prediction."59 The prophet employs an alternative consciousness that can cut through despair and "energize the community to fresh forms of faithfulness and vitality."60

52 See Cover, supra note 18, at 33-40 (describing redemptive constitutionalists).
53 See J. Severino Croatto, Exodus: A Hermeneutics of Freedom 40 (1981) ("[P]rophets place themselves in confrontation with the power structure and almost always from within the community or the people."); Michael Walzer, Interpretation and Social Criticism 81 (1987) (Prophets are "rooted . . . in their own societies.").
54 Heschel, supra note 16, at 204-05.
55 J. Lindblom, Prophecy in Ancient Israel 344 (1962); see also Walzer, supra note 53, at 80 (the prophets are committed to the principle of solidarity).
57 The prophet is a fool, the man of the spirit is mad, Because of your great iniquity And great hatred. Hosea 9:7 (New Oxford Annotated Bible (1977)).

Jeremiah lamented that he had "become a laughing stock all the day; every one mocks me." Jeremiah 20:7 (New Oxford Annotated Bible (1973)); see also Heschel, supra note 16, at 18 ("'The prophet bears scorn and reproach.' He is stigmatized as a madman by his contemporaries.") (quoting Jeremiah). The abolitionist litigators were often discussed as extremists. Cover, supra note 8, at 213.
59 Heschel, supra note 16, at 12.
60 Brueggemann, supra note 50, at 62.
Although the prophets are probably most remembered for their message of doom, they communicated hope as well.\textsuperscript{61} "What saved the prophets from despair was their messianic vision..."\textsuperscript{62} Similarly, these constitutional litigators developed their legal theories in order to inspire and galvanize the populace.

Fourth, both the biblical prophet and the "prophetic" constitutional litigator appeal to tradition to mediate the tension between an unjust present and a redemptive future.\textsuperscript{63} The prophet's task is to "reactivate out of our historical past symbols that always have been vehicles for redemptive honesty."\textsuperscript{64} So too, the constitutional arguments of the abolitionists, the nineteenth century women's movement, the anti-segregationists and the labor movement all appealed to symbols culled from the American tradition. Interestingly, all four struggles—with the possible exception of the labor movement—relied on the same sources: the Republican tradition in American law, the Declaration of Independence, and the jurisprudential concepts of natural law and natural justice.

That the radical constitutional lawyers and Old Testament prophets relied on tradition might at first seem perplexing, for our modern age identifies appeals to tradition with conservatism. Yet, as Professor Cornel West—who is usually associated more with the prophetic tradition than with the legal one—notes, a "role of progressive lawyers is...to preserve, recast and build on the traces and residues of past conflicts coded in laws."\textsuperscript{65} The radical lawyer can be a "politically engaged narrator"\textsuperscript{66} who preserves the memory of progressive victories of the past "in the law of a society whose link with the past is tenuous."\textsuperscript{67} This prophetic legal practice fosters tradition not to maintain social stability, but to facilitate threats to the legal order. Memory can be subversive, as both the prophets of the Old Testament and the legal prophets of the nineteenth century recognized.

Finally, prophetic litigation is an extremely creative enterprise, involving the creation of new legal meaning out of an inspired inter-

\textsuperscript{61} Heschel, supra note 16, at 12.
\textsuperscript{62} Id. at 185.
\textsuperscript{63} Abraham Heschel argues that the prophets regarded the problem of history "as a tension between what happens now and what may happen next." Heschel, supra note 16, at 173.
\textsuperscript{64} Brueggemann, supra note 50, at 49 (asserting that the biblical prophets did not generally invent new symbols, but reactivated ancient motifs and ideals). Michael Walzer argues that "[p]rophecy aims to arouse remembrance, recognition, indignation, repentance." Walzer, supra note 53, at 75. The term "repentance" derives from a Hebrew word meaning "to turn, to turn back, to return." Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
pretation of society's traditions and symbols. The prophetic litigator functions like an artist, driven by a heightened sensitivity to reality and an inspired vision of future redemption based on recapturing traditional ideals. The prophetic litigator strains to its breaking point the tension between the world as it is and as it ought to be. Expressing and grappling with this conflict is often at the heart of the creative process for the artist, the poet, the prophet, and the prophetic litigator.

These analogies to the prophetic model pale, however, before a crucial difference: at the core of the Old Testament prophet's experience was a direct, intense, passionate engagement with God. Although none of the litigators discussed in this Article had that engagement with God, each had a spiritual perspective that the "impossible must be imagined if it is to be realized." Spirituality resides in the struggle against injustice and in the identification with the suffering of the oppressed. These litigators had faith in the righteousness of their causes. Albion Tourgee, the lawyer for Plessy, was a deeply religious man. He believed that both foolish lawyers and prophets are motivated by a "simple undoubting faith" that leads them to believe, in spite of overwhelming evidence to the contrary, that the commu-

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68 Max Weber once noted that "[p]rophets are the only ones who have taken a really consciously 'creative' attitude toward existing law; only through them has new law been consciously created." Max Weber, Law in Economy and Society 320 (1954), quoted in Perry, supra note 47, at 295 n.112; see also David Cole, Agon at Agora: Creative Misreadings in the First Amendment Tradition, 95 Yale L.J. 857, 859 (1986) (analogizing "strong," creative Supreme Court opinions to poetic "misreadings" of tradition).

69 Levi Olan, Prophetic Faith and the Secular Age 9 (1982) (stating that artist and prophet share an awareness of reality "deeper than that which our eyes and our capacities to weigh and measure can grasp, the reality in back of the shadows").

70 I am indebted to the late Robert Cover for the insight that law is the bridge between what is and what ought to be. Cover, supra note 18, at 9.

71 Derrick Bell has noted that the main creative urge of both the artist and the individual challenging injustice is the "expression of self through a medium that communicates a view of what is against a background of what might be." Derrick Bell, Commencement Address at the University of Pittsburgh Law School (May 28, 1994) (on file with author).

72 Joel Kovel, History and Spirit: An Inquiry into the Philosophy of Liberation 13 (1991). Kovel tells the story of an old Spanish anarchist who, when confronted with the fact that his ideals were beautiful but unrealizable, stated: "Of course it is impossible to realize them. But don't you see that everything that is possible today, is worthless." Id. Lenn Goodman articulates a point similar to Kovel's: "Just as human strivings inform our vision of the messianic future, so the conception of that future gives orientation to those strivings and imparts a meaning to them even when they fail of their proximate goals." Lenn E. Goodman, On Justice: An Essay in Jewish Philosophy 165 (1991).

73 See Kovel, supra note 72, at 200-02 (discussing the spiritual appeal of Augusto Cesar Sandino, the El Salvadoran revolutionary leader). Kovel, like Viktor Frankl, argues that the "value of suffering is downgraded these days, in the feel-good culture of late capitalism." Id. at 253. For him, soul is "the seat of suffering." Id.

74 Tourgee, supra note 37, at 6.
nity can mend its ways and be redeemed. 75 Both fools and prophets live lives “full of the poetry of faith.” 76

Yet the prophetic litigator cannot draw legitimacy from God. His or her reliance on a judicial forum to argue the case constitutes a significant departure from the experience and practice of an Old Testament prophet. The litigator must convince the judge that the current law supports his or her claim and yet also must articulate a vision of a hypothetical, just world. This conflict is present to a much lesser degree for the prophet whose pronouncements stem from an engagement with God. The methods of working out the tension between the impulse to make narrow legalistic arguments that might convince a conservative court and the desire to argue a broad prophetic critique of reality forms a central theme of the litigation narratives I describe in Parts III and IV of this Article. To the extent that litigators focus too strongly on narrow legal mechanisms for winning their cases, they can lose their prophetic focus and get drawn into a Kafkaesque, legalistic maze. The anti-intervention litigators of the 1980s at times were drawn down this path. On the other hand, if litigators eschew current law and focus too heavily on prophetic critique, they may fade into utopian irrelevance. Some of the abolitionist litigators faced this problem.

Litigation containing the foregoing “prophetic” characteristics represents an important tradition in American law; the historical cases I discuss in Part III are but a subset of that broader tradition. The best contemporary example of prophetic litigation is the recent Haitian refugee litigation. 77 That litigation radically critiqued U.S. policy toward Haitian refugees, was directly connected to a community struggling against oppression, was primarily aimed towards inspiring political struggle, relied on an American and international tradition of sheltering political refugees, and utilized creative tactics, strategies, and legal arguments. 78

75 Id. In his book, Tourgee characterized white supporters of the anti-segregation movement in three groups: “[M]artyrs, who were willing to endure ostracism and obloquy for the sake of principle; self-seekers, who were willing to do or be any thing and every thing for the sake of power, place, and gain; and fools, who hoped that in some inscrutable way the laws of human nature would be suspended, or that the state of affairs at first presenting itself would be but temporary.” Id. at 134-35.
76 Id. at 5.
Although Brown v. Board of Education\textsuperscript{79} also meets the criteria set forth above, the NAACP focused much more heavily on the court battle than on the educational aspects of the litigation. This focus might be attributable to the winnable nature of that case. Indeed, most prophetic litigators, like the prophets of old Israel, fight losing battles, with redemption arriving only decades or even centuries later, if ever. The fact that most of these cases lose raises the question whether this litigation has justly been consigned by mainstream scholarship and legal history to relative oblivion.

II

THE VALUE OF PROPHETIC LITIGATION: THE CULTURE OF LEGAL STRUGGLE

Traditional legal scholarship has viewed the law as a set of normative rules and procedures adopted by the state to govern society. From the perspective of the mainstream vision of the law, losing cases are virtually insignificant. They do not change legal rules. The mainstream attitude toward prophetic litigation parallels the critique of dissenting opinions proffered by some legal philosophers: "[I]t has no consequences within the system: no one's rights or duties are thereby altered."\textsuperscript{80}

Moreover, while initially creating public debate and controversy, losing litigation ultimately may have a negative effect on public discourse: the court's decision legitimates the challenged policies in the public's mind. Thus, it is easy to conclude that these cases have failed. As one historian has noted, the heroic, ingenious efforts of constitutional litigators have "failed frequently enough that historians may wonder whether clients might not have sought better weapons in struggles for respect and legitimacy."\textsuperscript{81}

These losing efforts sometimes provoke a negative reaction, even among those sympathetic to the plaintiff's substantive goals. The objections within the law-reform community are twofold. Some commentators have argued that the main result of these cases is to create bad legal precedent, and therefore, such cases generally "should not be brought if they are likely to be lost."\textsuperscript{82} The second objection deplores the time and energy wasted on these cases that could better be spent on more productive political activities.\textsuperscript{83}

\textsuperscript{79} 347 U.S. 483 (1954).
\textsuperscript{82} Greenberg, \textit{supra} note 42, at 349.
\textsuperscript{83} Human Rights Conference, \textit{supra} note 42, at 145.
Litigators of losing causes are likely to feel morally and ethically obligated to challenge injustice regardless of whether their actions will be successful. The act of challenging injustice gives meaning to and defines that litigator’s life; she does not undertake the calculus of a tort attorney as to the likely outcome of the case. Litigation is merely the lawyer’s familiar medium for expressing outrage at society’s callousness.

Yet alongside this moral dimension lies a complex set of justifications for prophetic litigation. This Article proffers three main rationales for these cases. The first rationale—often the lawyer’s primary motivation for initiating the litigation—is instigation of political activity and influence upon public debate. The second justification—usually not actually motivating the lawyer—is that the litigation speaks to future generations and that, although the case may lose in court, its arguments may be recognized as law later on. The third rationale is the least obvious yet most valuable contribution of this kind of litigation—the construction of a culture of legal struggle.

A. Litigation as Political Agitation

The tactic of framing radical demands in terms of established rights in order to inspire political action has a long history. “[T]hat is often from within [the] very rhetoric of law,” wrote E.P. Thompson, “that a radical critique of the practice of society is developed.” The belief in a minimal “right to subsistence” was a central factor in many feudal peasant revolts. British radicals of the eighteenth century developed a critique of society that exploited the rhetoric of rights. “[O]ne of the most successful elementary forms of mobilization . . . is the claim for the return of rights believed to have been illegally removed or denied.” History repeatedly has demonstrated the “immense symbolic power of an emancipatory vision of natural rights.” From this perspective, the appropriateness of a given legal strategy

84 Bell, supra note 71, at 10. For the noted psychoanalyst Viktor E. Frankl, the meaning of life for many people lies in the dignity with which they confront injustice or tragic situations. Frankl, supra note 40, at 78, 114-17. Frankl deprecates modern society’s conflation of being valuable with achieving one’s goals and being successful and happy.

85 Justice William Brennan has proffered a similar explanation for his repeated dissents on capital punishment. For Brennan, these dissents are repeated not for their usefulness but as expressions of his own conscience. These dissents state: “Here I draw the line.” William J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427, 437 (1986).


88 Thompson, supra note 86.


90 Hartog, supra note 81, at 1016.
should be assessed not solely by the likelihood of success in court, but also by the role it plays in advancing a popular movement.\textsuperscript{91}

In some of the cases I discuss, the litigation attracted significant media attention and invoked a broad popular response. The women’s movement in the 1870s, and to a lesser extent the plant closing movement over 100 years later, effectively energized people around the country.\textsuperscript{92} Both cases were brought in political climates that were, if not sympathetic, at least not totally hostile, and their invocations of rights rang true to substantial sections of society.\textsuperscript{93}

When, however, either the legal theory seems implausible to the overwhelming majority of the population, or the political climate is very hostile, litigation fails to provoke much reaction. The abolitionist lawyers faced the first problem, Plessy’s lawyers the second.\textsuperscript{94}

Some courts have questioned whether litigation brought for the purpose of provoking public dialogue and debate is legitimate. For example, the District of Columbia Court of Appeals imposed Rule 11 sanctions on the attorneys for fifty-five Libyan citizens and residents who sued for damages resulting from the 1986 United States air strike on Libya.\textsuperscript{95} Although the district court found that plaintiffs’ counsel “surely knew” that “the case offered no hope whatsoever of success,” and that it had been “brought as a public statement of protest” against President Reagan’s actions,\textsuperscript{96} it declined to impose Rule 11 sanctions because federal courts “serve in some respects as a forum for making such statements, and should continue to do so.”\textsuperscript{97} The court of appeals, however, held that Rule 11 sanctions were warranted because “[w]e do not conceive it a proper function of a federal court to serve as a forum for ‘protests.’” \textsuperscript{98}

\textsuperscript{91} See Arthur Kinoy, Rights on Trial 71 (1983).
\textsuperscript{92} See infra parts III.B, D.
\textsuperscript{93} For example, in the case of voting rights, President Grant and a senator from New York were sympathetic to Susan B. Anthony and her compatriots. See infra text accompanying note 236.
\textsuperscript{94} At times, losing cases will promote political discourse that can affect political decisions by government officials. When the case attracts significant public attention, public officials are often forced to respond irrespective of the outcome in courts. See Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2349, 2368-69 (1991) (describing transnational case that seeks to use litigation to spur the political process). For example, the New Jersey Slave Case lost in courts, but promoted a public discussion that resulted in the New Jersey legislature prohibiting slavery in that state. See infra notes 168-83 and accompanying text.
\textsuperscript{97} Id.
\textsuperscript{98} Saltany v. Reagan, 886 F.2d 438, 440 (D.C. Cir. 1989).
Commentators have criticized the court of appeals' decision. Yet even some forceful critics agree that courts do not exist as public forums. But as this Article demonstrates, from the early history of the American Republic onward, courts have been utilized by political movements to further public debate on important constitutional issues. Indeed, as one commentator noted, a "considerable amount of civil rights litigation" is in some sense a "public statement of protest." Courts are not merely forums to settle private parties' disputes, but can function, and have functioned, as forums in which broad public issues are debated, as attested by the enormous press coverage given to, and public fascination with, the Supreme Court.

The legitimacy of this type of litigation is thus not dependent on whether it attempts to speak to a broader public and spark political debate, but on whether the plaintiffs have a nonfrivolous legal claim. Although a party's motivation of provoking public debate will not legitimize an otherwise frivolous claim, neither will such motivation delegitimize a nonfrivolous lawsuit.

The parties in all the cases discussed in this Article had reasonable legal claims. Indeed, in our Central American litigation, existing law was often on our side. The reason that many of the cases discussed in this Article had little chance of success was the political and social climate in which they were brought, not the validity of the plaintiffs' legal theories. The argument that segregation by race violated the 14th Amendment was as "nonfrivolous" in 1890 as it was in 1950. It was the political climate in 1890 that made even counsel for Plessy realize the hopelessness of a favorable outcome in the Supreme Court, not the weakness of his legal argument. Similarly, our foreign affairs cases in the 1980s were brought on very sound legal grounds, and indeed, at times we won in the lower courts. In fact, we were often attempting to litigate the conflict between existing law and the courts' refusal to enforce that law.

100 D'Amato, supra note 99, at 706.
101 Tobias, supra note 99, at 119.
102 The recent Rule 11 amendments make clear that sanctions are not appropriate when a party's contentions "are warranted by existing law or by nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2); Proposed Amendments to the Federal Rules of Civil Procedure, reprinted in 146 F.R.D. 401, 580 (1993).
103 The Advisory Committee's notes to the 1993 Rule 11 Amendments provide guidance as to the meaning of nonfrivolous arguments for extensions, modifications, or reversal of existing law or for the creation of new law. A court should consider whether the litigant has support for its theories "even in minority opinions or law reviews" before determining that a position is frivolous. Fed. R. Civ. P. 11 advisory committee's note (1993).
The litigation described in this Article was brought to provoke public debate and agitation precisely because the attorneys and clients involved thought they had both justice and a correct interpretation of the law; yet, the courts were likely to be unsympathetic to their claims. The main aim of these litigations was to provoke enough debate and dialogue to force either the Court or Congress to support their perspective: litigation was but one tool to achieve that result.

B. Pentimentos of Law

Even when prophetic litigation loses in court, it often functions, like important dissenting opinions, as an appeal to future generations. These losing cases keep alive an oppressed community's vision of the law, which collides and interacts with the state's law, sometimes ultimately transforming the state's law, albeit decades, or even centuries later.

The view that losing cases, like dissents, do not affect legal rules, is ahistorical. To interpret the current normative order as fixed neglects the order's historical roots and potential for growth. However, law, like art, is best understood as consisting of layers of meaning embedded under the present normative reality. The pentimentos of law are the narratives of struggle throughout the centuries.

Justice Hughes argued: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Charles E. Hughes, The Supreme Court of the United States 68 (1928). Although at times a dissenting opinion can sway the majority, judges and commentators have generally concurred with Hughes that the main influence dissents have is on future generations. See, e.g., Harlan F. Stone, Dissenting Opinions Are Not Without Value, 26 J. Am. Judicature Soc'y 78 (1942) ("The dissenting opinion is likely to be without any discernable influence in the case in which it is written. Its real influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law."). Justice Brennan noted that often a dissent is "offered as a corrective—in the hope that the Court will mend the error of its ways in a later case." Brennan, supra note 85, at 430. The best dissents "seek to sow seeds for future harvest." Id. Justice Stanley Fuld of the New York Court of Appeals agreed with Justice Douglas that although "it may serve no immediate purpose in the case at hand, the dissent 'may salvage for tomorrow the principle that was sacrificed or forgotten today.'" Stanley H. Fuld, The Voices of Dissent, 62 Colum. L. Rev. 923, 928 (1962) (quoting William O. Douglas, The Dissent: A Safeguard of Democracy, 32 J. Am. Judicature Soc'y 104, 107 (1948)); see also Charles P. Curtis, Lions Under the Throne 75 (1947) (The dissent is a formal appeal by the court to the future.).

Scholars thus need to look beyond legal rules, by rediscovering forgotten narratives to find "what went unsaid in the formal legal texts." Martha Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, 1985 Wis. L. Rev. 819, 826; see also Hartog, supra note 81, at 1029-33 ("Largely banished from the domain of constitutional history have been the activities and beliefs of all who were not official interpreters.").

Artists use the term pentimento to refer to a change the painter has made in the painting, which she then covers with a new layer of paint. As the paint ages, the covering pigment sometimes becomes transparent, and the lower layer shows through, revealing the artist's first statement and subsequent change. The term is derived from the Italian word
“Every 'renaissance,' every 'reformation' reaches back into an often distant past to recover forgotten or neglected elements with which there is a sudden sympathetic vibration, a sense of empathy, of recognition.” Brown v. Board of Education cannot be fully understood without uncovering the efforts of Charles Houston, Albion Tourgee, and the radical abolitionists—all of whom contributed in some way to the Brown narrative—and Brown itself spurs a narrative of enforcement and disappointment that continues today. Some of these layers might have directly influenced the decision in Brown: Charles Houston’s strategy and dedication in the 1930s and 1940s comes to mind. Other layers might have a more indirect, theoretical link, such as the radical abolitionist theory of equality rediscovered as an important aspect of the meaning of the Fourteenth Amendment. Some layers might influence the path of decision by a circuitous and fortuitous route, like Justice Robert Jackson’s rediscovery of and fascination with Albion Tourgee’s brief in Plessy during the course of the Supreme Court’s deliberation over the constitutionality of segregation in the 1950s. Still other layers might be totally obscured beneath more recent painting.

Prophetic litigation arises out of an oppressed community and reflects that community’s legal vision and aspirations. When the state’s courts reject that legal vision, the community—if it is committed to its view—does not acquiesce in the court’s ruling, but rather continues to struggle through various channels to reverse the court’s interpretation. The losing litigation becomes a part of the community’s understanding of its view of the law and a reflection of the community’s commitment to struggle for its view. The community’s law exists in tension with the state’s law. The late Robert Cover argued that transformative—as well as sectarian—communities could maintain law independent from, and in opposition to, the state’s law. For Cover, “within the domain of constitutional meaning,” albeit not in the realm of social control, these communities “create law as fully as does the judge.” That law constantly jars with the dominant law, forcing the state either to adjust its law or to use force to repress the alternative law.


See infra notes 188-93 and accompanying text.


Cover, supra note 18, at 28.
A community's creation of its own law requires two key ingredients: narrative and commitment.\(^{112}\) "The narrative is a story of struggle between moral ideals and recalcitrant social reality."\(^{113}\) Narratives represent a community's traditions in which its understandings of the law are encoded.

Losing prophetic litigation plays a dual role in creating a community's legal narratives. First, the litigation itself represents a narrative of resistance, usually intertwined with a broader political and social struggle. Our Central American litigation was a secondary, but important, part of the struggle against U.S. intervention in that region.\(^{114}\) The fugitive slave litigation represented a narrative of resistance—intertwined with the heroic narratives of escape, demonstrations, and election campaigns—of the abolitionist movement. The stories of these litigation efforts, along with other narratives, contain the legal principles, visions of justice, and social contexts that constitute a movement's law, just as the decisions of the courts serve that function for the state.

Second, prophetic litigation results in judicial decisions that record the legal theories and factual narratives of the community. At times, the court merely describes the complaint and then summarily dismisses it, as happened in some of our Central American litigation.\(^{115}\) At other times, the judicial decision, while denying relief, vividly records the narrative of injustice and resistance and even expresses sympathy.\(^{116}\) In other cases, the court engages and analyzes the movement's argument and concludes that no right has been violated.\(^{117}\) And sometimes—Plessy being the paradigm—the case results in a ringing dissent that writes into the United States Reports the arguments and even the phrases proffered by the plaintiffs. In all of these cases, some record exists to which future generations can look.

Litigation—even losing litigation—can thus be an important forum for a narrative development that is central to the creation of a redemptive community's alternative legal meaning. Yet losing litiga-

\(^{112}\) Id. at 7; see also Susan Koniak, The Law Between the Bar and the State, 70 N.C. L. Rev. 1890 (1992) (explicating Cover's thesis and applying it to professional ethics).

\(^{113}\) Paul W. Kahn, Community in Contemporary Constitutional Theory, 99 Yale L.J. 1, 61 (1989).

\(^{114}\) The recent Haitian litigation is an example of prophetic litigation that, at least for one year, became the primary narrative in an overall struggle against the U.S. government's Haitian refugee policy. Other components of that narrative were the refugees' own stories, the work of the refugee advocacy community in the U.S. to publicize the refugees' plight, the civil disobedience demonstrations against the U.S. government's policy, and President Aristide's protests against U.S. policy.

\(^{115}\) See infra part IV.A.

\(^{116}\) See, e.g., the Youngstown litigation described infra notes 332-56 and accompanying text.

tion may also debilitate that process, for the narrative’s ending is usually a judicial decision that attempts to destroy the very legal meaning the community seeks to create.\textsuperscript{118} From this perspective, prophetic litigation, as a mechanism of creating alternative legal meaning, may be regarded as self-defeating. A better strategy would be to utilize the political arena and not to resort to the courts. Even if defeats were suffered in the political process, those losses would not as definitively cut off development of the law.

Yet even when a dispositive court decision rejects the substantive legal meaning the redemptive movement seeks to create, the movement still leaves behind a narrative of resistance. The lesson learned by future generations is not that the substantive goal was lost, but that a movement and their lawyers found the courage, energy, and creativity to resist injustice in the face of overwhelming odds. As I will discuss in the next section, that narrative of struggle can be more important than the substantive doctrinal development of legal meaning.

Moreover, judicial decisions, including those of the Supreme Court, do not always destroy a community’s vision of the law. The \textit{Plessy} decision did not convince the African-American community that separate but equal was consistent with the Fourteenth Amendment. Rather, the decision served as a symbol of injustice that Charles Houston and others could rally people to fight to overturn. The women suffragists of the 1870s did not accept the dominant constitutional ideology after their defeat in the Supreme Court, even as they refocused their efforts in the legislatures. In 1878, Elizabeth Cady Stanton still contended that the Fourteenth Amendment had “no settled interpretation.”\textsuperscript{119} Similarly, the Vietnam War cases did not deter us in the 1980s from resorting to the courts to fight U.S. intervention abroad. Instead, they were symbols of resistance to the activist community. Cover’s work recognizes that court decisions both destroy the legal meanings of communities who acquiesce in the superior power of the state and “escalate the commitments of those who remain to resist.”\textsuperscript{120}

Litigation is also a mechanism by which the community may demonstrate its commitment to its own narrative. Faced with state

\textsuperscript{118} \textit{See} Mark De Wolfe Howe, \textit{The Garden and the Wilderness} 3-5 (1965). I must remind you however, that a great many Americans . . . tend to think that because a majority of the justices have the power to bind us by their law they are also empowered to bind us by their history. Happily that is not the case. Each of us is entirely free to find his history in other places than the pages of the United States reports. Howe thus suggests that the narratives of redemptive or insular communities normally develop outside of official sources, particularly the courts.

\textsuperscript{119} Hartog, \textit{supra} note 81, at 1032.

\textsuperscript{120} Cover, \textit{supra} note 18, at 60.
conduct that it finds fundamentally wrong, the community can either acquiesce in the state's view of the law or develop ways to maintain its own vision of law. Cover discusses civil disobedience and other methods of struggle that subject the group to the state's violence as strong methods of demonstrating the group's commitment to its view of the law.\textsuperscript{121} Often, however, a group develops modes of resistance that require some accommodation (staying out of jail, for example) while still challenging the state's law.\textsuperscript{122} Litigation can be one of those modes.

Any complex and vibrant political movement offers a variety of forms of resistance to oppressive state policies. Civil disobedience or violence "is not the only way in which commitment operates to constitute law for a community."\textsuperscript{123} Opposition may be demonstrated through simple speech.\textsuperscript{124} The expenditure of time and emotional and physical energy involved in confronting the state also requires a commitment, even if the confrontation is not one that is likely to lead to violence.\textsuperscript{125} Demonstrating against U.S. policy and organizing friendship committees to send material aid to Latin American communities affected by U.S. policies helped to deepen commitment to the norms prohibiting U.S. intervention, but did not directly provoke state violence.\textsuperscript{126} Similarly, litigation entails a significant temporal and emotional commitment to an alternative vision of the law even though it conforms with the ruling regime's procedures for expressing dissent.

Litigation is thus a means of demonstrating commitment. For many people who dedicate their public lives to this form of struggle, it reflects a commitment that puts them outside of mainstream discourse and career paths. Many of the litigators described in Part III of this Article could have had more prominent careers if they were not

\begin{itemize}
\item \textsuperscript{121} \textit{Id.} at 52.
\item \textsuperscript{122} Groups such as the Quakers and the Amish create a "jurisprudence that orders the forms and occasions of confrontation, a jurisprudence of resistance that is necessarily also one of accommodation." \textit{Id.}
\item \textsuperscript{124} \textit{Cover uses Abraham Lincoln's comments on the Dred Scott decision as an example of a challenge to the Court's authoritative interpretation, one that suffers from its "attempt to separate completely" the social meaning created by the Court's decision "from the decree that is its direct exercise of power." \textit{See Cover, supra note 18, at 53-54 n.146.}
\item \textsuperscript{125} \textit{Cover notes that "[t]hose who would offer a law different from that of the state will not be satisfied with a rule that permits them to speak without living their law." \textit{Id.} at 49.
\item \textsuperscript{126} \textit{For a sample of the articles discussing the protests against U.S. intervention in Central America, see Peter Perl, \textit{Old Faces, New Groups to Protest U.S. Actions, Wash. Post, Oct. 28, 1988, at A9; Peter Perl & Caryle Murphy, Opposing Groups Air Latin America Views at Vietnam Memorial, Wash. Post, July 3, 1988, at A1; Monte R. Young, 6 Arrested at Demonstration, Newsday, Feb. 18, 1988, at 25.}
committed to action and litigation on behalf of their beliefs. In a sense, the decision to challenge governmental policy through what is seen by the profession as hopelessly radical, utopian litigation risks not death or injury, "but a form of madness."  

Even when a movement has kept alive its vision of law through a strong commitment to its own narratives, one may still argue that the earlier losing case played no role in the court's later reversal of its position. Did Tourgee's losing effort in *Plessy* have any direct influence on the *Brown* decision? Scholars question whether even a powerful dissenting opinion contributes to later doctrinal change in a causal sense: "When a new generation of judges engages in overruling, the historical dissent may provide nothing more than some quotable support for a decision that would have been the same in any event."  

Another scholar is more acerbic:

> Was the Supreme Court of 1954 dependent upon, or even substantially influenced by, the wisdom of Mr. Justice Harlan when it discovered that "separate but equal" had become a constitutional non sequitur? To so frame the question[] is to require answers that I believe to be obviously in the negative.  

These critics fail to understand the sometimes imperceptible pentimento effect of both dissenting opinions and losing litigation. Yet their critique of the instrumentalist justification has some persuasive force, and the defense of dissents has been refocused somewhat away from their role in later judicial reversals towards a structural, process-oriented justification. Dissents are perceived as valuable in contributing to our democratic culture by promoting divergent views, and a vision of law "as a mosaic . . . of . . .

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127 See Cover, *supra* note 123, at 204.


129 Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 *CORNELL L.Q.* 186, 211 n.129 (1959). Moreover, the vast majority of dissents never become law. Fuld, *supra* note 104, at 927. Even Justice Holmes, the "Great Dissenter," whose dissenting opinions became law to an unusual degree, had fewer than one-tenth of his 173 dissenting opinions recognized as valid in the substance of later decisions. ZoBell, *supra*, at 211.

130 Justice Douglas termed dissents a "safeguard of democracy." Douglas, *supra* note 104, at 104. For him "disagreement among judges is as true to the character of democracy as freedom of speech itself." *Id.* at 105. Dissent for Douglas plays a role similar to that of prophetic litigation: it fosters the concept of law's uncertainty. Divergent readings of the Constitution do not undermine but rather further respect for the Constitution and are critical to democratic governance. *Id.* at 106. Other scholars have echoed Douglas and referred to dissents as acts of institutional disobedience, akin to civil disobedience, that seeks to give law new meaning.

131 Justice Brennan believes that dissents perform the function of providing vigorous debate, thus making the resulting collection of opinions resemble the "product of a judicial town meeting." Brennan, *supra* note 85, at 430. Infusing different ideas and methods of analysis into judicial decisionmaking prevents the process from becoming stale.
perceptions at variance with the dominant vision." So too, the primary justification for losing prophetic litigation is to be found in its role in the development of an American culture of constitutional struggle.

C. A Culture of Legal Struggle

Although each of the litigators I will describe in Part III advanced an important substantive view of justice, their legacies are not founded primarily on changes in legal rules—even if their views eventually were adopted by the courts. Rather, the prophetic litigator's main contribution is aiding the development of a culture of legal struggle that continually informs and inspires future generations to challenge oppressive practices. This uniquely American legal culture of struggle, while not religious, is deeply spiritual and has much in common with a view of justice articulated by the Old Testament prophets.

Our society's key metaphor for justice—the traditional scales of justice—connotes the ideals of balance, equipoise, detachment, and congruence. In contrast to the tranquil order that the scales of justice conjure, the prophetic vision of justice calls forth the image of a mighty, turbulent, cascading river:

But let judgment roll down as waters,
and righteousness as a mighty stream.

For Abraham Heschel, this central prophetic image expresses that "[j]ustice is not a mere norm, but a fighting challenge, a restless drive." The mighty stream is "expressive of the vehemence of a never-ending, surging, fighting movement." The Reverend Martin Luther King, Jr., turned to Amos's stream metaphor in his "I Have a Dream" speech, employing the imagery of justice as struggle, not merely a norm. Robert Kennedy also invoked the idea that small, even futile acts against injustice feed the stream of struggle for justice. In Capetown, South Africa, almost thirty years ago he said:

It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends a tiny ripple of hope, and crossing each other from a million different


133 HESCHEL, supra note 16, at 212.

134 Amos 5:24 (King James).

135 HESCHEL, supra note 16, at 212.

136 Id.

137 The entire speech is reprinted in the St. Louis Post-Dispatch, Jan. 15, 1990, at 3B.
centers of energy and daring these ripples will build a current which
can sweep down the mightiest walls of oppression and resistance.138

Justice is not, therefore, merely the technical legal process em-
ployed to reach a judgment, nor even the set of norms that might
constitute a just society, but the continual, turbulent process of strug-
gle. Substantive justice must be linked to this dynamic movement if it
is to maintain its meaning. If justice is the mighty stream of struggle
against oppression, these losing efforts constitute the myriad rivulets
that constantly feed that stream and inspire further struggle.

Litigators who bring cases that they know are uphill battles must
be able to draw upon some cultural or familial tradition of struggle.139
A complex set of motivations drives them to forsake conventional
goals in favor of social causes. We generally perceive the primary and
often sole motivation to be outrage against the injustice being chal-
lenged. Yet another important motivation for rebels is identification
with a tradition of protest. The spiritual aspect of struggle develops
over generations of difficulty, suffering, losing struggles, and
defeats.140

It might appear paradoxical that losing causes can inspire hope
and create a culture of struggle. Our intuitive sense is that victory
engenders hope and inspires further struggle. Indeed, the dominant
American culture glorifies success and achievement; we pride our-
selves as a country that emerges victorious. Yet the cultures of op-
pressed peoples are often defined and held together by the memories
of defeats, massacres, or martyrs.141 History offers numerous exam-
pies of martyrs and defeated movements that serve as spiritual symbols
of resistance. The memory of a defeated guerilla fighter who managed
to stymie the U.S. Marines for almost a decade before being ac-

138 Arthur M. Schlesinger, Jr., Foreword to Robert Kennedy, In His Own Words at xvii-
viii (Edwin O. Guthman & Jeffrey Schulman eds., 1988) (quoting Robert Kennedy's 1966
speech); see also D. Trigonis, Foreword: A Ripple of Hope, 1 TEMP. POL. & CIV. RTS. L. REV. 1

139 Louis Brandeis once remarked, in reference to his bitter confirmation battle, that
"eighty centuries of Jewish persecution must have enured me to such hardships." ROB-
ERT A. BURT, TWO JEWISH JUSTICES 33, 118-23 (1988).

140 KOVEL, supra note 72, at 200-02; see also JAMES LUTHER ADAMS: ON BEING HUMAN
RELIGIOUSLY 109 (1976) (a prophetic idea emerged in reaction to the weakness of Israel in
the face of the overwhelming strength of the great powers); FRANKL, supra note 40, at 93
(difficult circumstances often allow people to grow spiritually); Stone, supra note 104, at
888 n.399 (quoting Psalms 45:3, 1 The Midrash On Psalms 450 (William G. Bravde trans.,
1959) ("[W]hen you have gone down to the very bottom of the pit, in that hour I shall
redeem you.").

141 See, e.g., William Wiecek, Preface to the Historical Race Relations Symposium, 17 RUTGERS
LJ. 407, 412 (1986) (for oppressed people, their past oppression is the "crucible of their
identity and their cohesion"); Patricia J. Williams, Alchemical Notes: Reconstructing Ideas from
Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 417 (1987) ("The individual and unify-
ing cultural memory of black people is the helplessness, the uncontrollability of living
under slavery.").
sasinated helped to sustain the 1979 Nicaraguan revolution.\footnote{Augusto Cesar Sandino led a peasant army against U.S. Marines and Anastasio Somoza's American-trained National Guard. When several students founded an organization to revive Nicaragua's national liberation movement, they called in the Sandinista National Liberation Front (FSLN) to honor Sandino's struggle. Sandino's memory and ideas were the basis of the activities of the FSLN. \textit{Gary Ruchwarger, People in Power, Forging A Grassroots Democracy in Nicaragua} 8-11 (1987).} The narrative of the Jewish Warsaw Ghetto uprising against the Nazis might be interpreted as a reminder that overwhelming force prevails against poorly armed resistance fighters, or that the Jews were abandoned by the Poles and Allied nations. However, the prophetic message of that resistance narrative is that people can struggle even when faced with overwhelming odds, and that through struggle they may achieve a spiritual victory over their oppressors.\footnote{\textit{Yuji Suhl, They Fought Back} 4-6 (1975) (discussing the significance of the Jewish resistance).} That lesson is a critical component of the narratives created by the legal movements discussed in this Article.

Of course, litigation and law are not ideally structured for the development of that message. But the idea of justice is. And in a nation like ours, where the idea of justice historically has been attached to courts and judicial proceedings, it is inevitable that lawyers who are connected with radical social movements will introduce their struggles into the judicial arena even when they recognize that their chances of success are small.

I make no special claim for the particular strategic usefulness of prophetic litigation as compared with other forms of political and social action. Indeed, it could be argued that the development of a legal culture around aspirational cases is counterproductive in that it raises false hopes or encourages undue optimism in the judicial system.\footnote{\textit{See Mark Tushnet, An Essay on Rights}, 62 Tex. L. Rev. 1363, 1385-86 (1984) (questioning whether rights claims actually facilitate social activism); \textit{see also The Politics of Law: A Progressive Critique} (David Kairys ed., 2d ed. 1990) (collection of essays on the role of law and rights in progressive movement); Frances Olsen, \textit{Statutory Rape: A Feminist Critique of Rights Analysis}, 63 Tex. L. Rev. 387 (1984) (discussing statutory rape laws to examine the struggle for women's rights); President's Page, 36 Stan. L. Rev. i (1984) (symposium issue devoted to a collection of articles by Critical Legal Studies scholars); Elizabeth M. Schneider, \textit{The Dialectic of Rights and Politics: Perspective From the Women's Movement}, 61 N.Y.U. L. Rev. 589 (1986) (discussing and disagreeing with the Critical Legal Studies critique of rights). I have sought to address some of those issues in \textit{A Less Than Perfect Union} (Lobel ed., 1988). \textit{See also Hartog, supra note 81, at 1015} (discussing the study of constitutional-rights consciousness). Professor Robin West has recently explored the merits of what she terms progressive constitutional skepticism and progressive constitutional faith. \textit{Robin L. West, Constitutional Scepticism}, 72 B.U. L. Rev. 765, 792-799 (1992). She recognizes some of the contradictions inherent in the tradition of progressive constitutional faith—a tradition that I would argue is similar to the prophetic tradition described herein. It is "at one and the same time, utterly futile, deeply utopian, absolutely necessary, terribly risky, and one of the most imaginative, fecund, and important shared enterprises presently ongoing in the legal academy." \textit{Id.} at 798.}
do not argue that the litigation described herein necessarily had a positive effect in its era, or that it was more effective than other methods of resistance. My argument is that from a prophetic perspective, litigation, like other forms of resistance to oppression, helps build a spiritual or cultural consciousness that motivates people to struggle against injustice.

The main legacy of prophetic litigators is their contribution to the uniquely American culture of faith in constitutional rights. Professor Hendrick Hartog defines such consciousness as: "[A] faith that the received meanings of constitutional texts will change when confronted by the legitimate aspirations of autonomous citizens and groups. Such a faith has survived even when aspirations ran contrary to ruling doctrines of constitutional law." The emancipatory vision of natural rights, rooted in the subversive and utopian messages that people read into constitutional texts "has justified continued struggle by groups in the face of (presumably temporary) judicial and political defeats."

The reasons for the constitutional faith and rights consciousness of Americans are too complex to be explored fully here. What does seem clear is that the tradition of litigating the aspirations of oppressed groups is firmly entrenched and long preceded the explosion of civil rights litigation of the 1960s. The American Revolution’s reliance on natural law principles probably gave rise to this tradition. The Constitution’s open-ended clauses and the Supreme Court’s recognition of judicial review of legislative and executive acts certainly contribute to this tradition. Other factors, such as the decentralization of American society and courts, gave hope to groups offering their own interpretations of the law. That litigators and political movements continually press their radical views in the courts also plays an important role in sustaining the American tradition of constitutionally-grounded aspirational struggle.

The abolitionist movement was one of the first major struggles in this radical constitutional tradition. As one commentator has noted, "the long contest over slavery did more than any other cause to stimulate the development of an alternative rights conscious interpretation of the federal constitution." The nineteenth century women’s movement and the equal rights movement for the former slaves was built explicitly on the abolitionist tradition. The aspirational visions developed by these movements have now been accepted as critical

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145 Hartog, supra note 81, at 1014.
146 Id. at 1016.
147 See, e.g., Sanford Levinson, Constitutional Faith (1988) (comparing our view of the Constitution to civic religion).
148 Hartog, supra note 81, at 1017.
components of our constitutional order. But of equal importance, the persistent legal-political struggles they embodied helped to create and nurture the faith in aspirational constitutional struggle that, for good or bad, continues to thrive. When mainstream constitutional interpretation fails people, constitutional struggle is a legitimate and potentially empowering response. As Professor Otto Olsen, the biographer of Albion Tourgee and editor of a documentary history of the *Plessy* case, has argued:

It would be, however, a most limited appreciation of the memory of these crusaders that would identify their efforts only with a now popular and much more successful struggle for racial justice. . . . [T]he tradition of *Plessy* encompasses a great deal more. That tradition represents a determined commitment to the rights of all mankind in the face of the greatest odds . . . . The memory of *Plessy* will be properly recalled only to the extent that there are still those possessed of the conscience and the courage to fight for causes that may not achieve respectability for generations . . . .149

The extent to which issues of constitutional interpretation occupy legal scholars and their publications reflects the American people's insistence that the Constitution incorporate their aspirations. That insistence may lead Americans to place too much faith, time, and energy in constitutional litigation. But the continued persistence of constitutional rights consciousness, initiated by the radical abolitionists and furthered by the women's, labor, and civil rights movements assures the "essentially contested"150 nature of constitutional interpretation. The efforts of some legal scholars, politicians, and courts to articulate conclusive constitutional interpretations based on textual analysis or the original intent of the Framers151 are destined to fail in the face of aspirational struggle, which insists on flexibility and flux. If textual analysis or originalism was "conclusive of struggles for legal rights, then those who lost in court should have either accepted the loss as legal and slunk into passivity or insisted on power through nonlegal means."152 The litigators discussed in Part III of this Article did neither, and this refusal to give in contributed to the development of a political-legal culture that views the Constitution as an arena of struggle rather than a static, determinative text. The Constitution is thus an "invitation to struggle" in large part because of the efforts of

150 Cover, *supra* note 18, at 17.
152 Hartog, *supra* note 81, at 1031.
the political movements and the prophetic litigators discussed in the next Part of this Article.

III

PROPHEtic Litigation in American History

Radical reform litigation did not commence in the 1950s and 1960s, as many people believe; it is deeply ingrained in the American legal culture. This discussion presents the narratives of four such litigation campaigns: the radical constitutional abolitionists of the 1840s and 1850s; a subset of the post-Civil War women's movement known as the New Departure, which flourished in the 1870s; Plessy v. Ferguson in the 1890s; and the litigation against plant closings in Youngstown, Ohio in the 1980s.

This Part has several purposes. The first is to preserve four important narratives of resistance for future litigators and movements. The second is to illustrate how each exemplified prophetic litigation. The third is to explore how the litigators in each case resolved the conflict between focusing narrowly on a winnable legal issue and bringing an ideological attack on injustice. The final purpose is to analyze the campaigns in terms of the values of prophetic litigation: instigating political action; preserving legal arguments for future generations; and inspiring a culture of legal struggle.

A. Radical Constitutional Abolitionists

During the late 1830s and early 1840s, abolitionists developed a radical theory of the Constitution as an antislavery document. They developed this theory primarily to spur antislavery political agitation and sentiment in the North. While attracting relatively few followers, they contributed to an enormous growth in antislavery law that was ultimately incorporated into the Fourteenth Amendment. Their constitutional arguments also provided an important foundation for the great equal rights struggles of the latter part of the nineteenth century.

The radical constitutional theory of the abolitionists drew heavily on natural rights ideas, supported by the Declaration of Independence. Their constitutional interpretation maintained that only clear and unequivocal textual support for slavery could override natural

153 163 U.S. 537 (1896).
Their theory has been termed “so extreme as to appear trival,”156 “a questionable theory at best,”157 and “flawed and disingenuous.”158

The radical abolitionist wing designed its constitutional argument to sway popular opinion against slavery.159 Lysander Spooner, one of the most prominent radical theorists, argued that five percent of Northerners were slavery supporters, five percent were abolitionists, twenty percent were opportunists who would side with the strongest party, and the remaining seventy percent disliked slavery, but were unwilling to defy the Constitution.160 Spooner concluded that the most important political task facing abolitionists was demonstrating that the Constitution outlawed slavery.161

Fredrick Douglass, the most famous convert to the radicals’ position, articulated a similar perspective. Douglass had been a follower of William Lloyd Garrison, who believed that the Constitution was an evil, pro-slavery document and opposed participation in the federal system it established. Douglass later adopted the radical constitutional position because he believed that only dramatic political reform of the national government would eradicate slavery. A political movement against slavery required a constitutional interpretation that undermined the lawfulness of slavery. To Douglass, Northerners were a “law abiding people . . . [who] love order.”162 The great respect that

155 The constitutional abolitionists developed their position in opposition to two other widely held abolitionists positions: Garrison’s argument that the Constitution was pro-slavery, and a moderate Free Soil abolitionist position that viewed the Constitution as permitting slavery only where the local or state law supported it. See generally William Wieck, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848, at 202-75 (1977) (discussing the three antislavery factions and their respective constitutional theories).
156 Cover, supra note 8, at 156.
158 Wieck, supra note 155, at 249. William Lloyd Garrison wrote that the radical theory was “ingenious—perhaps as an effort of logic unanswerable.” But the radical’s theory ignored the Framers’ clear intent to permit slavery in America and for Garrison and the Taney Court, “Fact is to be preferred to logic; intention is mightier than legal interpretation.” William Lloyd Garrison, Chattel Slavery and Wages Slavery, The Liberator, Oct. 1, 1847, quoted in Arleen Kraditor, Means and Ends in American Abolitionism 195-96 (1967); see also Dred Scott v. Sanford, 60 U.S. 393 (1856) (original intent of Framers outweighed any new sense of justice developed subsequently).
159 Other abolitionist theories were also based on their political perspectives. The moderate free soilers developed a constitutional theory designed to win over moderate Northerners and allay Southern fears. Kraditor, supra note 158, at 188-89. Garrison’s view of the Constitution as a pro-slavery compact furthered his political program of disunion. Id. at 188.
160 Id. at 195. Spooner was merely following John C. Calhoun’s characterization of northern public opinion. Id.
161 Id.
American society accords the law made it important for Douglass to argue that slavery was unlawful. He could then say that "all I ask of the American people is, that they live up to the Constitution, adopt its principles, imbibe its spirit and enforce its provisions." He demanded that the document "be wielded in behalf of emancipation."

The development of a radical constitutionalist theory also coincided with abolitionists’ increasing utilization of litigation as an avenue for antislavery action. Until the mid-1830s, antislavery litigation was treated as a “practical necessity, not as an ideological opportunity.” The gradualism of the more mainstream antislavery movement generally disfavored broad legal attacks on slavery. Moreover, abolitionists often faced mobs and riots and needed to garner their precious legal resources to defend themselves from specious charges.

The rise of militant abolitionism and the changing public climate in the North encouraged the radicals’ broad, ideological attack on slavery. Lawyers of all the various factions eventually pursued this tactic. In New Jersey, for example, a group of militant constitutional abolitionists brought a legal challenge to the constitutionality of slavery in that state. They genuinely hoped to win in court, but their primary goal was to focus the attention of an indifferent public on their cause.

The case was brought under New Jersey’s constitution, ratified in 1844, which stated, “All men are by nature free and independent, and

163 Id. at 183; see also id. at 365-66 (noting that the Constitution does not prohibit the abolition of slavery).
164 WILLIAM S. McFEELY, FREDRICK DOUGLASS 169 (1991). The radical constitutionalist theory also provided an opportunity for abolitionist participation in the political system. To Robert Cover, the real purpose of what he termed the utopian argument was not to prove that slavery was unconstitutional, but to convince abolitionists to become judges so that they could use their power to free slaves. COVER, supra note 8, at 156. The position that the United States Constitution opposed slavery permitted abolitionists like Fredrick Douglass to argue that the movement should run candidates for Congress and other elected offices. DOUGLASS PAPERS, supra note 162, at 366. Spooner’s book on the constitutionality of slavery was sent to every member of Congress, and Spooner himself sought to have it distributed to the nation’s 30,000 lawyers. LEWIS PERRY, RADICAL ABOLITIONISM, ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT 204 (1973).
165 COVER, supra note 8, at 160.
166 Paul Finkelman, Introduction to ABOLITIONISTS IN NORTHERN COURTS iv (Paul Finkelman ed., 1988); TENBROEX, supra note 154, at 37.
167 COVER, supra note 8, at 161. While the fugitive slave cases typified the abolitionist litigation of the two decades prior to the Civil War, id., the abolitionist bar also pursued other litigation opportunities.
168 David Ernst, Legal Positivism, Abolitionist Litigation and the New Jersey Slave Case of 1845, 4 LAW AND HIST. REV. 337, 338 (1986). The New Jersey Slave Case of 1845 was really two cases that were combined and litigated as one case. COVER, supra note 8, at 56.
have certain natural and unalienable rights . . . ."169 Shortly after the adoption of the new New Jersey constitution, the New Jersey State Anti-Slavery Society resolved to initiate a test case to "settle the question of the existence of slavery under the new Constitution."170 The Society retained Alvan Stewart, a noted New York abolitionist lawyer, to argue the case.171 He convinced the Society to argue broadly that the U.S. Constitution prohibits slavery, and not to base the case solely on the New Jersey constitution.

The Trenton State Gazette characterized Stewart's argument as remarkable for "its powerful though disjointed reasoning, its warm appeals to the best feelings of human nature and its ingenious and copious accumulation of terms of abhorrence and contempt of slavery."172 Indeed, Stewart's argument was a rambling discourse based on natural law, the common law, the Preamble to the Constitution, the Ten Commandments, European and ancient history, the requirement of a republican form of government, the Declaration of Independence, the New Jersey constitution, and the Treaty of Ghent of 1814.173

Stewart made two key arguments that were to be repeated almost verbatim by the suffragist movement in the 1870s and the anti-segregation advocates of the 1880s and 1890s. First he stressed an interpretive method arguing that broad constitutional phrases such as "all men are by nature free and independent" or "due process of law," or "Republican form of government" be read consistently with a higher law, such as the law of nature.174

Second, Stewart claimed that the law of nature was more than a set of abstract moral precepts. He claimed that the 1844 New Jersey constitution had recognized the natural law principle of freedom "in the most solemn form as a rule of action."175 Similarly, the Declaration of Independence was not a mere "rhetorical flourish,"176 but a particularized mandate, a rule on which courts could act. Finally, Stewart eschewed legal formalism in favor of a broad political-moral argument. While he purported to be arguing a dry legal question,177 his argument reads like a political speech. In his request for relief, he asked that the "Court set the nation the shining example of doing

169 Ernst, supra note 168, at 342.
170 Id. at 343.
171 Id. 345-48. Stewart had developed a theory that slavery violated the Due Process Clause of the United States Constitution.
172 Ernst, supra note 168, at 349.
173 Stewart's argument is reproduced in ABOLITIONISTS IN NORTHERN COURTS, supra note 166, at 442-92.
174 Id. at 463, 478, 482.
175 Id.
176 Id. at 469-70 (emphasis added).
177 Id.
right on this question, by acting up to the full measure of their judicial and moral power."\footnote{178}

The New Jersey Supreme Court, by a three-to-one vote, rejected Stewart's plea. The justices chose to follow the formalistic reasoning of the defense counsel, Joseph Bradley, who was later appointed to the United States Supreme Court.\footnote{179} Stewart's arguments were, according to one member of New Jersey's highest court, "addressed to the feelings rather than to the legal intelligence of the court."\footnote{180} The court interpreted the "free and independent" clause of the state constitution as a mere hortatory provision, which did not provide individual rights.\footnote{181} Only the antislavery Justice Hornblower dissented, and he did so without writing an opinion.\footnote{182} The \textit{New Jersey Slave Case} was thus consigned to history as a loser. The case did, however, accomplish the abolitionists' aim of initiating a political debate on slavery, eventuating in the New Jersey legislature's formally abolishing slavery in that state.\footnote{183}

Robert Cover has demonstrated that litigating the antislavery cause led the mainstream abolitionists to constant battle over formal legal principles instead of the broad moral imperatives: "Instead of arguing about slavery, the antislavery man found himself arguing about state court habeas corpus jurisdiction; the appellate authority of the United States Supreme Court over state court decisions; the proper bounds of judicial interpretation; and the deference due to imperfectly articulated legislative policy."\footnote{184} As the \textit{New Jersey Slave Case} illustrates, the radical constitutional abolitionists avoided such "sidetracks" by demanding that public law conform to some moral ideal, in the absence of explicit defeasance by express legislative action.\footnote{185} They sought to challenge slavery directly, without getting

\footnote{178} Id. at 470.
\footnote{179} Justice Bradley's most famous civil rights decision was his opinion in \textit{The Civil Rights Cases}, 109 U.S. 3 (1883), in which he articulated a formalistic reading of the Fourteenth Amendment to deny Congress the power to prohibit segregation in public inns, accommodations, and transportation.
\footnote{181} Id. at 372.
\footnote{182} The abolitionists appealed to the New Jersey Court of Errors and Appeals, which affirmed the decision of the Supreme Court by a 7-1 vote without issuing written opinions. State v. Post, 21 N.J.L. 699 (N.J. 1848).
\footnote{183} In Massachusetts, Charles Sumner litigated and lost the Boston School desegregation case, \textit{Roberts v. City of Boston}, 59 Mass. (1 Cush.) 198 (1849). In both New Jersey and Massachusetts, abolitionists eventually obtained politically through legislative action what they failed to win in the courts. \textit{Harold H. Hyman & William M. Wieck, Equal Justice Under Law, Constitutional Development 1835-1875}, 96 (1982) (racial segregation was prohibited in Boston by statute in 1855); Ernst, \textit{supra} note 168, at 364 (Abolitionists won a partial victory in 1846 when the New Jersey legislature formally abolished slavery but declared the slaves to be apprentices for life.).
\footnote{184} \textit{Cover, supra} note 8, at 198.
\footnote{185} \textit{Id.}
bogged down in technical questions about jurisdiction and statutory interpretation. In avoiding such obstacles, however, the radical constitutionalists risked having their theories viewed as too extreme to be relevant. They made it easy for the courts and the American people to dismiss them.

As William Wiecek has observed, "In the short run, radical constitutionalism was a failure."\(^{186}\) Although the radicals’ program was endorsed by a number of abolitionist conventions and political organizations such as the Liberty League and attracted several notable adherents such as Fredrick Douglass, the radicals became more isolated and sectarian as the Civil War drew closer. Their theory never articulated what most Americans felt to be the essential nature of the Constitution, and thus it failed as a rallying call. No significant section of the political, economic, or legal elite adopted the radicals’ legal interpretation. Northern opposition to slavery was increasingly attracted to the more moderate Free Soil and Republican efforts, and the radical constitutional program had little impact on the great constitutional debates leading to the Civil War.\(^{187}\)

Despite this, the radical constitutionalists had a significant long-term impact on the law. Robert Cover has argued that:

Their pamphlets, arguments, columns, and books constitute an important part of the legal literature on slavery, which, I believe, would substantially eclipse contemporaneous writings in, say, American tort law. Their work reveals a creative pulse that proliferates principle and precept, commentary and justification, even in the face of a state legal order less likely to hold slavery unconstitutional than to declare the imminent kingship of Jesus Christ on Earth. In the workings of a committed community with common symbols and discourse, common narratives and interpretations, the law undeniably grew.\(^{188}\)

Although both the courts and the mainstream antislavery movement rejected the “law” of the radical constitutionalists, it did not die. Scholars now recognize that the doctrines developed by this small band of radicals influenced concepts and clauses that constitute Section I of the Fourteenth Amendment.\(^{189}\) The doctrines of substantive due process, equal protection of the laws, paramount national citizenship, and privileges and immunities all have roots in ideas that the radicals introduced.\(^{190}\) The natural law theories of the radicals were given a solid basis in positive law.

\(^{186}\) WIECEK, supra note 155, at 274.

\(^{187}\) Id.

\(^{188}\) Cover, supra note 18, at 39-40 (footnotes omitted).

\(^{189}\) TENBROEK, supra note 154, at 89; see also Cover, supra note 8, at 155.

\(^{190}\) See TENBROEK, supra note 154, at 150.
Throughout the nineteenth century, radical political movements continually rearticulated the radical abolitionists' theories. Both the women's and the civil rights movements after Reconstruction sought to use the Declaration of Independence and natural rights to inform their interpretations of the Fourteenth Amendment. The perspectives of these other movements also failed to take root in nineteenth-century law, but were eventually adopted in the twentieth century.\footnote{See discussion of Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965), infra text accompanying notes 256-58.}

Moreover, several academic theorists in the 1950s resurrected the constitutional abolitionists' theories in their attacks on \textit{Plessy v. Ferguson} and its restricted view of the Fourteenth Amendment.\footnote{TENBROEK, supra note 154, at 7-26.} The abolitionist view of the Constitution prevails among mainstream thinkers today.\footnote{WIECEK, supra note 155, at 274-75.}

\section*{B. The 1870s Campaign for Women's Suffrage}

The post-Civil War women's suffrage movement developed a radical interpretation of the Constitution that drew upon, and in many respects mirrored, the radical abolitionists' theory. Each relied heavily on natural law and the Declaration of Independence. Each constitutional interpretation developed as a means to galvanize a political movement. The key difference between the movements is that the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments and the post-Civil War political climate gave the women's rights constitutionalists a greater aura of legitimacy. Because the suffragists' constitutional interpretation gained more respect than that of the radical abolitionists, it was able to inspire considerably more political action. Their interpretation was taken up by thousands of women and, for a brief moment in the 1870s, played an important role on a national stage. Ultimately these women, like their abolitionist predecessors, failed, and their main legacy lies in the construction of a culture of rights consciousness.

By the end of 1869, the post-Civil War women's movement was at a strategic and tactical watershed. The movement had failed to gain the express ratification of women's suffrage in the Reconstruction Amendments enacted after the Civil War. The abolitionist-women's movement coalition of pre-war years had collapsed during the bruising fight over the Fourteenth and Fifteenth Amendments, with most of the prominent pre-war abolitionists placing women's rights on the back burner to avoid complicating and possibly derailing the fight for
black suffrage.\textsuperscript{194} Congress passed the Fifteenth Amendment in 1869 without mentioning gender discrimination in voting, thus creating what appeared to be a "strategic dead end for woman suffrage."\textsuperscript{195}

At a women's suffrage convention later that year, a husband and wife team of Missouri suffragists, Francis and Virginia Minor, proposed a radical new approach. The Minors argued that, rather than continue to agitate for a new constitutional provision granting women the right to vote, feminists should assert that they already had the constitutional right to vote.\textsuperscript{196} The suffragists had been criticizing the Reconstruction Amendments, but the Minors saw a way to use the Amendments to their advantage. The argument's key premise was that voting was a "privilege or immunity" of U.S. citizenship, protected by the Fourteenth Amendment to the Constitution.

The strategy that women need not demand more rights, but merely take what was already theirs, galvanized a flagging women's movement. As Francis Minor put it, "we no longer beat the air—no longer assume merely the attitude of petitioners. We claim a right, based on citizenship."\textsuperscript{197} The leaders of the women's movement changed their tactic from complaining about women's oppression to demanding respect for their rights.\textsuperscript{198} The new approach "changed the tone of the speeches in our conventions," Elizabeth Cady Stanton proudly proclaimed, "from whinings about brutal husbands, stolen babies and special laws, to fundamental principles of human rights."\textsuperscript{199} This new direction, known as the "New Departure" movement, represented a basic turn toward a rights-conscious women's movement.\textsuperscript{200} "Individual rights," declared Stanton, "are a great American achievement, underlying our whole political and religious life."\textsuperscript{201}

This rights strategy inevitably led to the courthouse. The Minors urged a combination of direct action and litigation. "I am often jeer-

\textsuperscript{194} Despite opposition from feminist leaders such as Elizabeth Cady Stanton and Susan B. Anthony, the Fourteenth Amendment contained the Constitution's first sex-based distinction, providing that congressional representation would be based on the number of "male citizens." Feminists also opposed the Fifteenth Amendment because it provided only that the states could not deny a citizen the right to vote because of "race, color or previous condition," but did not mention sex. Ellen C. DuBois, \textit{Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878}, in \textit{A LESS THAN PERFECT UNION} 104, 116-17 (Jules Lobel ed., 1988).

\textsuperscript{195} \textit{Id.} at 121.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} Letter from Francis Minor to \textit{The Revolution} (Oct. 14, 1869), \textit{reprinted in 2 THE HISTORY OF WOMAN SUFFRAGE} 408 (Elizabeth Cady Stanton et al. eds., 1882) [hereinafter \textit{SUFFRAGE}].

\textsuperscript{198} \textit{Id.} at 485.

\textsuperscript{199} \textit{Id.} at 511.


\textsuperscript{201} \textit{SUFFRAGE}, \textit{supra} note 197, at 508.
ingly asked,' Virginia Minor explained, 'If the Constitution gives you this right, why don't you take it.' In response, she and other movement leaders urged women to attempt to vote and, if prevented, to sue the officials who had denied them that right. Hundreds of women around the country tried to vote. Some succeeded, but most were turned back. Susan B. Anthony and several other women succeeded in voting in Rochester, New York in 1872, but were arrested shortly thereafter by federal marshals and charged with "criminal voting." Later that year, Virginia Minor attempted to register to vote in Missouri and sued the election official who refused to register her.

In 1871, the New Departure movement dramatically entered the political arena. Victoria Woodhull, a well-known advocate of sexual liberation and free love, presented a memorial to Congress and secured a hearing before the House Judiciary Committee. She argued that the Fourteenth and Fifteenth Amendments secured women’s right to vote, and that Congress should therefore enact legislation enforcing that right and nullifying state laws to the contrary.

Woodhull's dramatic appearance before Congress electrified the women's suffrage movement. The New Departure leaders immediately adopted Woodhull's arguments and urged Congress to pass a law declaring women's inalienable right to vote under the Fourteenth and Fifteenth Amendments. Although the House Judiciary Committee rejected Woodhull’s position, a strong dissent on the Committee continued to give hope to the New Departure leaders.

In January 1872, a year after Woodhull's appearance before the House Judiciary Committee, the National Women's Suffrage Association (NWSA) leaders secured a hearing before the Senate Judiciary Committee. Hundreds of women attempting to gain entrance to the hearing filled the corridors of the Capitol. Elizabeth Stanton told the senators that Woodhull's statement had "roused wise men to thought," opened up a "new and fruitful source of litigation," and in-

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202 DuBois, supra note 194, at 122.
203 In early 1871, the National Women's Suffrage Association enacted a resolution urging women "to apply for registration at the proper times and places, and in all cases when they fail to secure it to see that suits be instituted in the courts having jurisdiction and that their right to the franchise shall secure general and judicial recognition." Id. at 126.
204 Id. at 126.
205 Id.
206 Id. at 128.
207 Id. at 124-25.
208 Id. at 123.
209 Victoria Woodhull, Address to the Judiciary Committee of the U.S. House of Representatives (Jan. 11, 1871), reprinted in SUFFRAGE, supra note 197, at 444-48.
spired women with "fresh hope that the day of [their] enfranchise-
ment was at hand." Newspaper accounts of the National Women's 
Suffrage Convention of 1871 reported that the suffragists' new inter-
pretations of the Fourteenth and Fifteenth Amendments lent "an air
of novelty [to] the proceedings, indicating healthy life in the move-
ment." The consequence was "that the cause of women's en-
franchisement made a new, sudden and profound impression at
Washington."

That the demand for women's suffrage should attract national
attention when clothed in the rhetoric of existing constitutional rights
is consistent with the experiences of social movements throughout his-
tory. To be effective in developing a political movement, the invoca-
tion of existing rights must be believable. The leaders of the
movement must see their claim not as merely an instrumental tactic,
but as a valid textual interpretation. The NWSA leaders and
thousands of women developed a strong conviction that their constitu-
tional reading was correct. Francis Minor argued that the New De-
parture view "will stand the test of legal criticism." The NWSA
leaders wrote in their appeal to women, "The interpretation of the
Constitution which we maintain, we cannot doubt, will be ultimately
adopted by the courts." The women and their male supporters lo-
cated themselves within traditional Republican post-war ideology, ar-
guing that they were not making any great constitutional innovation,
but only restoring the historical connection between the theory of
American constitutionalism and its practice. The suffragists looked
backward to the fundamental principles of republican government to
construe the post-war Amendments.

Despite much optimism, the New Departure's argument was deci-
sively rejected by the courts. The first decided case involved seventy
putative women voters in Washington, D.C. The court unanimously
held that despite plaintiffs' "ingenious argument," there was no natu-
ral or inherent right to vote. "[T]he legal vindication of the natural
right of all citizens to vote would," said Judge Cartter, "involve the
destruction of civil government." The Fourteenth Amendment's

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211 Suffrage, supra note 197, at 511.
212 Id. at 442.
213 Id. at 442.
214 Letter from Francis Minor to The Revolution (Oct. 14, 1869), reprinted in Suffrage, supra note 197, at 408.
215 Suffrage, supra note 197, at 487. The new departurists did recognize that the courts were "cautious and conservative" and that therefore temporary setbacks could be expected.
216 Id. at 424, 481.
217 Id. at 598.
citizenship clauses simply distinguish citizens from aliens, making all citizens capable of becoming voters at the discretion of Congress.

As more women attempted to register and vote, the number of cases increased. In California, Pennsylvania, and Illinois, women sued state officials who refused to let them vote and register, and the courts invariably dismissed their suits. But the most celebrated case of the period was the criminal trial of Susan B. Anthony in 1873 for having illegally voted in Rochester, New York.

On November 1, 1872, an editorial in the morning newspaper inspired Susan B. Anthony to vote. The inspectors, according to Anthony, were young men "entirely unversed in the intricacies of constitutional law" and "utterly incapable of answering her legal argument." The two Republican inspectors agreed to register her over the lone Democrat's objections. Eventually, Anthony and thirteen others voted.

This novelty apparently created quite a stir in Rochester. Three weeks later, the federal marshal asked the women voters to turn themselves in to be prosecuted for violating an 1870 federal statute designed to prevent ex-Confederates from voting illegally or intimidating blacks from voting. Ironically the statute was entitled: "An Act to enforce the Right of Citizens of the United States to vote." As Anthony colorfully tells the tale, "The ladies, refusing to respond to this polite invitation, Marshal Keeney made the circuit to collect the rebellious forces." Eventually, all fourteen women and the three inspectors were indicted.

Anthony immediately launched a broad speaking campaign to educate the people of Rochester on the right of all citizens to have equal access to the ballot. Over the course of the next several months, she spoke in twenty-nine of the post-office districts in the county, "in order to make a verdict of 'guilty' impossible." The district attorney then moved to change venue to another county, and the court granted his motion. In the twenty-two days between the change of venue and the opening of the trial, Anthony made twenty-one speeches in the county to which the action had been transferred. An-

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218 Id. at 600-01.
219 Id. at 627-28.
220 Id. at 627.
221 Id. at 627-29.
222 Act of 1870, ch. 113-14, 16 Stat. 140 (1870).
223 Suffrage, supra note 197, at 628.
224 After two months under a peculiar sort of house arrest under which she was free to fulfill her speaking obligations, Anthony's bail was set at $1,000. She objected to paying, but her lawyer insisted on it because his "sense of gallantry made him feel it a disgrace to allow his client to go to jail." Id. at 629. Anthony regretted her decision to comply with her lawyer, as it made it impossible for technical reasons to appeal to the U.S. Supreme Court.
225 Id. at 630.
other suffrage leader, Matilda Joslyn Gage, spoke in an additional sixteen townships. Together they covered the whole county. The two defendants took the offensive, arguing: "The United States [is] on trial, not Susan B. Anthony." Anthony argued that she had committed no crime, but had simply exercised her "citizen's right" to vote as guaranteed by the Constitution. "Our democratic republican government is based," she claimed, "on the idea of the natural right of every individual member thereof to a voice and a vote in making and executing the laws." The Declaration of Independence, the Preamble to the Constitution, and the Fourteenth and Fifteenth Amendments all secured this basic right of national citizenship.

Anthony's trial opened on June 18, 1873 before Circuit Court Judge Hunt, whom the suffragists described as "a small-brained pale-faced, prim-looking man," who had the "remarkable forethought" of having written his decision before hearing the case. The packed courtroom included such notables as ex-President Millard Fillmore, Senator Charles Sedgwick, and former Congressman E.G. Lapham. Immediately after the opening statements, Judge Hunt read his prepared opinion that Anthony had no right to vote under the Constitution and that any mistaken belief she may have had as to such a right did not excuse her criminal action. As a matter of law, he directed the jury to find Anthony guilty and discharged the jury.

The court then moved to sentence Anthony and asked her if she had anything to say. When she launched into her arguments defending women's suffrage, Judge Hunt ordered her to sit down and shut up, insisting that she had been "tried according to the established forms of law." Anthony responded tellingly by analogizing Hunt's verdict to the decisions of judges who decided the fugitive slave cases, thus highlighting the connection between the radical constitutional abolitionists and her own constitutional struggle for women's suffrage.

The Anthony case generated substantial public controversy. The Albany Law Journal, although agreeing with the guilty verdict, criti-

226 Id. at 630.
227 Id. at 631.
228 Id. at 647.
229 Id.
230 Id. at 675-79.
231 Id. at 680.
232 Id. at 688.
233 Another example of the affinity between the suffragist and radical abolitionist theories is found in Isabella Beecher Hooker's testimony before Congress: "Having attempted a strictly legal view of this question [the 14th and 15th Amendments] permit me, gentlemen, to say that in my heart my claim to vote is based upon the original Constitution, interpreted by the Declaration of Independence." Id. at 505.
cized the judge's decision to remove the case from the jury. Several newspapers and pamphlets reprinted the legal arguments of Anthony's counsel on women's constitutional right to vote.

Another round of political agitation commenced when the three inspectors who allowed Anthony and her cohorts to vote were tried by a jury and convicted. The inspectors' case became a national cause when Anthony, fulfilling a prevote promise to the inspectors, persuaded New York Senator Sergeant to intervene. Sergeant appealed directly to President Grant and on March 3, 1874, Grant pardoned the inspectors. During the week that the inspectors languished in jail before the pardon, hundreds of local supporters visited the "boys" in jail, and the women voters of Rochester cooked dinner daily for the prisoners.

The Anthony case represents a successful use of losing litigation as political agitation. Anthony and her compatriots spoke to thousands of people, engaged prominent figures, such as the President of the United States and a New York senator, and initiated debate in legal and popular journals.

The most decisive and devastating legal setbacks suffered by the New Departure movement came as a result of affirmative litigation brought under the Fourteenth Amendment's Privileges and Immunities Clause. In 1873, the Supreme Court turned down Myra Bradwell's request to be admitted to the bar of Illinois, citing the Slaughter-House Cases, decided the same day. The Court held that the right to a license to practice law in a state was not a privilege or immunity of U.S. citizenship. Justice Bradley, joined by Justices Swayne and Field, concurred in the judgment because the "natural

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234 The Journal also "suggested that if Anthony was dissatisfied with 'our laws . . . she would better adopt the methods of reform that men use, or, better still, migrate.'" Hoff, supra note 200, at 159.

235 On January 22, 1874, Anthony unsuccessfully petitioned Congress for remission of the fine. Suffrage, supra note 197, at 698-702. The House Judiciary Committee did report out a bill recommending that Congress pay the fine, but the Senate Judiciary Committee refused to take similar action. Judge Hunt never enforced the fine against Anthony, and thus she could not technically appeal to the U.S. Supreme Court. The prosecuting attorney dropped the charges against the women who voted with Anthony. Id.

236 Judge Hunt instructed the jury to find them guilty. When the defense counsel asked the court why he was submitting the case to the jury when he had charged the jury that there was sufficient evidence to sustain the indictment, Judge Hunt answered that it was "a matter of form." Id. at 695. The jury, after lengthy deliberations in which at least one juror was in favor of acquittal, eventually voted to convict.


239 Bradwell retained Matt H. Carpenter of Wisconsin, an eminent republican U.S. Senator and one of the best known Supreme Court advocates of his era, to argue the case. Carpenter commenced his argument before the Supreme Court with a long discourse arguing that while women had no right to vote, they did have a right to practice a profession. Perhaps Carpenter felt that the potential explosiveness and radical nature of the New De-
and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." Only Justice Chase dissented.

The Bradwell and Slaughter-House cases were devastating blows to the New Departure's interpretation of the Fourteenth Amendment. Nevertheless, legal advocates for women suffrage still maintained, at least in public, an optimistic view of the legal possibilities. Francis Miller, the attorney for the Minors, wrote to Susan B. Anthony that there was nothing in the Slaughter-House and Bradwell opinions that was "necessarily conclusive of the suffrage cases." Maybe not, but as a practical matter there was no way that the New Departure voting argument would win in the Supreme Court.

In 1875, the Supreme Court dealt the definitive defeat to the New Departurists' legal strategy in Minor v. Happersett. The Minors had set up an affirmative test case by attempting to register and vote in Missouri. The case reached the Supreme Court in 1874, one year after the Slaughter-House and Bradwell cases. Defeat seemed a foregone conclusion. Indeed, the state of Missouri did not even submit a brief to the Court. Chief Justice Chase, the only dissenter in Bradwell, had left the Court, replaced by Justice Waite. Reconstruction was waning.

By 1874, the Minors must have sensed that defeat was inevitable. Their strategy was to rely on broad political-constitutional arguments instead of narrow legalistic positions. Knowing the Court would almost certainly rule against them, they sought at least to force the Court to confront the basic issue of women's status as citizens. As one commentator has noted, "The language in all the Minors' briefs is both so constitutionally and politically extreme for the time that it leads one to wonder whether the briefs were written to win in court or for posterity." Their strategy's chief success was in engaging the Court.

Francis Minor's brief opened by arguing that women were citizens at the time the Constitution was ratified and that voting in national elections was a fundamental right of such citizenship. The Minors rejected the possibility of "halfway citizenship":

Either we must give up the principles announced in the Declaration of Independence, that governments derive their just powers from

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240 Bradwell, 83 U.S. (16 Wall.) at 141.
241 Letter from Francis Miller to Susan B. Anthony (May 5, 1873), in Suffrage, supra note 197, at 536.
242 88 U.S. (21 Wall.) 162 (1875).
243 Hoff, supra note 200, at 171.
244 Plaintiffs Argument and Brief, Minor v. Happersett, 88 U.S. 162 (1875), in Suffrage, supra note 197, at 720.
the consent of the governed . . .; or we must acknowledge the truth contended for by the plaintiff, that citizenship carries with it every incident to every citizen alike.245

Tied, but subordinated, to this broad argument was a strong but narrow claim: that federal rather than state law must govern the issue of the plaintiffs' right to vote in national elections.246 The states could regulate the voting process, but could not arbitrarily deprive persons of their ability to vote for President and Vice President, because to do so was to interfere with the functioning of the federal government. The Fourteenth Amendment merely supported this proposition, which according to the plaintiffs was established with the Constitution's ratification.

The Court unanimously rejected the plaintiffs' arguments.247 Chief Justice Waite started his opinion by noting that the Court could have dismissed the case on technical grounds, but instead chose to address the central issue of whether women could be denied the right of suffrage.248 The Court must have been tempted to follow the tack taken in Bradwell and tersely dismiss the case with perhaps a short reference to the Slaughter-House Cases. The Court, however, perhaps troubled by the Minors' charge that to establish a group of second-class citizens was despotism, spent most of the fourteen-page decision responding to the Minors' broad arguments.

Waite first agreed that women have always been U.S. citizens. The Fourteenth Amendment therefore "did not affect the citizenship of women."249 The Court then undertook a lengthy analysis of the historical practice to demonstrate that:

For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.250

Although the Court was clearly troubled by the prospect of imposing second-class citizenship, it rationalized its decision by resort to history, original intent, and the usual positivistic platitudes. Its self-

245 Id. at 730.
246 Id. at 719-21.
248 Id. at 165.
249 Id. at 170.
250 Id. at 177-78. The Court also rejected plaintiff's argument that federal supremacy necessarily implied that a state could not arbitrarily deny a class of U.S. citizens their right to vote. All officers of the United States are chosen by "state voters." The power of the state to decide who would vote was "certainly supreme until Congress acts." Id.
described duty was to decide “rights as they exist” and not to look “at the hardship of withholding” those alleged rights.251 If the law ought to be changed, the power to do so lay elsewhere. The Minors had forced the Court to adopt a jurisprudential rationale for withholding women’s rights similar to the one that the Court had used twenty years earlier in the Dred Scott decision.252

The New Departure strategy that had commenced with such fanfare died with a whimper. The Minor decision received little attention at the time and to this day is virtually unnoticed outside of a small circle of feminist scholars.253 Indeed, in hindsight the views of Congressman Loughridge of Iowa seem prescient. He argued that it was a “mistake” to follow a litigation strategy.

In this country, on questions involving political rights the courts are generally in the rear rank; the people are mostly in advance of the courts. In my opinion the most speedy and certain victory will be acquired through the political departments of the government.254

Yet the New Departure movement did achieve a certain success. Positing a constitutionally guaranteed right to vote spurred a half-decade of tremendous political activity. The Anthony case was an important state trial of the latter part of the nineteenth century and received a great deal of public attention and notoriety. That the Anthony case achieved more prominence than Minor v. Happersett is probably due to several factors: Anthony’s stature and her ability to attract members of the elite to her defense; the massive political organizing she and her associates undertook; the rapid resolution of the trial, unlike the years-long Minor litigation; and the fact that Anthony’s trial ended in 1873, when the New Departurists still had strong support, while the Minor case was decided in 1875, after the movement had been defeated on virtually every front and their constitutional interpretation had been rejected.

Probably the broadest impact of the New Departure movement was not to be felt for almost a century. The movement’s articulation of an “unwritten constitution” incorporating certain “natural” or fundamental rights resurfaced in the 1960s and 1970s feminist challenge to restrictive contraceptive and abortion laws. Elizabeth Cady Stanton asserted that “the numerous demands by the people for national pro-

251 Id. at 178.
252 The Court in Dred Scott also based its decision on the purported original intent of the Framers, arguing that “[i]t is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws,” but merely to discern the intent of the Framers. Dred Scott v. Sandford, 60 U.S. 393, 405 (1856).
253 Feminist writers such as Joan Hoff and Ellen DuBois have discussed Minor v. Happersett and the political and legal movement behind the case. See Hoff, supra note 200, at 170-74; DuBois, supra note 194, at 120-29.
254 Suffrage, supra note 197, at 720.
tection in many rights not specified by the Constitution, prove that
the people have outgrown the compact that satisfied the fathers.255
That same view, while unsuccessful in the 1870s, was vindicated 100
years later in Griswold v. Connecticut256 and Roe v. Wade.257

Yet the arguments made by Stanton and the other New Departure
leaders appear to have had no direct impact on the 1960s and 1970s
feminist litigation. There is no mention of either the earlier litigation
or the New Departurist theories in either the Griswold or Roe due pro-
cess litigation. And indeed, it is hard to see how that earlier litigation
would have been relevant. Minor v. Happersett and United States v. Su-
san B. Anthony were simply losing cases, with not even a stirring dissent
for successor litigators to cite to.

The main contribution of the New Departure movement to the
twentieth century movement was its role in developing a culture of
rights. Scholars now recognize that the New Departure movement
played a crucial role in launching the women's movement on a rights-
oriented mode of struggle.258 In 1876, Anthony and other leaders of
the NWSA formally presented a "Women's Declaration of Rights" dur-
ing the official proceeding of the centennial celebration of the Ameri-
can Revolution.259 Elizabeth Cady Stanton devoted enormous
emphasis after the 1870s to speaking and agitating about women's
concerns as a human rights issue. Quoting the radical abolitionist
Charles Sumner, Stanton argued that the true interpretation of the
Constitution "is that anything for human rights is constitutional."260
Some commentators have suggested that the movement's focus on the
struggle for constitutional rights, as opposed to women's happiness
and well being, diluted the radical demands of the early feminists.261
Others have praised the approach.262 Its importance, however, can-
not be questioned. The rights-based women's movement has engen-
dered enormous political and legal struggle over the past century,
even though its focus has led to significant dilemmas and constraints
on the radical potential of feminism.263

255 DuBois, supra note 194, at 131.
258 Hoff, supra note 200, at 174-77 (critiquing the New Departure's use of male dis-
course of rights); DuBois, supra note 194, at 121-31.
259 Hoff, supra note 200, at 178.
260 Elizabeth Stanton, Address to the Judiciary Committee of the U.S. Senate (Jan. 10,
1872), reprinted in Suffrage, supra note 197, at 513.
261 Hoff, supra note 200, at 179-82.
262 DuBois, supra note 194, at 104-06, 129-31 (DuBois views positively the women's
movement's pursuit of rights not explicitly mentioned in the Constitution.).
263 Rhonda Copelon, Unpacking Patriarchy, Reproduction, Sexuality, Originalism and Con-
stitutional Change, in A LESS THAN PERFECT UNION, ALTERNATIVE PERSPECTIVES ON THE U.S.
CONSTITUTION 303, 320-24 (Jules Lobel ed., 1988) (discussing contradiction of focusing on
a negative right to privacy).
When surveying the discouraging results of their efforts, the leaders of the New Departure considered the inspiration their efforts might provide for future generations. "Although defeated at every point, woman's claim as a citizen of the United States to the Federal franchise is placed upon record in the highest court of the Nation, and there it will remain forever."\(^{264}\)

C. \textit{Plessy v. Ferguson}

In 1891, Albion Tourgee agreed to be counsel to a committee of New Orleans blacks who wanted to challenge Louisiana's recently enacted law requiring segregation of railroad cars. Tourgee, a former Reconstruction-era carpetbagger and "vociferous white champion of full racial equality,"\(^{265}\) encouraged blacks to maintain a militant fight against segregation. Despite an environment that discouraged progressive change, he argued that it was only "by constant resistance to oppression that the race must ultimately win equality of right[s]."\(^{266}\)

Tourgee's life reflected the tension between a foolhardy charge into certain defeat and the prophetic vision of a more egalitarian America. Tourgee moved to North Carolina after fighting in the Union armies during the Civil War. Troubled by insecurity and self-doubt, Tourgee nonetheless had the brilliance and ambition to become a leader of the Radical Republicans in North Carolina. He played a central role in drafting the Reconstruction Constitution of North Carolina in 1868 and was later elected a judge.\(^{267}\) His fearless stands against the Ku Klux Klan and in support of racial equality led even his enemies to praise him.\(^{268}\)

Tourgee's greatest fame came, however, when he returned to the North in 1879 after the defeat of Reconstruction. That year he pub-

\(^{264}\) \textit{Suffrage}, \textit{supra} note 197, at 755.  
\(^{265}\) Olsen, \textit{supra} note 10, at 11.  
\(^{266}\) \textit{Id.} (citation omitted).  
\(^{267}\) Tourgee was elected delegate to the Constitutional Convention on a platform that included equal civil and political rights for all citizens, no property qualification for jurors, blanket voter eligibility for every office, popular election of all state legislative, executive and judicial officials, free public schools from the primary to university level, equalization of property taxes, and abolition or at least reduction of poll taxes. Otto H. Olsen, \textit{Carpetbagger's Crusade: The Life of Albion Winegar Tourgee} 89 (1965).  
\(^{268}\) As one leading conservative newspaper later wrote:  

\textit{His was a striking personality, and none the less so because of the fact that he was for many years the most thoroughly hated man in North Carolina. . . . He was open, bold, determined, fearless and self-reliant. . . . He had convictions, and with them the courage and the resources with which to proclaim and maintain them . . . . With full knowledge of the dangers attending his mad course, in the face of the dire threats that were daily thrown in his face, consciously aware that there was dynamite under every foot of earth he trod, . . . he displayed the nerve of a martyr in his wild, mistaken attempt to make an Ohio of North Carolina.}  

lished a novel based on his experiences in the South, entitled *A Fool's Errand*, whose author was originally only identified as "One of the Fools." The novel was a powerful critique of both the national government for its failure to come to grips with the fundamental issue of equality for the former slaves after the war and of the South for its persistence in racial prejudice and violence against anyone who supported change.

Underlying Tourgee's social critique of northern vacillation and southern obduracy during Reconstruction lay a psychological self-study: the study of the fool. Tourgee's brilliant preface, entitled *Letter to the Publishers* is a witty, profound analysis of the nature of the honorable and ancient order of fools. Fools are prophets who are not historically vindicated. Noah, one of the earliest of the fools, was laughed at by his peers until the "Deluge saved his reputation, and made his Ark a success. But it is not often that a fool has a heavenly voice to guide him, or a flood to help him out."

The conflict between the arrogant prophet and the humble fool was a continuing theme in Tourgee's life. His voice of post-war radical Republican idealism was overcome by a long wave of racism, materialism and cynicism. While *A Fool's Errand*, notes Edmund Wilson, "was received as a sensation in its day," Tourgee has been aptly considered as "perhaps the most neglected figure in American literature." He was influential as a civil rights lecturer and columnist, yet he was never part of a successful reform movement and operated primarily on "a decisive but unjustly neglected social level." He constantly fluctuated between optimism and despair.

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269 Tourgee, supra note 37. See supra notes 37-39 and accompanying text for a discussion of Tourgee's thesis.

270 Both fools and martyrs act on principle: the martyr willingly accepts ostracism or death, but the fool maintains the blind faith and hope that "in some inscrutable way the laws of human nature would be suspended, or that the state of affairs at first presenting itself would be but temporary." Tourgee, supra note 37, at 134-35.

271 Id. at 6.

272 Tourgee's work after 1879 continued to reveal both hope and frustration. He met James Garfield at the Republican National Convention in 1880, and the then Presidential candidate agreed to implement certain key programs urged by Tourgee. Garfield wrote to Tourgee expressing the "hope that the day may come when our country will be a paradise for all such fools." John H. Franklin, Introduction to Tourgee, supra note 37, at xxii. However, shortly after being elected President, Garfield was assassinated.


275 Olsen, supra note 267, at 294.

276 The diary kept by Tourgee's wife Emma is constantly punctuated with despair. "Albion [is] in despair over his work. Life does not seem worth the struggle anyhow," she wrote. Olsen, supra note 267, at 267. After one of the magazines he had started failed, she wrote that Tourgee's "life was embittered, ruined, by his trying to do what he had no
The *Plessy* case was the last major battle for the Fool. Shortly after Tourgee agreed to challenge Louisiana's law, a local New Orleans activist, Louis Martinet, wrote him that "[t]he fight we are making is an uphill one." Martinet did not foresee a "favorable result," and in a despondent tone stated, "but perhaps it is best that the battle be fought."

Indeed, the political, social, and legal developments preceding the *Plessy* litigation were ominous. During the 1880s, at least four southern states had enacted segregation statutes, and the Interstate Commerce Commission had endorsed the principle of separate but equal. In the one-and-a-half-year period following the passage of Louisiana's law, additional segregation measures were adopted in at least six southern states and lynching soared toward a new peak.

Moreover, the lower federal courts generally had applied the separate but equal doctrine. So too had most state courts. And the Supreme Court had, in a series of decisions beginning with the *Slaughter-House Cases* in 1873, adopted a very narrow reading of the rights granted by the Thirteenth and Fourteenth Amendments. Indeed, a number of prominent commentators, including Jack Greenberg, former General Counsel for the NAACP Legal Defense Fund, have questioned whether it was a mistake to bring the *Plessy* test case in such a hostile environment.

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capacity to do." *Id.* at 263 (quoting letter from Emma Tourgee to Mr. Moot (June 17, 1905)).

277 Letter from Louis A. Martinet to Albion W. Tourgee (July 4, 1892), *reprinted in Olsen, supra* note 10, at 61, 64.

278 *Id.* at 63.


280 *Olsen, supra* note 10, at 11. "The civil rights community was encouraged by a number of victories in the North against racial injustice in the early 1890s. Between 1891 and 1895, at least 11 northern states improved or established civil rights laws, and in 1892, New York and Michigan state courts had ruled against public segregation."


282 *Lofgren, supra* note 6, at 79 ("the judicially defined Amendment, as it emerged in the state and lower federal case reports, remained quite hospitable to the principle of separate-but-equal").

283 *See* The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughter-House Cases, 83 U.S. 36 (1873).

284 Greenberg, *supra* note 42, at 326 ("We can only wonder whether Tourgee was right or wrong in proceeding in the face of such inauspicious omens."); *see also Lofgren, supra* note 6, at 4.
Nonetheless, Albion Tourgee and Louis Martinet eagerly urged the case forward in 1891-1892.\textsuperscript{285} The \textit{Plessy} case thrust upon Tourgee the conflict between the prophetic visionary and the practical litigator. He recognized that technical legal arguments had a greater chance of success in the courts, but believed in a broad-based vision of the affirmative grant of equality contained in the Fourteenth Amendment. For that reason, Tourgee was initially skeptical about his co-counsel's\textsuperscript{286} proposal that the person arrested in the test case should hold a ticket for an out-of-state destination, thereby enabling them to challenge the Louisiana statute as a state infringement on the congressional power to regulate interstate commerce. "What we want," Tourgee wrote his co-counsel, "is not a verdict of not guilty, nor a defect in this law but a decision whether such a law can be legally enacted and enforced in any state and we should get everything off the track and out of the way for such a decision."\textsuperscript{287} Eventually, he agreed with his co-counsel's approach, admitting that he "may have spoken too lightly of the interstate commerce matter."\textsuperscript{288} In fact, the first test case did involve an out-of-state traveler, and the Louisiana Supreme Court held that the statute applied only to intra-state travel. Only after that decision did Plessy buy his intra-state ticket.

Tourgee did not, however, totally eschew narrow grounds in his challenge to the Louisiana statute.\textsuperscript{289} Over the objections of Louis Martinet and some other members of the New Orleans Citizens Committee, Tourgee urged that a Negro whose complexion was nearly white be selected to test the statute.\textsuperscript{290} Such a test case would both highlight the arbitrariness of the statute and provide a claim that whiteness was a property right protected by the Due Process Clause, an argument that might move a property-minded Supreme Court.\textsuperscript{291} In addition, Tourgee and his co-counsel included various other narrow challenges to the Louisiana law, such as an attack on the statute's immunization of railways and train officials from liability for damages.

\begin{footnotesize}

\textsuperscript{285} Olsen, \textit{supra} note 267, at 310 (suggesting that Tourgee and Martinet were encouraged by Supreme Court Justice Harlan's dissents, which read the post-Civil War Amendments more broadly than did the majorities).

\textsuperscript{286} Tourgee's co-counsel was Jas C. Walker. Olsen, \textit{supra} note 10, at 74.

\textsuperscript{287} C. Vann Woodward, \textit{The Case of the Louisiana Traveler, in Quarrels That Have Shaped the Constitution} 145, 150 (J. Garraty ed., 1962).

\textsuperscript{288} \textit{Id.}

\textsuperscript{289} Jack Greenberg has suggested that the critical problem Tourgee had with the interstate commerce approach was that someone else had thought of utilizing that strategy. Greenberg, \textit{supra} note 42, at 325.

\textsuperscript{290} Letter from Louis A. Martinet to Albion W. Tourgee (Oct. 5, 1891), \textit{reprinted in Olsen, supra} note 10, at 55, 56-57.

\textsuperscript{291} Lofgren, \textit{supra} note 6, at 31; Greenberg, \textit{supra} note 42, at 324.

\end{footnotesize}
LOSERS, FOOLS & PROPHETS

for refusing to carry passengers who objected to their assigned seats.  

Tourgee's argument to the Supreme Court highlighted both the broad and narrow approaches. Tourgee's central argument, placed first in the Assignment of Errors, was that the segregation statute was a "badge of servitude" that, *inter alia*, "abridges the rights, privileges and immunities of citizens on account of race and color." This argument, elaborated in Plessy's brief to the Court, focused on (1) the affirmative provisions of the Fourteenth Amendment, particularly the conferral of national citizenship and the rights accruing thereto, and (2) the Thirteenth Amendment, which according to Plessy's brief was designed to destroy the "estate and condition of subjection and inferiority of personal right and privilege." Tourgee also resurrected the abolitionist and suffragist argument that the Declaration of Independence is not a mere rhetorical flourish, but that "all-embracing formula of personal rights on which our government is based." Tourgee virtually repeated Alvan Stewart's position on the Declaration in the *New Jersey Slave Case.* He also returned to the abolitionist and suffragist model of constitutional interpretation, arguing that the Fourteenth Amendment must be interpreted "in strict accord" with the Declaration, which "has become the controlling genius of the American people."

The brief's Fourteenth and Thirteenth Amendment arguments directly attacked the Court's recent record and were unlikely to succeed. As one commentator has noted, "Hopes of so drastically altering the judicial mind would have been unrealistic. . . ." Tourgee probably recognized the futility of these arguments because he chose to begin his brief to the Supreme Court with the much narrower argument that Plessy's reputation in being white was property which had

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292 Assignment of Errors, *ex parte* Plessy v. Ferguson, 163 U.S. 537 (1896), *reprinted in* Olsen, supra note 10, at 74, 76; *see also* Lofgren, supra note 6, at 56. In addition, Plessy challenged a train official's legal ability to determine a person's race.

293 Brief for Plaintiff in Error at 8, Plessy v. Ferguson, 163 U.S. 537 (1895), *reprinted in* 13 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 27, 3 (Philip Kurland & Gerhard Casper eds., 1975) [hereinafter Landmark Briefs].

294 Brief for Plaintiff in Error at 33, Plessy v. Ferguson, 163 U.S. 537 (1895), *reprinted in* Landmark Briefs, supra note 293, at 60.

295 Brief for Plaintiff in Error at 34, Plessy v. Ferguson, 163 U.S. 537 (1895), *reprinted in* Landmark Briefs, supra note 293, at 61.

296 *See* supra notes 172-78 and accompanying text.

297 Brief for Plaintiff in Error at 34, Plessy v. Ferguson, 163 U.S. 537 (1895), *reprinted in* Landmark Briefs, supra note 293, at 61.

298 Tourgee's brief admitted that "Cruikshank's case (a Supreme Court decision on equal rights) is squarely against us . . . and cannot stand." Brief for Plaintiff in Error at 26, Plessy v. Ferguson, 163 U.S. 537 (1895), *reprinted in* Landmark Briefs, supra note 293, at 53.

299 Olsen, supra note 10, at 85.
been denied without due process. Only at Point VI did Tourgee set forth his central contentions based on equality.

By the time the case reached the Supreme Court, Tourgee and his associates were deeply pessimistic about their chances. In a letter written nine months after filing the Assignment of Errors to the court, Tourgee expressed serious doubts about the case. He now realized that there were five Justices against Plessy.\textsuperscript{300} "The court has always been the foe of liberty," according to Tourgee, "until forced to move on by public opinion."\textsuperscript{301} Moreover, Tourgee now realized that "[i]t is of the utmost consequence that we should not have a decision against us," since the Court had "never reversed itself on a constitutional question."\textsuperscript{302}

He therefore counseled Martinet's committee in New Orleans to delay the case and "[t]o bend every possible energy to secure the discussion of the principle in such a way as to reach and awaken public sentiment."\textsuperscript{303} The only hope for the case was to mobilize broad public support against segregation. Tourgee believed that one Justice could be swayed "if he 'hears from the country.'"\textsuperscript{304}

The Supreme Court did delay. It decided \textit{Plessy v. Ferguson} on May 18, 1896, more than three years after the appeal was filed. However, far from intensifying pressure on the Court as Tourgee had hoped, public opinion became even more unfavorable. The nascent social sciences added a veneer of expert opinion to the fast-developing racism.\textsuperscript{305} In 1895, Frederick Douglass, symbol of militant African-American struggle for equality, died. That same year, Booker T. Washington delivered his famous Atlanta address that was "widely interpreted as a sign of Negro acceptance of an inferior status."\textsuperscript{306} Between 1892 and 1896 lynchings reached new peaks, new segregation laws were adopted, and Congress repealed a host of Reconstruction-era statutes protecting equal rights.\textsuperscript{307} In New Orleans, Louis Martinet and his newspaper were on the verge of collapse. The political and social climate boded ill.

\textsuperscript{300} Letter from Albion W. Tourgee to Louis A. Martinet (Oct. 31, 1893), \textit{reprinted in id.} at 78.
\textsuperscript{301} \textit{Id.}
\textsuperscript{302} \textit{Id.}
\textsuperscript{303} \textit{Id.} at 79.
\textsuperscript{304} \textit{Id.} at 80.
\textsuperscript{305} A speech given to the American Association for the Advancement of Science by its president, Daniel G. Brinton, typified the prevailing attitude on the eve of the Supreme Court's decision in \textit{Plessy}. Brinton argued that each race and ethnic group had its "own added special powers and special limitations and were not 'equally endowed.'" \textit{Lofgren, supra} note 6, at 104-05.
\textsuperscript{306} \textit{Olsen, supra} note 267, at 328.
\textsuperscript{307} \textit{Id.} There were some major protests and victories, particularly in the northern states in the period between 1895-1896. \textit{Olsen, supra} note 10, at 24; \textit{Woodward, supra} note 278, at 153.
The Supreme Court's decision in *Plessy v. Ferguson*, rejecting virtually all of Plessy's arguments, received surprisingly little national attention. The typical press reports only routinely mentioned the case. C. Van Woodward reports that

the country as a whole received the news of [the Court's] momentous decision upholding the "separate but equal" doctrine in relative silence and apparent indifference. Thirteen years earlier the Civil Rights cases had precipitated pages of news reports, hundreds of editorials, indignant rallies, congressional bills, a Senate report and much general debate. In striking contrast, the *Plessy* decision was accorded only short, inconspicuous news reports and virtually no editorial comment outside the Negro press.

The *New York Times* included the decision in its regular page three Tuesday column on railway news, along with one other very minor railroad decision. Unlike *Plessy v. Ferguson*, three Supreme Court decisions rendered on May 18, 1896 did receive front page coverage: a federal contract labor law dispute involving a sugar plantation owner, a challenge to a portion of an heiress's multi-million dollar inheritance, and a playwright's claim of plagiarism, which the court refused to review. It was small solace that the few newspapers that did editorialize about the case generally supported Harlan's dissent.

Nor was the media alone in its silence. The Democratic and Populist party platforms in 1896 contained strong anti-Supreme Court planks criticizing the decisions of the Court in the income tax, sugar monopoly, and Pullman strike decisions. Neither platform made mention of the recently decided *Plessy* case. The fact that *Plessy* did not spark the broad public discussion and dialogue Tourgee had

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308 The Court agreed that the section of the Louisiana statute that immunized railway officials from liability for mistaken judgments about a person's race was unconstitutional, but that infirmity had no bearing on the requirement that railways provide separate accommodations. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court also conceded that one's reputation of belonging to the dominant race was property, but that also was irrelevant to the question of whether Louisiana could segregate the races. *Id.* at 549.

309 *LOFGREN*, supra note 6, at 196; *OLSEN*, supra note 10, at 25; Riegel, *supra* note 281, at 17.


311 *LOFGREN*, supra note 6, at 196-97.

312 *Id.* at 196-97.

313 *OLSEN*, supra note 10, at 25. Lofgren writes that "[a]mong editors outside the South who judged the judges, hostility to the decision overshadowed approval by perhaps three to one." *LOFGREN*, supra note 6, at 196.

hoped for,\textsuperscript{315} while still furthering segregation,\textsuperscript{316} adds legitimacy to the question of whether it should ever have been brought or appealed to the Supreme Court.\textsuperscript{317}

Louis Martinet, Albion Tourgee, and their compatriots thus had little impact on their era; the only significant justification for this litigation effort is its possible impact on history. Tourgee's arguments were incorporated into Harlan's dissent, which prevailed in another age. As Charles Lofgren has noted, \textit{Plessy} is "more than a tale of losers. Besides having their years in court, Martinet and his associates had their arguments displayed on the record—indeed memorialized in Justice Harlan's dissent—to instruct later generations."\textsuperscript{318} Tourgee's statement that justice is "color blind" became one of the most important quotations in constitutional law, used by both liberals and conservatives for different purposes.

Moreover, Tourgee's original brief was read by at least one member of the Court that decided \textit{Brown v. Board of Education}. In 1950, segregation was again before the Court. Justice Robert H. Jackson discovered that Albion Tourgee had lived in a town close to Jackson's home in upstate New York. Struck by Tourgee's connection to \textit{Plessy}, he wrote friends that

\begin{quote}
I have gone to his [Tourgee's] old brief, filed here, and there is no argument made today that he would not make to the Court. He says, "Justice is pictured blind and her daughter, The Law, ought at least to be color-blind." Whether this was original with him, it has been gotten off a number of times since as original wit. Tourgee's
\end{quote}

\begin{small}
\textsuperscript{315} LOFGREN, supra note 6, at 5. The primary reason that \textit{Plessy} was ignored for so long was that for white America, its holding was not controversial. Most whites accepted the compromise of 1877 ending Reconstruction, and the lower federal courts and state courts had virtually unanimously adopted the "separate but equal" doctrine. Tourgee's central and most radical arguments on the meaning of the Thirteenth and Fourteenth Amendments had already been rejected by the Supreme Court in the preceding two decades. \textit{Id.}

\textsuperscript{316} Many scholars have viewed \textit{Plessy} as triggering a second wave of Jim Crow segregation. See JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 65 (1976); see also Riegel, supra note 281, at 19 n.10 (citing other sources that support this proposition). One scholar has argued that it was only after the Court's decision in \textit{Plessy} "that rigid segregation in fact began to run rampant." Paul Oberst, \textit{The Strange Career of Plessy v. Ferguson}, 15 ARIZ. L. REV. 389 (1973). Another commentator agrees, maintaining that \textit{Plessy} and the Civil Rights Cases "constitutionally encouraged the Jim Crow laws." Charles A. Miller, Constitutional Law and the Rhetoric of Race, 5 PERSPECTIVES ON AMERICAN HISTORY 147, 196 (D. Fleming & B. Barlyn eds., 1971). More recent scholarly commentary treats the effect of the \textit{Plessy} decision more modestly, as merely encouraging existing trends. LOFGREN, supra note 6, at 203 ("[T]he evidence of Plessy's direct role is slight."); Riegel, supra note 281, at 39 (\textit{Plessy} was "not a turning point ... [but] rather an affirmation of the dominant legal concept.").

\textsuperscript{317} Charles Lofgren argues that even if \textit{Plessy} had not been brought, cases challenging segregation would have probably reached the Supreme Court within a few years, and with the same result. LOFGREN, supra note 6, at 200. Indeed, four years later, Chesapeake & Ohio Railway Co. v. Kentucky, 179 U.S. 388 (1900), involving the Kentucky separate car law, was similarly decided by an 8-1 vote, with only Justice Harlan dissenting.

\textsuperscript{318} LOFGREN, supra note 6, at 208.
\end{small}
brief was filed April 6, 1896 and now, just fifty-four years after, the question is again being argued whether his position will be adopted and what was a defeat for him in '96 be a post-mortem victory.319

_Plessy_ became a symbol of injustice and resistance for twentieth century African-American activists. Charles Thompson, the dean of Howard’s School of Education, argued in the 1930s that resort to the courts was important and that “[e]ven unfavorable decisions by the courts had some value: they dramatized Negro discontent.”320 The New Orleans Citizens Committee was accurate when it declared, shortly after the decision, “In defending the cause of liberty, we met with defeat . . . but not with ignominy.”321

History vindicated Tourgee’s and Martinet’s position. But the import of the _Plessy_ case cannot be measured in the ultimate vindication of Homer Plessy’s claims.

[T]radition represents a determined commitment to the rights of all mankind in the face of the greatest odds . . . . The memory of Plessy will be properly recalled only to the extent that there are still those possessed of the conscience and the courage to fight for causes that may not achieve respectability for generations and to resist injustices even when sanctioned by their own national leaders and law.322

_Plessy_ thus represents the prophetic tradition that looks not primarily at concrete substantive improvement in the law, but as law as a powerful, ongoing struggle that speaks to future generations about justice. Louis Martinet wrote Tourgee, in a moment of deep pessimism, that he had asked himself “a thousand times” why he fought this battle in which he would gain nothing but expend “time, labor [and] money.”323 His answer to his own question, which almost 100 years later is still the best one I can offer, was that “[l]ike you, I believe I do it because I am built that way.”324

D. The Plant Closing Movement in Youngstown, Ohio

The labor movement has a long tradition of radically invoking rights derived from sources similar to those of the movements already discussed in this Part. The Gilded Age labor leaders asserted repeatedly that the “‘wage labor system’ fell afoul of the republican Constitution.”325 Those labor leaders, like the feminists of the 1870s, argued

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319 Woodward, _supra_ note 287, at 158.
321 _Lofgren, supra_ note 6, at 208.
323 _Id._ at 64.
324 _Id._
that the existence of inequality compromised the idea of a republic. The Knights of Labor premised their arguments on the Declaration of Independence and natural rights. In the early twentieth century, the AFL attacked court injunctions against strikers by invoking the Thirteenth Amendment. That amendment, claimed AFL leaders, "enshrined not only self-ownership, but also labor's dignity and independence." The AFL borrowed the language of the abolitionist movement to support its Thirteenth Amendment argument. More recently, the community challenges to plant closings in Youngstown and Pittsburgh also developed a radical community-oriented notion of rights, which had its roots in a similar concept of republicism that motivated abolitionists, suffragists, and Albion Tourgee.

Between 1977 and 1987, the steel industry in the two leading steelmaking cities of the nation, Pittsburgh and Youngstown, declined precipitously. A wave of plant shutdowns ended all steelmaking in Youngstown and decimated the once vibrant industry in Pittsburgh, resulting in the direct loss of approximately 80,000 jobs in basic steel in the two metropolitan areas. A broad coalition of workers, churches, and community activists emerged to fight these mill closings.

Litigation played an important role in this struggle. The major legal challenge to plant shutdowns was a 1979 lawsuit filed by five local steelworker unions, an incumbent Republican Congressman, the Lordstown Local of the UAW, sixty-five individual steelworkers, and the Tri-State Conference on Steel. The suit sought to prevent U.S. Steel's announced shutdown of its Youngstown plants. The broad coalition of plaintiffs reflected the wide array of social forces opposing the plant closings.

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326 Leon Fink, Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order, 74 J. Am. Hist. 904, 912 (1987). Terrence Powderly, a leader of the Knights of Labor, later recalled that "[m]aybe we placed a too implicit faith in what the Declaration of Independence held out to us." Id. at 914.
328 Id. at 136.
329 Staughton Lynd, The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburgh, 1977-1987, 74 J. Am. Hist. 926, 929 (1987). Lynd states that the Constitutional argument against plant-closings is "best understood as a variant of the artisan republicanism espoused in earlier epochs by Thomas Paine and the mechanics of the American Revolution, by the working men's parties of the 1820s and 1830s, by the local labor parties associated with the Knights of Labor in the 1880s, and by (less well known) local labor parties active between 1929 and 1936."
330 Lynd, supra note 11, at 6-9; see also 10,000 Jobs Lost in Youngstown, N.Y. Times, Jan. 21, 1987, at A8 (steel industry jobs declined from 90,000 to 22,000 in Pittsburgh).
331 Lynd, supra note 11, at 9-11.
The complaint articulated in legal terms the feelings of ordinary steelworkers and a substantial section of the community. U.S. Steel had made a promise to keep the Youngstown mills open if they could be made profitable.333 The workers had agreed to a variety of concessions, worked hard, and relied on that promise to their detriment,334 yet U.S. Steel had breached its promise. The workers' contract theory was promissory estoppel. The complaint later added a second, more radical theory, actually suggested by the district court judge trying the cases, that a community "property right has arisen from [the] lengthy, long-established relationship between United States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and the Mahoning Valley in having given and devoted their lives to this industry."335 The contract theory could certainly be viewed as falling within well-established law;336 the community right to property was a more radical interpretation and revamping of property law.337

The Youngstown elite generally viewed the lawsuit as futile. The mayor of Youngstown thought it was a ridiculous, silly, pathetic, and contemptible lawsuit.338 The International Steelworkers Union did not join the plaintiffs, and one important reason for that failure may have been the Union's perception that the lawsuit could not succeed.339

Much of the community, however, supported the litigation. Other methods short of litigation had been tried in prior plant closings, and the workers felt that there was virtually no other alternative.340

In a preliminary hearing before District Court Judge Lambros, the plaintiffs won a preliminary injunction against the plant clos-

333 492 F. Supp. at 4; Local 1330, United Steelworkers v. United States Steel Corp., 631 F.2d 1264, 1270-1273 (6th Cir. 1980).
334 631 F.2d at 1274-76.
335 Proceeding Heard Before The Honorable Thomas D. Lambros on Feb. 28, 1980, quoted in 631 F.2d at 1280.
336 See Restatement (Second) of Contracts § 90 (1981).
337 Both theories, however, were based on the same basic notion that the workers and community had some reliance interest built up over many years of interaction with the company. Compare Joseph W. Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611 (1988) with Daniel A. Farber & John H. Matheson, Beyond Promissory Estoppel: Contract Law and the Invisible Handshake, 52 U. Chi. L. Rev. 903, 938-42 (1985). For this reason the two theories were often intermingled and confused even in the minds of the litigators at the time.
338 Interview with Staughton and Alice Lynd, Pittsburgh, Pennsylvania (Aug. 1993).
339 Id.
340 The workers petitioned, demonstrated, and negotiated unsuccessfully with the companies to avert shutdown. Interview with Staughton and Alice Lynd.
Judge Lambros responded to the plaintiffs' argument with a rambling discourse in which he (1) proclaimed sympathy for the workers' plight; (2) expressed grave doubts about the court's ultimate jurisdiction over the case; (3) suggested the radical idea, as yet unproposed by the plaintiffs, that the workers and community might have a property right to the U.S. Steel mills; and (4) granted the injunction.\textsuperscript{342}

The trial was held in Youngstown in early March. The judge dismissed the plaintiffs' claims in a thirty-seven-page opinion that expressed great sympathy for the workers' situation, but rejected the promissory estoppel claim\textsuperscript{343} and found no community property right. Although he himself had suggested the argument, the judge's opinion held that "this new property right[,] is not now in existence in the code of laws of our nation."\textsuperscript{344}

By the time of the trial, the workers' activist movement to keep the mills open had dissipated, and the lawsuit represented the only significant resistance to the company's decision. An appeal to the Sixth Circuit Court of Appeals, argued by Arthur Kinoy and Staughton Lynd, also failed. Before the argument, Kinoy felt that they had no chance, but as always happens to litigators in such situations, when he got up to argue, a wave of hope and faith overcame his pessimism.\textsuperscript{345} Unfortunately, his initial instincts were correct. The Sixth Circuit's Chief Judge Edwards, who, like Judge Lambros, was considered a liberal, wrote the appellate court's decision denying relief. The opinion characterized the workers' suit as "a cry for help from steelworkers and townspeople in the City of Youngstown,"\textsuperscript{346} but found no basis for granting their claim.\textsuperscript{347}

\textsuperscript{341} The plaintiffs' case was argued at trial by Staughton Lynd along with former Attorney General Ramsey Clark.

\textsuperscript{342} Interview with Staughton and Alice Lynd, \textit{supra} note \textsuperscript{338}.

\textsuperscript{343} See \textit{Farber & Matheson, supra} note \textsuperscript{337}, at 938 (summarizing \textit{Local 1330, United States Steel Workers v. United States Steel Corp.}, 492 F. Supp. 1, 4-10 (D. Ohio 1980): (1) no definite promise was made; (2) the company statements plaintiffs relied on were made by lower-level company officials; and (3) the plaintiffs had failed to demonstrate that the condition precedent to keeping the plants open—the mills renewed profitability—had indeed been achieved).

\textsuperscript{344} 492 F. Supp. at 10.

\textsuperscript{345} Interview with Arthur Kinoy, New York, N.Y. (Oct. 1993).

\textsuperscript{346} \textit{Local 1330, United Steel Workers v. United States Steel Corp.}, 631 F.2d 1264, 1265 (6th Cir. 1980).

\textsuperscript{347} \textit{Id.; see also Steel Valley Authority v. Union Switch & Signal Div.}, 809 F.2d 1006 (3d Cir. 1987), cert. dismissed, 484 U.S. 1021 (action to prevent the closing of a factory before a governmental authority could formulate a plan of acquisition); \textit{Serrano v. Jones & Laughlin Steel Co.}, 790 F.2d 1279 (6th Cir. 1986) (challenge to shutdown of Campbell Works Coke Ovens in Youngstown, in which the court also denied relief); \textit{Fran Ansley}, 81 Geo. L.J. 1757, 1813-18, 1834-35, 1848-51, 1853-55 (1993). Yet the court affirmed Lambros's decision. Although Staughton Lynd and the Youngstown and Pittsburgh communities
Some of the legal services lawyers who had worked on the case were devastated by the legal defeat.\textsuperscript{348} Lynd was, of course, saddened and distressed, but had recognized that defeat was probably in the offing. He remembers a recurring image that visited him throughout the legal battle: “Soviet tanks were rolling into Hungary in 1956, and kids were picking up bricks and throwing the bricks against the tanks. I saw myself as one of the kids.”\textsuperscript{349}

Despite the legal loss, the litigation left a legacy. It generated a significant amount of publicity. It allowed the steelworkers of Youngstown to gain the nation’s attention, to “make a claim on the reason and conscience of the community.”\textsuperscript{350} The lawsuit was “one more voice asserting that the mill closings were wrong.”\textsuperscript{351}

The lawsuit also gave voice to the steelworkers’ own stories and aspirations. It was important to Lynd that the legal theory articulate the injustice felt by the ordinary people of Youngstown. For Lynd, the most important thing that a lawyer for a marginalized group of people could do was to articulate their stories and aspirations and to help define their issues in court. He and the other lawyers gave voice to the victims of Youngstown. Both the district court and court of appeals decisions left a strong narrative record of the injustice of the plant closings.\textsuperscript{352}

Moreover, the lawsuit provided a focus for a community’s affirmation of its identity. As Bob Vasquez, one of the workers’ leaders, said, “It saved people’s dignity that they made that fight for the mill.”\textsuperscript{353} Or as John Barbaro put it, “Youngstown sure died hard.”\textsuperscript{354}

A decade later, another devasting plant closing sparked a similarly radical litigation. General Motors, after obtaining years of tax abatements from the town of Ypsilanti, Michigan in return for a promise to keep its auto factory located in that town open, nevertheless closed the plant. The community sued GM in state court, making the same claim that the Youngstown steelworkers had raised in their suit.

\begin{footnotes}
\item[348] Interview with Staughton and Alice Lynd, \textit{supra} note 338.
\item[349] \textit{Id.}
\item[350] \textit{Id.}
\item[351] \textit{Id.}
\item[352] See, \textit{e.g.}, Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264, 1270-77 (6th Cir. 1980) (reproducing verbatim the plaintiffs’ complaint, which provided a vivid and detailed document of the breach of trust the company had committed).
\item[353] Dorry Kraus & Carol Greenwall, \textit{Shout Youngstown} (Media Works 1984) (video produced on Youngstown struggle).
\item[354] Interview with Staughton and Alice Lynd, \textit{supra} note 338.
\end{footnotes}
This time, the plaintiffs won a judgment enjoining General Motors from shutting the plant down.355

It is possible that the trial court judge in Charter Township of Ypsilanti v. GM was simply more courageous than Judge Lambros had been in the Youngstown case. However, the facts of the Ypsilanti case were also much better for the plaintiffs’ case: the company’s promise was clearer; the town’s provision of tax abatements was stronger evidence of detrimental reliance; and the plant was more profitable. In addition, the decade of dramatic decline in the United States’ industrial base that followed the Youngstown case may have disproved an earlier perception that the plant closing was a local problem or an isolated incident. Whatever the complex mix of reasons, the Ypsilanti community was able to persuade at least one judge that it had both justice and the law on its side.

Ypsilanti’s victory was reversed by the appellate court, and the Michigan Supreme Court denied Ypsilanti leave to appeal.356 Nevertheless, the Ypsilanti case demonstrates that the Youngstown vision lives on in other communities, despite the defeat suffered by the Youngstown workers. Furthermore, one trial court judge saw sufficient merit in their legal arguments to grant their claim.

The Youngstown litigation helped to create a narrative, an alternative legal vision, supported by communities that are committed to fighting for that vision. For example, the Michigan Supreme Court used an argument similar to that put forth by the Youngstown plaintiffs in a case involving dairy farmers.357 This case was decided during the pendency of the Ypsilanti case. While the Michigan Court of Appeals distinguished that case from Ypsilanti,358 the tension between the application of the Youngstown plaintiffs’ legal theory to the dairy farm context but not to plant closings will probably spark further struggle. In addition, several prominent law review articles have criticized the decision in Local 1330 v. United States Steel.359 Youngstown may have died hard, but in its death it created legal meaning and a narrative of resistance that will live on in the struggles of other workers and communities for decades and generations to come.

358 506 N.W.2d at 559 n.2.
359 See, e.g., Farber & Matheson, supra note 337, at 939-42.
IV
THE SISYPHEAN QUEST: FOREIGN POLICY LITIGATION IN THE 1980s

In the 1980s, I participated in litigation that challenged interventionist United States foreign policy in Central America. That effort shared some characteristics with the four narratives of Part III. We articulated a fundamental critique of an imperial United States unjustly intervening abroad, and we expressed a vision of a redemptive future in which popular revolutionary movements in Latin America would throw off the yoke of empire and establish just societies. We viewed our lawsuits as a means to educate and mobilize a complacent American population, and we challenged the present reality by invoking tradition. Our vision of the future was premised on legal symbols from America’s revolutionary past and its recent, searing experience in Vietnam. However, in certain important respects, our litigation was different. The term that seems best to capture the essence of our struggle is “Sisyphean,” not “prophetic.”

The first notable difference between our litigation and those already described was in our invocation of tradition. The litigators discussed above relied on alternative legal symbols to inform the constitutional text: natural rights, the Declaration of Independence, and notions of republican government. Their key dilemma was how to reconcile the Framers’ toleration of slavery, women’s second-class citizenship, and limited employee rights with their radical interpretations. In virtually all of these cases the judiciary responded with positivistic reserve: a court must uncover the law as it is, not as it should be.

Conversely, we appealed to symbols rooted in the mainstream of constitutional law: the text of the Constitution, early congressional enactments, and a series of reform statutes such as the War Powers Resolution and the International Economic Emergency Powers Act that Congress enacted in the wake of the Vietnam War. Most of our cases were premised on textual analysis of the Constitution with reference to the post-Vietnam War legal framework by which Congress implemented the constitutional design. Our arguments relied heavily on the original intent of the Framers of these legal instruments. We invoked Article I, Section Eight’s explicit provision to Congress of the power to declare war\(^{360}\) the War Powers Resolution’s 60-day limitation of executive authority to introduce troops into hostile situations.\(^{361}\)

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361 See infra notes 367-83 and accompanying text.
and the Neutrality Act's command that "whoever" conspires to attack another country with which the United States is at peace is guilty of a crime.\textsuperscript{662}

A number of my friends questioned what they saw as the inher-ently conservative nature of our arguments. We adopted essentially the jurisprudence articulated by the Reagan Administration at the time. However, while the cases presented themselves as conservative ventures to enforce past law and not to create new legal meaning, they in fact posed a radical threat to the contemporary social order. This apparent paradox made clear that the "conservative" social order had no commitment to the original constitutional design or to the laws that attempted to reinforce it. It was equally heedless of the nation's history. The post-Vietnam statutes that we claimed had been violated represented the culmination of intense political struggles. Our task as lawyers was to force society to remember the anti-intervention struggles over the Indochina War despite the government's collective amnesia. As Cornel West has written, lawyers are well-suited to the struggle against such amnesia because we "have close contact with the concrete traces and residues of the struggles and battles of the past."\textsuperscript{368} We were seeking to invoke historic lessons that the government wanted to forget and to enforce statutes and constitutional provisions that the government was unwilling to enforce.

If the prophetic litigations described in Part III were attempts to bridge the gap between the written law "that is" and the law "that ought to be," our litigation focused more heavily on the contradiction between the law "that is" and the state's lack of commitment to that law. Our challenge to the political reality came not from a utopian vision of law but rather from the subversive nature of litigating the conflict between the law as is and the law as enforced. Both strategies force society to confront the divergence between law's myth and its reality, but in different ways.

The difference between litigating "law that is" and litigating "law that ought to be," is not as clear as the preceding paragraph suggests. For the "law that is" almost always can be subject to different interpretations, and history is never as clear as the distinction drawn above may suggest. Yet there does seem to me to be an important distinction between relying on laws and constitutional provisions that most mainstream scholars would agree were intended to limit Executive power and the radical abolitionist argument that the Constitution was an antislavery document which assaulted the fundamental precepts of most lawyers and political leaders of the age.

\textsuperscript{662} See \textit{infra} notes 401-32 and accompanying text.

\textsuperscript{368} West, \textit{supra} note 65, at 473.
This basic difference in the use of history led to differences in the judicial response. The *New Jersey Slave Case*, *Minor v. Happersett*, *Plessy v. Ferguson*, and *Local 660 v. U.S. Steel* all were resolved on the merits. The courts denied the radical claims by invoking a positivistic jurisprudence that distinguishes law from justice. With a few exceptions, the courts that heard our cases abstained on the merits, invoking judicial incompetence. Indeed, in a number of cases, the courts admitted that our view of the law's requirements was correct, but still withheld a remedy.

More importantly, the pursuit of narrow, technical arguments threatened to take us further from our vision of justice than any of the prophetic litigators had in their cases. We had a very strong substantive argument, but faced difficulty in forcing the courts to deal with the merits rather than treating the case as a political question. As the decade of the 1980s proceeded, we narrowed our claims and arguments. The courts often would abstain in one case, but leave us an opening for the next case. We would then try to fit within the opening the prior court had left, only to be blocked by some new procedural issue. The ongoing battle resembled a journey through a Kafkaesque maze, instead of a clarion call for justice. The question increasingly became how to navigate through the maze rather than how to articulate our vision of justice. Ironically, it seemed that our entire goal became procedural: forcing the court to engage our claims.

This procedural maze, combined with several other factors, diluted the passion and pathos in our legal argument, features that are central to the prophetic vision of law. Our clients were thousands of miles away, far removed from the courtroom, and we were often arguing not about their basic rights but about some abstract, technical procedural or separation-of-powers issue. While we attempted in various ways to overcome this dilemma, we never were able to reach the emotional appeal of a slave case, of Susan Anthony being deprived the right to vote, or of workers in danger of losing their jobs. At times, we appeared more like the lonely Sisyphus pushing his rock up the hill than emotional agitators stirring a crowd to action.

That many of our cases primarily raised separation-of-powers issues and not individual rights made it difficult to engage both the courts and nation. The culture of rights that Americans have constructed was not easily transferable to separation-of-powers claims, although it is possible that our cases, like the Vietnam War litigation of the 1960s and 1970s are part of a process of including separation-of-powers issues in that culture of legal struggle. We did have a broad alternative prophetic vision of the law in which international law and democratic principles of governance would bind the political
branches' conduct of foreign policy, and in that respect our cases were similar to the prophetic cases discussed in the previous part. We also attempted to connect individual rights to that vision, often by integrating a rights-based claim into a broad attack on U.S. foreign policy. We were moved by the human suffering U.S. policies were causing in Central America, and tried to connect that human dimension of the case with the legal principles we were litigating. But the fact that in many of our cases the individual rights aspect was secondary, did make it harder for the lawsuits to serve as a prophetic vehicle of passionate engagement with the broader community.

Finally, our cases clearly demonstrate the role that the political environment can play in judicial decisionmaking. Unlike the abolitionist and suffrage cases, there were few persuasive arguments that the substantive law did not support us. Although the Court's jurisdiction and propriety of judicial intervention were often hotly contested issues, our position, like Albion Tourgee's in \textit{Plessy}, proved untenable mainly because of the political climate rather than the state of the law. Judges were not about to halt U.S. intervention abroad because they accepted the general elite consensus that the political branches should be free to decide such issues on their own.

A. Nicaragua and El Salvador: The Early Cases

In 1981, Ronald Reagan took office as the fortieth President of the United States. He was committed to defeating the revolutionary forces in El Salvador and overturning the Nicaraguan, Cuban, and Grenadian revolutions, but his international policy had constitutional implications: a strongly interventionist policy led to the evasion and evisceration of the legal restraints on Executive power enacted in the wake of the Vietnam War.

The Reagan Administration's immediate plan was to escalate U.S. military involvement in the Salvadoran civil war and to arm, train, and direct counterrevolutionaries to attack Nicaragua.\footnote{364} In early 1981, without the approval of Congress, the Reagan Administration provided twenty-five million dollars in military aid and fifty-six U.S. military advisors to the government of El Salvador.\footnote{365} Later that year, the CIA began covertly to arm Nicaraguan Contras based in Florida and Honduras.\footnote{366}


The Center for Constitutional Rights (CCR) reacted to these developments by filing two broad, highly politicized challenges to U.S. foreign policy in El Salvador and Nicaragua. Both cases combined claims alleging executive usurpation of congressional war powers with claims that the Executive was aiding the commission of human rights violations in the two Latin American nations. Both cases were brought to help spur the anti-interventionist movement in the United States.

1. *Crockett v. Reagan*

Michigan Congressman George Crockett, a prominent member of the National Lawyers Guild with a history of involvement in popular movements, called the Center for Constitutional Rights regarding the dispatch of fifty-six U.S. military advisors to El Salvador without congressional approval. The CCR lawyers were at first reluctant to pursue the case, knowing full well the failure of the courts to strike down executive unilateral war-making during the Vietnam War era. It did seem, however, that the Reagan Administration was violating the War Powers Resolution. That Resolution, enacted over President Nixon’s veto in 1973,\(^{367}\) imposed a sixty-day limit on Executive authority to introduce U.S. troops into hostilities, after which the President must obtain congressional authorization or withdraw the troops.\(^{368}\) The advisors in El Salvador were drawing “hostile fire pay,” accompanying Salvadoran troops on combat missions and aiding one side in an ongoing, bloody civil war.\(^{369}\) Yet the Administration had not sought congressional approval as required by the War Powers Resolution. The CCR agreed to file what would be the first major test of the War Powers Resolution.

The CCR also wanted to challenge the United States’ provision of military aid to a country in which violations of human rights had reached epidemic proportions.\(^{370}\) Section 502B of the Foreign Assistance Act of 1961 prohibited the provision of any security assistance “to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”\(^{371}\) While the CCR lawyers knew that the human rights claim would be


\(^{368}\) 50 U.S.C. § 1545(b) (1988) (giving the President the power to extend the authority for one additional 30-day period, after which it would automatically terminate).


\(^{370}\) For a description of the wave of terror unleashed by the Salvadoran government, see Robert Armstrong & Janet Shenk, El Salvador: The Face of Revolution 137-81 (1982).

even more difficult to litigate than the war powers claims, they felt that an important part of the lawsuit was educating the public about the atrocities occurring in El Salvador.

Crockett v. Reagan, was filed by eleven members of Congress, who were ultimately joined by eighteen others. The complaint in this first case requested extremely strong relief in the form of an injunction ordering the immediate withdrawal of all U.S. troops, weapons, military equipment, and aid from El Salvador. Some have argued that requesting narrower relief, such as simply requiring the President to file a report pursuant to the War Powers Resolution, would have made the case easier to win. Indeed, it was unthinkable that a court would order immediate withdrawal, and the intrusiveness of the requested relief may have politicized the case in the judge's mind. The CCR's interest, however, went beyond winning to publicizing illegal conduct. Likewise, the members of Congress who joined the suit were able to convey a strong political position, regardless of the outcome.

District Court Judge Joyce Hens Green granted the government's motion to dismiss the case. Green, a fairly liberal judge, held that the human rights claim based on the violation of the Foreign Assistance Act was barred by the equitable discretion doctrine, which counsels judicial abstention where a congressional plaintiff's dispute is primarily with his or her fellow legislators. Congress had enacted another statute allowing aid to El Salvador if the President certified that the Salvadoran government was making a concerted effort to comply with internationally recognized human rights. The President had done so twice, although those certifications had been challenged by some members of Congress as "akin to calling night, day or a duck, an eagle." In these circumstances Judge Green found plaintiffs' dispute to be primarily with their fellow members of Congress.

373 The lawyers and some of the congressional plaintiffs held a press conference the day the lawsuit was filed. The members of Congress were surprisingly militant. Future senators Barbara Mikulski and Tom Harkin attacked the human rights record of the Salvadoran government while Congressmen Crockett, Frank, and Lowry focused on the War Powers Resolution violation. Although local TV and the major wire services attended the press conference, the CCR failed to attract the national papers like the New York Times and The Washington Post or network TV. Conversation with Michael Ratner, Lawyer for the Plaintiffs (Sept. 1993).
376 Id. at 902.
377 Id.
379 558 F. Supp. at 902.
The War Powers Resolution claim was more difficult for the court to resolve. Green agreed that the complaint's factual allegations were "at a minimum disturbing." The court however could not engage in the fact-finding necessary to determine whether U.S. forces had been introduced into hostilities in El Salvador. Therefore, the case presented a nonjusticiable political question.

Nonetheless, Judge Green left the door slightly ajar for a future case. According to Green's opinion, were the United States to be involved in a major military conflict, a court could enforce the War Powers Resolution, at least to the extent of ordering the President to report to Congress. Attempting to get any case through that crack, however, would prove to be a Sisyphian venture.

The court of appeals affirmed the next year in a brief per curiam opinion agreeing with the district court. The Crockett decision signaled that the courts would not enforce the War Powers Resolution absent a full-scale war.

What had the litigation gained? It had helped build the popular movement against intervention in El Salvador. Despite the absence of national media coverage, the CCR used the lawsuit as a vehicle for organizing a major effort against U.S. intervention in El Salvador. The CCR published a pamphlet detailing the Executive's violations of law; spoke at fora and bar association meetings around the country; and collaborated with the National Lawyers Guild to form a lawyers group against U.S. intervention in Central America and in favor of self-determination for the countries in that region.

Crockett v. Reagan was a bold case, challenging the legal order to live up to its post-Vietnam statutes. That the plaintiffs lost was no surprise; they had stood on a principle the courts were simply unwilling to enforce. Moreover, the Crockett court had not totally closed the door, although the crack it left open seemed to be more theoretical than real.

2. Sanchez-Espinoza v. Reagan

The case of Sanchez-Espinoza v. Reagan was brought by Nicaraguan citizens, members of Congress, and U.S. citizens to enjoin the covert war against Nicaragua and to recover damages for the Nicaraguan plaintiffs who were tortured, raped, murdered, kidnapped, or...
wounded by the Contras. The case was like the Crockett litigation in that it requested broad relief that a court was unlikely to grant.

Although the lawyers at the CCR were no more optimistic about their chances of winning Sanchez than they had been about prevailing in Crockett, the Sanchez case also served some valuable goals. First, the case was one of the earliest attempts to tell the story of what was happening in Nicaragua and to portray the Contras as a ruthless band of murderers and rapists who terrorized the civilian population. Michael Ratner and other lawyers at the CCR had undertaken a substantial human rights investigation, making several trips to Nicaragua to uncover the facts of the brutalities committed by the Contras. The complaint setting forth those facts was republished in a book on Nicaragua and got the Nicaraguans' story heard in the United States.

Second, the complaint was a springboard for political organizing. The CCR in conjunction with various artists, filmmakers, and poets organized a multimedia event about the case at New York University in the summer of 1983. Ratner and others spoke about the case around the country and used it to mobilize the National Lawyers Guild and other lawyers against the covert war.

Third, the case had an impact in Nicaragua. While the mainstream U.S. press paid little attention to the case, Sanchez was front page news in Nicaragua. That U.S. lawyers had filed a legal challenge to U.S. policy in U.S. courts served, at least in a small way, to strengthen the resolve of the Nicaraguans fighting the Contras.

Fourth, the CCR lawyers creatively linked the Contra human rights violations committed in Nicaragua to the problem of aggressive and unilateral executive war-making. There were two basic claims raised in Sanchez: First, that the U.S. government and its Contra agents were committing human rights violations in Nicaragua that were actionable under the Alien Tort Act; and second, that the Executive was conducting a covert war in Nicaragua in violation of the Constitution and applicable statutes.

Sanchez, like Crockett, raised both human rights and separation-of-powers issues. The CCR was criticized for presenting too many claims in one case, thus allowing the court to sidestep the Nicaraguan plaintiffs' human rights tort claim. However, the CCR was developing an important theory that the two issues were in fact linked. The Reagan Administration intervention in El Salvador and Nicaragua had no respect for law: constitutional law, statutory law, or international human rights law. Moreover, and more importantly, U.S. intervention was

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386 Human Rights Conference, supra note 42, at 137, 140.
fundamentally undemocratic, as evidenced by its lack of popular support. Continuation of the intervention therefore required both circumventing the democratic process here and terrorizing the population there. Human rights violations and war powers subterfuge were integral and related aspects of the policy.

Finally, Sanchez tested "the limits of the independent authority of law." In 1980, the Court of Appeals for the Second Circuit had held in Filartiga v. Pena-Irala that a Paraguayan citizen could bring a civil action in a U.S. court against the Paraguayan police chief for torture committed in Paraguay. The plaintiffs in Filartiga had invoked the 1789 Alien Tort Act, which allows foreign nationals to sue in U.S. courts over violations of international law. The Sanchez plaintiffs structured their claims similarly to the claim upheld in Filartiga. Only the defendants were different: the plaintiffs in Sanchez were suing American rather than Paraguayan officials. It seemed "a common sense proposition . . . that United States courts should apply principles of international law as rigorously to United States officials as to foreign officials."

The courts avoided responding to that proposition. The district court dismissed all of the claims as presenting non-justiciable political questions. To adjudicate those claims would require the court to "determine the precise nature and extent of the U.S. government's involvement in the affairs of several Central American nations." Because the "covert activities of CIA operatives in Nicaragua and Honduras are perforce even less judicially discoverable than the level of participation by U.S. military personnel in hostilities in El Salvador," the court relied on Crockett to dismiss. Apparently, the CIA may engage in widespread covert torture, murder and rape abroad with judicial immunity, since covert activities are inherently judicially unmanageable. The court's analysis was not altered by the fact that the plaintiffs' human rights were involved: the war powers and tort claims were equally subject to the political question doctrine's broad sweep.

The court of appeals affirmed, using different language but nonetheless articulating the same basic principle. Then-Judge Scalia found that the doctrine of sovereign immunity protected the federal

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389 690 F.2d 876 (2d Cir. 1980).
390 Cole, supra note 388, at 156; see also Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy & International Law, 71 VA. L. REV. 1071 (1985) (discussing the Filartiga decision).
392 Id. at 601.
393 Id. at 600.
officials from suit for damages under the Alien Tort Statute.\textsuperscript{395} Scalia denied plaintiffs’ request for injunctive relief because in “so sensitive a foreign affairs matter as this”\textsuperscript{396} a court should exercise its discretion to withhold equitable relief. Even in the absence of the sovereign immunity defense, the plaintiffs’ damages action would have failed because the sensitive nature of the challenged conduct precluded a private right of action.

The defeat in \textit{Sanchez} was total. At no point in the litigation did the courts look at the human consequences of U.S. policy in Central America.\textsuperscript{397} And, unlike \textit{Crockett}, \textit{Sanchez} left not even a slight crack through which future plaintiffs might attempt to wriggle.

Moreover, many in the human rights community questioned whether \textit{Sanchez} should have been brought. They focused on the bad precedent created and questioned, “[H]ow successful is a highly publicized case if the legal result presents a new hurdle for future litigants?”\textsuperscript{398} After \textit{Sanchez}, some opined that a broad range of questions formerly open for adjudication could be considered nonjusticiable.\textsuperscript{399} As one participant in a 1985 human rights conference argued, “If the primary goal of those who brought the suit was simply to direct public and media attention to the situation in Nicaragua . . . , congressional trips to Nicaragua could have produced a positive dramatic effect without creating bad precedent.”\textsuperscript{400} Despite such criticism, the lawyers at the CCR still felt that the lawsuit had been valuable for publicizing the human rights abuses committed by the Contras.

The \textit{Sanchez} and \textit{Crockett} cases displayed important aspects of the prophetic litigation discussed in the prior section. By intertwining

\textsuperscript{395} \textit{Id.} at 206. The opinion relegates to a footnote its response to the troubling \textit{Filartiga} analogy:

Since the doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply here, being based upon considerations of international comity rather than separation of powers it does not necessarily follow that an Alien Tort Statute suit filed against the officer of a foreign sovereign would have to be dismissed. Thus, nothing in today’s decision necessarily conflicts with the decision of the Second Circuit in \textit{Filartiga} . . . .

\textit{Id.} at 207 n.5 (citations omitted). Scalia’s attempt to construct a legalistic distinction between \textit{Filartiga} and \textit{Sanchez} made no sense. Why should considerations of international comity be less weighty than those presented by separation of powers? Nor is it obvious that U.S. courts ought to be less reluctant to adjudicate damages against foreign officials accused of torturing aliens abroad than to adjudicate similar actions against executive branch officials, with whom the courts share the task of governing. Scalia had simply come up with a distinction without content.

\textsuperscript{396} \textit{Id.} at 208.


\textsuperscript{398} \textit{Human Rights Conference, supra} note 42, at 149.

\textsuperscript{399} \textit{Id.}

\textsuperscript{400} \textit{Id.}
human rights and war powers claims, each case radically critiqued U.S. policy as not merely violative of separation of powers, but antidemocratic and inhumane as well. The broad relief requested made clear that redemption, not minor reform, was the goal. Only an abrupt halt to U.S. intervention in the two countries would remedy the alleged infractions. The litigators were deeply involved in the popular struggles both here and in Latin America, and the complaints reflected the passion of their involvement. The courts' refusal to adjudicate these cases, their sterile decisions avoiding any discussion of the human tragedy in Latin America, pointed the CCR in the direction of narrower cases in which we might induce the courts to engage our claims.

3. Dellums v. Smith

In Dellums v. Smith,\(^401\) the CCR brought a narrower challenge to the covert war against Nicaragua that sought more limited relief. Our clients' aim was to avoid the broad political question problems raised in Crockett and Sanchez, and to obtain a court ruling declaring that if the facts alleged in press accounts were accurate, the President was violating the law. Three of the Sanchez plaintiffs—Congressman Ron Dellums, a Nicaraguan doctor, Myrna Cunningham, who had been kidnapped and raped by the Contras, and Florida ACLU President Eleanor Ginsberg, who lived close to the contra training camps—wrote a letter to Attorney General Smith requesting an investigation of whether top administration officials had violated the Neutrality Act in aiding the Contras.\(^402\) The Neutrality Act, enacted in 1794, declares that:

> Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign... state... with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.\(^403\)

From a literal reading, it appeared that the Administration had violated the Neutrality Act. Administration officials had provided at least nineteen million dollars to finance covert paramilitary operations against the Nicaraguan government and had trained and organized the Contra forces, at least in part, in Florida.\(^404\) Thus, unless

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\(^401\) 573 F. Supp. 1489 (N.D. Cal. 1983), mot. denied, 577 F. Supp. 1449 (N.D. Cal. 1984), rev’d on other grounds, 797 F.2d 817 (9th Cir. 1986).

\(^402\) See id. at 1492 (reproducing part of plaintiffs' letter).


\(^404\) Dellums, 573 F. Supp. at 1492.
Congress had implicitly repealed or superseded the Neutrality Act, CCR had a good claim.\textsuperscript{405}

The procedural device CCR employed to get the case to court was the Ethics in Government Act.\textsuperscript{406} That Act, passed in the wake of Watergate to ensure that “no one, regardless of position, is above the law,”\textsuperscript{407} required the Attorney General to conduct a preliminary investigation upon receipt of specific information from a credible source that a high-level executive official had engaged in non-petty criminal conduct.\textsuperscript{408} Dellums, Cunningham, and Ginsberg sent a letter detailing their allegations and requesting preliminary investigation of seven high government officials, including President Reagan, Secretary of State Alexander Haig, and CIA Director William Casey. When the Justice Department refused to initiate the requested investigation, the plaintiffs sued in the Northern District of California, Dellums’s home district.

The Administration argued that this case, like Sanchez, presented a political question.\textsuperscript{409} However, the court was able to distinguish Sanchez because we had structured the complaint to avoid the political question pitfalls.\textsuperscript{410} District Court Judge Wiegel held in his opinion in Dellums:

Unlike the complaints in Crockett and Sanchez-Espinoza, the complaint in the case at bar does not directly challenge the legality of any action taken by the President. . . . The case before this Court does not require any assessment by the Court as to the accuracy of the data reported by plaintiffs to the Attorney General. The sole issue is whether the report is sufficient to trigger the preliminary investigation plaintiffs contend is required by the Ethics in Government Act. The limited task requested of the Court is thus judicially manageable, unlike those requested in Crockett and Sanchez-Espinoza. Should plaintiffs prevail, the Attorney General, not the Court, will investigate the allegations and then determine whether any prosecution is warranted as a matter of fact and law. There is consequently no danger of “multifarious pronouncements” such as the court feared in Sanchez-Espinoza. . . . Nor is the Court asked to declare any Presidential action illegal.\textsuperscript{411}

\textsuperscript{405} I had written a law review article arguing that the Administration was violating the Neutrality Act, and the case was structured along the lines suggested in that article. Jules Lobel, The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy, 24 Harv. Int’l L.J. 1 (1983).


\textsuperscript{407} H.R. Rep. No. 1307, 95th Cong., 2d Sess. 3 (quoting President Carter).


\textsuperscript{409} Dellums, 573 F. Supp. at 1493.

\textsuperscript{410} Id. at 1493.

\textsuperscript{411} Id. at 1502 (footnote and citations omitted).
The court ordered the Attorney General to conduct a preliminary investigation.\textsuperscript{412}

The Justice Department, probably confident that it would win on jurisdictional grounds, had not argued the merits—namely whether the Neutrality Act applied to covert paramilitary activities undertaken with the President's approval. After Wiegel's opinion came out, the government made a motion to alter the court's judgment, arguing for the first time that the Neutrality Act does not apply to actions authorized by the President.\textsuperscript{413} The district court rejected that argument, holding that the conclusion that the Neutrality Act requires universal obedience and applies to the President is "well supported by the history" of the Act.\textsuperscript{414} The language, history, and judicial precedents made plaintiffs' reading of the Act "at least as persuasive as defendants"\textsuperscript{415} and demonstrated the "reasonableness of the view that the Act applies to all persons, including the President."\textsuperscript{416}

The Attorney General appealed, and the Ninth Circuit stayed the lower court judgment and ordered an expedited appeal. Almost two and one-half years after the emergency appeal was argued, the court issued a terse opinion dismissing the case.\textsuperscript{417} The court declined to address the district court's ruling on the scope of the Neutrality Act and failed to respond to the government's political question argument. Instead, it held that the plaintiffs lacked standing to challenge the Attorney General's refusal to investigate.\textsuperscript{418} The court relied on two analogous D.C. Circuit cases\textsuperscript{419} to find that Congress "did not intend to create procedural rights in private citizens sufficient to support standing to sue."\textsuperscript{420}

The panel, composed of Judges Fletcher, Fairchild,\textsuperscript{421} and Canby, left a small opening in its opinion for future litigation. The court stated that its opinion did not render the Ethics in Government Act meaningless because the Attorney General's compliance with the Act

\textsuperscript{412} Id. at 1505.
\textsuperscript{413} Dellums v. Smith, 577 F. Supp. 1449, 1451 (N.D. Cal. 1984).
\textsuperscript{414} Id. at 1453.
\textsuperscript{415} Id. at 1452.
\textsuperscript{416} Id. at 1454.
\textsuperscript{417} Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986). A year after the Ninth Circuit issued its decision, I received information that the delay was due to a dispute over the rationale. Presumably, there was some sentiment on the court supporting a broader holding than the narrow dismissal based solely on standing.
\textsuperscript{418} Id. at 823.
\textsuperscript{419} Id. at 819, 823 (citing Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984), and Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984)).
\textsuperscript{420} Id. at 823.
\textsuperscript{421} The Honorable Thomas E. Fairchild, Senior Circuit United States Judge for the Seventh Circuit, sat by designation.
remained subject to oversight by members of the congressional judiciary committees.\footnote{797 F.2d at 823. Dellums, although a member of Congress, was not on the judiciary committee and was suing as a private citizen.} We never had an opportunity to try that opening. On April 9, 1984, while \textit{Dellums} was still pending in the court of appeals, a majority of the Democratic members of the House Judiciary Committee invoked section 595(e) of the Ethics Act and requested the appointment of a special prosecutor to investigate violations of the Neutrality Act. The Attorney General refused to do so. When the court of appeals issued its opinion in \textit{Dellums}, we urged the committee members to renew their request. On October 17, 1986, two months after the court of appeals' decision, a majority of Democrats on the House Judiciary Committee again requested the appointment of a special prosecutor. Had the Attorney General again denied their request, we would have sought to intervene \textit{with} the committee members to request reargument in the court of appeals or to start anew at the district court.

However, by this time, the allegations in our lawsuits had received unwelcome confirmation. The Nicaraguans had shot down a plane carrying an American, Eugene Hasenfus, and evidence was mounting that the Administration was evading congressional restrictions on aid to Nicaragua in addition to those imposed by the Neutrality Act.\footnote{See Milt Freudenheim \textit{et al.}, \textit{Trial of America in Managua Stirs Allegations on Aid}, \textit{N.Y. Times}, Oct. 26, 1986, at E2.} Attorney General Edwin Meese was forced to set in motion the investigation that led to the Iran-Contra scandal and the appointment of Special Prosecutor Lawrence Walsh. We declared political victory and ended the \textit{Dellums v. Smith} case.

What had been achieved by this lawsuit? First, for over two years during the height of U.S. aid to the Contras, a district court ruling strongly suggesting that the President was violating the Neutrality Act stood untouched. As supporters of the Contras recognized, the \textit{Dellums} case was "widely cited by opponents of U.S. policy in Central America"\footnote{John N. Moore, \textit{The Secret War in Central America and the Future of World Order}, 80 Am. J. Int'l L. 43, 92 n.197 (1986).} as demonstrating the illegality of U.S. policy. The decision was prominently reported in Nicaragua. It also received significant attention in the U.S. mainstream media, meriting attention by the \textit{New York Times}, \textit{The Washington Post}, \textit{The McNeil-Lehrer News Hour}, and other smaller papers and broadcasts around the country.\footnote{Lawsuit on Contras Dismissed in California, \textit{N.Y. Times}, Aug. 22, 1986, at A5; Stuart Taylor, Jr., \textit{War Powers: Back in Court}, \textit{N.Y. Times}, Jan. 13, 1984, at A9; \textit{Nicaragua Aid Probe Resisted}, \textit{WASH. Post}, Jan. 18, 1989, at A17.} The case also prompted two House Judiciary Committee requests for a spe-
cial prosecutor and contributed to the growing demand for accountability that eventually exposed the Iran-Contra scandal.

The Dellums case also focused attention on the question of the lawfulness and legitimacy of covert warfare. Stuart Taylor, a New York Times legal correspondent, wrote an in-depth story on the case and noted that while there was "virtually no chance that Mr. Reagan or anyone else will be prosecuted" for Neutrality Act violations, the Dellums case illustrated the "legal ambiguities that arise whenever the President supports guerrilla operations amid dispute as to whether Congress has authorized them." To Taylor, the "ultimate issue" in the case was not whether the President was violating the Neutrality Act, but whether a covert war violates the "exclusive power of Congress under the Constitution to declare war." Indeed, as Judge Weigel recognized, one of the Neutrality Act's "major purposes was to protect the constitutional power of Congress to declare war or authorize private reprisal against foreign states." The observations that arose from resolution of our case thus influenced the course of public discussion of the Executive's power and responsibilities.

Moreover, Weigel's opinion on the Neutrality Act still survives, despite the court of appeals' dismissal of the case. Because the Ninth Circuit dismissed solely on jurisdictional grounds, Weigel's decision remains the most prominent recent judicial interpretation of the meaning of the Neutrality Act.

The Sanchez and Dellums cases contain several of the important indicia of prophetic litigation discussed in Part I. Both cases critiqued U.S. policy, sought to exhort the population to debate that policy, and were based on a history and tradition rooted in our country's founding. We were recalling our early history just as the civil rights litigators of the 1960s sought to uncover the equalitarian roots of radical reconstruction and the prophets of the Old Testament exhorted the population to return to historical tradition. In our case, we were focusing

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428 Dellums v. Smith, 577 F. Supp. 1449, 1453 (N.D. Cal. 1984), rev'd on other grounds, 797 F.2d 817 (9th Cir. 1986).
429 But cf United States v. Terrell, 731 F. Supp. 473 (S.D. Fla. 1989) (dismissing a Neutrality Act prosecution because the United States was not "at peace with Nicaragua"). As Professor John Hart Ely has written, "unless the Neutrality Act has been implicitly repealed at least in part by the post-Vietnam legislation—Dellums v. Smith held that it was not—'covert wars' not approved by Congress are not simply beyond the authority of the executive branch, they are criminal." JOHN H. ELY, WAR AND RESPONSIBILITY 220 n.8 (1993) (citations omitted). While Ely concludes that the recent congressional toleration of covert wars implicitly does repeal criminal liability for Administration officials acting under the president's direction, he recognizes the continued viability of the Neutrality Act's criminal sanctions where the Congress has prohibited the particular war involved, as was the case during different periods of time vis-à-vis Nicaragua. Id.
on very early statutes whose purpose was to ensure that America was not drawn into foreign conflict.\textsuperscript{430}

Framing the \textit{Dellums} case narrowly and requesting minimal relief\textsuperscript{431} had several consequences, however. First, it allowed us to win in the district court, which thrust the case into the mainstream media, gave our arguments much more legitimacy, and allowed us more access to the broader community. Yet to a certain extent, the \textit{Dellums v. Smith} case lost the passion, human connectedness, and prophetic quality of \textit{Sanchez} and \textit{Crockett}. We were drawn into an argument about citizen standing under the Ethics Act and the meaning of the obscure 1794 Neutrality Act. While all our public pronouncements sought to emphasize the basic proposition that the President was not above the law and that our policy toward Nicaragua was illegal, our connectedness to the situation in Nicaragua was becoming more attenuated. In a real sense, \textit{Dellums} was a more academic case than \textit{Sanchez}.\textsuperscript{432} We had found a technical handle to get somewhere in the courts—albeit not very far—but it came at the cost of diluting our basic critique of U.S. policy and our compassion for and solidarity with the Nicaraguan people.

The cases discussed so far demonstrate the failure of the courts to address the issues we sought to litigate, whether we chose to litigate those issues narrowly or broadly. In \textit{Crockett}, we expected that by relying on positive law we could force a court to enforce the constitutional and congressional design, but the courts declined our invitation with limiting constructions. The \textit{Sanchez} court rejected the plaintiffs' broad claims by invoking broad doctrines of judicial abstention. The Ninth Circuit panel in \textit{Dellums} could not use the broad political question doctrine to reject the plaintiffs' claims; we had jumped through

\textsuperscript{430} For example, the 1794 Neutrality Act at issue in \textit{Dellums} and the Alien Tort Act utilized by the plaintiffs in \textit{Sanchez} were both designed to avoid Americans harming foreigners and thus offending foreign nations in a manner that could give rise to warfare.

\textsuperscript{431} The relief we sought was embarrassingly minimal, \textit{Dellums v. Smith}, 577 F. Supp. 1449 (1984). We did not seek the appointment of a special prosecutor, merely the conducting of a preliminary investigation. We virtually admitted that if the Attorney General conducted a preliminary investigation, we could not challenge the outcome. We were essentially asking the court to declare what the law was, without interfering with U.S. foreign policy. I never understood why the Attorney General didn't just conduct an investigation concluding that the Neutrality Act was inapplicable. Perhaps the Reagan Administration wanted the challenge, was confident of the ultimate outcome and sought to demonstrate concretely its utter disregard for respecting legal forms. Better to demonstrate the Ethics in Government Act's impotency and the court's lack of resolve than to comply meekly with Weigel's order and dispose of the issue.

If the Attorney General had conducted an investigation, that investigation itself might have become part of a political debate on the Neutrality Act, a political debate the Administration wanted to avoid.

\textsuperscript{432} In \textit{Sanchez} and \textit{Crockett}, the CCR had been drawn into a long legal argument about justiciability, yet the human rights and war powers issues were more closely connected to the heart of our efforts against the contras than was the Neutrality Act of 1794.
that hoop by narrowly framing what was in fact a radical case. Thus, in that case we suffered a narrow, technical defeat.

The *Dellums* court did leave us an opening, by suggesting that the Judiciary Committee might have standing even though individual members of Congress did not. But I suspect the opening was simply theoretical; the appearance of the Judiciary Committee at the court's doorstep undoubtedly would have led to the invocation of some other doctrine—perhaps Executive discretion—to avoid confrontation with a popular president over foreign policy. The quest for judicial relief was appearing more Sisyphean with each passing case. But we were not dissuaded by the mounting losses.

4. *Barnes v. Kline and Beacon Products v. Reagan*

Between 1984 and 1987, the CCR brought several other lawsuits challenging U.S. involvement in El Salvador and Nicaragua. Partly in reaction to the defeats suffered in *Crockett* and *Sanchez*, this later litigation tended to be more legalistic and procedurally oriented. Presenting narrow legal issues to avoid the jurisdictional and prudential barriers to the early cases, these efforts were in many respects deeply dissatisfying, because the arguments often strayed far from the underlying issue of U.S. policy toward Nicaragua. The later cases demonstrated the weakness of using this kind of litigation as a tool for organizing. In part because the issues were so legalistic, the cases proved incapable of sustaining popular activism. The cases also took so long to litigate that, by the time we reached a higher court, they were generally moot. Moreover, our continuing campaign, while coordinated and systematic, was reactive to the Administration's policy. We thus had little control over when and where to fight our legal battles.

The CCR revisited the Salvadoran human rights issue in *Barnes v. Kline*, which challenged President Reagan's pocket veto of legislation that would have required a certification that human rights were improving in El Salvador. This lawsuit, which the entire House of Representatives and Senate eventually joined as plaintiffs, was a challenge to the constitutionality of a presidential pocket veto. Unlike *Crockett v. Sanchez*, the complaint in *Barnes* raised only the separation of powers issue of the constitutionality of the President's pocket veto, and not the broader political-legal question of the human rights violations being committed by the Salvadoran government with our aid. The District of Columbia Court of Appeals ruled in the plaintiffs' favor, but refused to expedite the case. The legislation expired after

434 759 F.2d at 24.
the Supreme Court agreed to hear the government's appeal, thus mooting the case.\textsuperscript{435}

\textit{Barnes v. Kline} was an important case when filed because the human rights community in the U.S. viewed the congressional mandate that the President certify human rights improvement in El Salvador as critical. The CCR's challenge to Reagan's pocket veto initially attracted considerable interest and support both from members of Congress and the activist community. The case did initially highlight the Administration's utter lack of concern with the human rights record of the Salvadoran government and helped spur debate on that issue.

Eventually, however, despite the victory in the court of appeals, the case was dissatisfying not only in its result, but in its relationship to the political movement. As the lawsuit dragged on, the abstract constitutional question of whether a president could pocket veto legislation became paramount, and the political nature of the legislation he had vetoed was rendered virtually irrelevant. Lead counsel Michael Ratner felt that when the case reached the Supreme Court it presented an abstract constitutional question disconnected from the issue of whether our government should be permitted to foster human rights violations abroad.\textsuperscript{436} There was much less mass organizing around \textit{Barnes v. Kline} than had been undertaken in the \textit{Crockett} litigation. Moreover, the litigation did not result in even a temporary cessation of U.S. aid to El Salvador because it was mooted prior to any final resolution.

In 1984 President Reagan declared that a state of national emergency existed with Nicaragua, imposed an embargo on that country, and terminated our Treaty of Friendship, Commerce, and Navigation with Nicaragua.\textsuperscript{437} The CCR challenged the embargo and the termination of the Treaty in \textit{Beacon Products v. Reagan}.\textsuperscript{438} As with \textit{Barnes v. Kline}, our main claims were very legalistic, and the effects of U.S. policy on the ordinary Nicaraguan were nowhere to be found in our complaint or other documents. Unlike \textit{Barnes}, we lost both in the district court\textsuperscript{439} and the court of appeals.\textsuperscript{440}

The filing of the \textit{Beacon Products} complaint was important both to the anti-intervention movement in the U.S. and the Nicaraguans. The

\begin{itemize}
\item \textsuperscript{435} 479 U.S. 361 (1987). Michael Ratner, the CCR lawyer for Congressman Barnes, tried to expedite the appeal so that the Court could rule on the issue prior to the U.S. aid being dispensed, but the Circuit refused to do so.
\item \textsuperscript{436} Conversation with Michael Ramer (Sept. 1993).
\item \textsuperscript{437} Exec. Order No. 12,513, 3 C.F.R. 342 (1986).
\item \textsuperscript{438} 814 F.2d 1 (1st Cir. 1987).
\item \textsuperscript{440} 814 F.2d at 1.
\end{itemize}
embargo was a major issue, and our case did touch a chord with many anti-U.S. intervention activists. At oral argument the district court was packed with spectators, reflecting the interest in the case among political activists. Moreover, our legal claims were strong, and challenged imperial Executive power.

After losing in the district court, the case dragged on and activists lost interest. Moreover, Congress amended the relevant statute to remove its unconstitutional aspect and forced us to make more technical arguments that were totally divorced from any important political controversy. In hindsight, we should not have appealed after losing in the district court.

Probably the only significant result of the *Beacon Products* litigation was to demonstrate conclusively that two key reform statutes of the post-Vietnam era—the National Emergencies Act and the International Economic Emergency Powers Act—had been eviscerated by Congress and the courts. However, that result certainly does not justify the expenditure of hundreds of hours of legal work that could have been devoted to other projects.

B. Cuba

While the Reagan Administration had at first focused on shoring up the tottering regime in El Salvador, by 1982 it was ready to strike at what it saw as the “source of the problem” in Central America: Cuba. Direct military intervention would have been too costly; instead, the United States tightened the embargo against Cuba. Knowing that Cuba was expanding its tourist facilities, the Administration announced on April 19, 1982, that it was imposing new restrictions on travel to Cuba, effectively banning the average American from going there.

Many of the parties involved in framing our challenge to the ban sympathized with the Cuban revolution and wanted to challenge this extension of the policy of isolating Cuba and strangling its economy. Furthermore, we all felt strongly about Americans’ right to travel. But we knew that a broad, principled challenge to the embargo as an unlawful interference with Cuba’s sovereignty would be quickly dismissed by the courts, as would a broad First or Fifth Amendment argument. In *Haig v. Agee* the Supreme Court had held that “the freedom to travel abroad . . . is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable govern-

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The freedom to travel abroad was thus not particularly high on the Court's pantheon of rights. However, a post-Vietnam War reform statute offered us hope. The 1977 International Economic Emergencies Powers Act (IEEPA) requires the President to declare a national emergency, subject to congressional oversight, before imposing an economic embargo on another nation. But in enacting the IEEPA, Congress had decided not to address the divisive question of whether to terminate the long-standing, and no longer emergency-based, embargo against Cuba, North Vietnam, Kampuchea, and Korea. Therefore, the IEEPA grandfathered those embargoes. The legislative history clearly indicated that this grandfather clause was a limited exception, applicable only to allow the continuation of "existing uses" and not to give the President "authority to expand what has already been done." When the IEEPA was enacted in 1977, Americans were free to travel to Cuba. The Reagan Administration had expanded the restrictions already in effect, but President Reagan had not declared a new national emergency as required by IEEPA.

Uncovering the legislative history of IEEPA led us into a dilemma. Our perception that the courts were hostile to broad human rights or anti-interventionist claims involving foreign policy had led us to search for a procedural device with which challenge the President's policy. The IEEPA seemed a strong candidate for such a challenge. But tension existed between the broad values and constitutional principles we and our clients wanted to vindicate, and the crabbed, technical terrain the courts were forcing us into. The prophetic vision of presenting a radical challenge to the United States' imperial approach to Cuba clashed with the search for a narrow space through which to enter the legal maze.

This tension characterized the entire litigation of Wald v. Reagan. We were forced to spend a substantial portion of our briefs and oral argument discussing the meaning of the obscure grandfather clause in IEEPA. Moreover, the relief we sought under IEEPA was

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444 Id. at 306 (emphasis added).
446 In 1977 even the Administration agreed that there was no national emergency basis for these continuing embargoes. Emergency Controls of International Economic Transactions: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. 193 (1977) (remarks of L. Santo); see also id. at 110, 117, 119 (remarks of Rep. Bingham).
very narrow: We asked the court to order the President to comply
with the statutory requirements by declaring a national emergency
and submitting that declaration to Congress for review. While a court
was much more likely to order that relief than the relief sought in
Crockett or Sanchez, our clients wanted much more.

We attempted to resolve that tension by tying our technical
IEEPA argument to a broad attack on both the executive misuse of
emergency power against Cuba and the deprivation of the fundamen-
tal right to travel. When the case came before the Supreme Court,
Leonard Boudin, a great constitutional litigator, had planned to open
his argument with a broad discussion of the importance of affirming
the right to travel, and to tie the IEEPA argument into that point. But
at the last moment he, as many excellent litigators do, got an intuition
from listening to the Court's questions, and felt they wanted to hear
about the technicalities of IEEPA.

The case attracted a lot of publicity which almost always empha-
sized the broader issues at stake. After the Supreme Court decision,
New York Times columnist Anthony Lewis called it "the Court's most
important judgment of this or any recent terms" because underneath
the "dry lawyers' language" was a "worshipful view of executive power
... virtually assuming that anything the executive branch does under
the label 'foreign policy' is lawful."450

Our strategy of litigating a narrow legal issue and seeking limited
relief worked to an extent. We lost in the district court, but won a
unanimous decision in the First Circuit Court of Appeals.451 Then-
Judge Breyer rejected the government's argument that because trade
with Cuba was already prohibited when the IEEPA was passed, regulat-
ing travel was not a new restriction but simply a restriction on the
trade of services rather than commodities.452 The constitutional
dimensions of the freedom to travel distinguished the Reagan Admin-
istration ban from the preexisting trade embargo.453 After an exhaust-
ive search of the legislative history, the court concluded that the
government had not been regulating travel to Cuba on July 1, 1977,
and that the Reagan Administration had acted unlawfully by imposing
the new restrictions without complying with the IEEPA requirements.

The Supreme Court, by a bare five-to-four majority, overturned
the court of appeals' decision.454 Justice Rehnquist—writing for Justi-
tices O'Connor, Burger, White, and, surprisingly, Stevens—adopted
the government's arguments. "[T]he authority to regulate travel-re-

451 708 F.2d 794 (1st Cir. 1983).
452 Id. at 796.
453 Id. at 797.
lated transactions," said the Court, "is merely part of the President's general authority to regulate property transactions." Rehnquist accepted the government's argument that the government was regulating travel to Cuba in 1977 by exempting travel-related transactions from the general prohibition on trade with Cuba. By permitting travel, the government was in fact exercising its authority over travel (certainly a counterintuitive notion of the government's exercise of authority).

The Court rejected the plaintiffs' argument that there was no national emergency and consequently no justification for the restriction on the constitutional right to travel. The Court responded by saying that it must defer to the Executive's judgment about when such restrictions are necessary. It would not make an independent inquiry as to whether an emergency actually existed.

Justice Blackmun dissented, joined by Justices Powell, Brennan, and Marshall. The only surprise among the four dissenters was Powell, a conservative Justice not known to take on the government in foreign policy matters. Even more curious was his separate, pithy, dissenting opinion, with the disclaimer that its author was not questioning the political wisdom of President Reagan's policy. Powell agreed that the majority's opinion might be in the best interests of the United States, but maintained that an inquiry into the nation's best interests was not the question before the Court. The Court's role, rather, was "limited ... to ascertaining and sustaining the intent of Congress." The President and Congress were empowered to determine the political wisdom of a particular foreign policy, but the nine Justices were empowered only to uphold the law. As Powell read that law, "Congress intended to bar the President from expanding the exercise of emergency authority."

Only much later did I discover what probably triggered Justice Powell's curious, short discourse on the relationship between law and politics. The Supreme Court clerks that year heard Justice Rehnquist state that, although the plaintiffs probably had presented a more persuasive legal interpretation of IEEPA, the Court should not enjoin the Executive action toward Cuba. Powell's dissent may have been a response to Rehnquist's comment. Politics, not a narrow legal interpretation of the law, lay behind the Court's decision in Regan v. Wald, and Powell knew it.

455 Id. at 232.
456 Id. at 243.
457 Id. at 244.
458 Id. at 262.
459 Id.
460 Id.
Today, the right to travel to Cuba has again become a focus of controversy, as hundreds of Americans have flagrantly violated the ban on such travel.\textsuperscript{461} For those involved in such disobedience, \textit{Wald v. Regan} serves as a symbol of the Court's insensitivity to the rights of Americans. The continuing opposition to the ban will certainly revive the broad legal issues raised in \textit{Wald}. The \textit{Wald} plaintiffs' legal vision, although rejected by the Supreme Court, lives on in a new generation of activists.

C. \textit{CUSCIN v. Reagan}: The World Court Judgment

On April 9, 1984, the Nicaraguan government brought an action against the United States in the International Court of Justice (ICJ) alleging that U.S. support for the Nicaraguan Contras constituted both an impermissible intervention in Nicaragua's internal affairs and a use of armed force that contravened the UN and OAS charters and general principles of international law. The United States contested ICJ jurisdiction. After considering extensive briefs filed by both sides and hearing several days of oral argument, the court ruled that it had jurisdiction and competence to adjudicate Nicaragua's claims.\textsuperscript{462} The United States thereupon formally withdrew from the proceeding.\textsuperscript{463} The case went forward, however, and on June 27, 1986, the ICJ issued its opinion on the merits. By a 12-3 vote, the court found that by training, arming, equipping, financing, and supplying the Contra forces, the United States had violated its obligations under international law not to use force against another state and not to intervene in the internal affairs of another state.\textsuperscript{464} Nevertheless, Congress thereafter authorized $100 million in new aid.\textsuperscript{465}

The World Federalist Association, a national organization founded in the aftermath of World War II\textsuperscript{466} to advocate the abolition of war through just and enforceable world law, wanted to pursue a case against the U.S. government for violating the ICJ decision.

\textsuperscript{461} Medea Benjamin, \textit{Cuba Travel Will Continue Despite U.S., Helms’s Sanctions}, S.F. CHRON., Mar. 15, 1995, at A23 (In 1994 over 600 people traveled to Cuba openly and illegally.).
\textsuperscript{462} Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) 1984 I.C.J. 392.
\textsuperscript{463} Statement of United States on Withdrawal from the Proceedings Initiated by Nicaragua at the International Court of Justice, reprinted in 24 INT’L LEGAL MATERIALS 246 (1985).
\textsuperscript{464} Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) 1986 I.C.J. 14.
\textsuperscript{466} Among the World Federalist Association’s early members were Albert Einstein, Oscar Hammerstein, William O’Douglass, and Norman Cousins. Ironically, Ronald Reagan served on the advisory board of the Association’s California branch in the late 1990s. Interview with Walter Hoffman, former Executive Director of the World Federalists (Nov. 1993).
Clearly the World Federalist Association had no standing to bring this lawsuit; in *United States v. Richardson* and *Valley Forge Christian College v. Americans United for Separation of Church & State* the Supreme Court rejected standing for generalized injuries suffered by all citizens. Injury to its organization's goals and purpose probably would not suffice to give the World Federalists standing.

But another group of Americans was suffering a grave, particularized injury from their government's violation of the ICJ's decision and order. This group consisted of the thousands of American citizens living in Nicaragua, particularly those who lived in the dangerous northern region where Contra activity was heavy. Several had been shot at or kidnapped by the Contras and agreed to be plaintiffs in a lawsuit.

In this latest case, *Committee of U.S. Citizens Living in Nicaragua v. Reagan* ("CUSCLIN"), we claimed that (1) the Executive was violating both Article 94 of the UN Charter, which mandates obedience to a decision of the ICJ, and customary international law; and (2) that the Executive had violated the Fifth Amendment by providing aid to the Contras, whose policy and practice is to kill, wound, kidnap, and detain civilians, thus threatening the lives and liberty of plaintiffs living in Nicaragua. Moreover, that imminent threat was arbitrary and unreasonable in that it violated Article 94 of the UN Charter and customary international law as set forth by the ICJ decision. The American plaintiffs living in Nicaragua not only had standing, but the threat to their individual, constitutional rights would make it more difficult for a court to dismiss the case as presenting a political question for "an area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action."
From a legal perspective, CUSCLIN was probably the most utopian case we brought in our whole campaign. The Executive was at this point aiding the Contras pursuant to an explicit congressional appropriation of $100 million in aid.\textsuperscript{472} Thus, the President's power was "at its maximum, for it include[d] all that he possesses in his own right plus all that Congress can delegate."\textsuperscript{473} In addition, we requested bold relief: the enjoining of a major foreign policy initiative supported by both the President and a majority of Congress. Of the several cases we had brought, this one most directly criticized the entire U.S. policy toward Nicaragua. To say that the case would be an "uphill battle," as I conceded at the press conference announcing the suit's filing, was a serious understatement.

From a prophetic standpoint, CUSCLIN directly evoked the tension between law as it is and law as it ought to be. For over a century, the federal courts had given effect to congressional statutes even when those statutes conflicted with U.S. treaty obligations\textsuperscript{474} or customary international law.\textsuperscript{475} Like the nineteenth-century prophetic litigators, we relied heavily on fundamental principles of justice to argue for an exception to the general rule. We utilized tradition to criticize the present reality and to pose an alternative vision of the future in which the U.S. government would obey international norms.

In fact, we had rejected a possible technical ground for arguing the case. In appropriating the $100 million, Congress had not directly mentioned the ICJ decision. We might have argued that Congress's appropriation had to be construed consistently with our treaty obligation to obey the ICJ.\textsuperscript{476} Indeed, a leading human rights casebook questions why we did not take that approach.\textsuperscript{477} However, our clients wanted to challenge directly the U.S. policy violating the ICJ decision,

\textsuperscript{473} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
\textsuperscript{475} Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960).
\textsuperscript{476} See, e.g., United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988). The argument would have been that Congress meant to appropriate the money simply for humanitarian, and not military aid.
\textsuperscript{477} INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 627 (Frank Newman & David Weissbrodt eds., 1990) (questions whether appellants would have had a stronger case if they had alleged that Congress had not intended to break Article 94 of the UN Charter).
and we did not believe that narrowing our claim would significantly help our chances of success—it might only cloud the issue.

In the district court, the government argued that the plaintiffs lacked standing and that the suit presented a non-justiciable political question. Their standing argument asserted that the plaintiffs were standing in the shoes of the Nicaraguan government and thus that the whole case should be dismissed. We countered by arguing that the plaintiffs' own lives were in danger, and that they simply wanted to continue to stand in their own shoes. Unfortunately, this argument was prescient.

Judge Richey, while impressed with the "extensive and learned briefing" on the issues (a clear indication that we were going to lose), dismissed the case as presenting a nonjusticiable political question. Noting that the court had "never shirked its duty to render decisions that make bureaucrats more than ordinarily squeamish," the opinion identified the potential for "embarrassment" to the political branches as justifying invocation of the political question doctrine. The distinction between judicial decisions that simply make bureaucrats "squeamish" and those that present "embarrassment" was not to be gleaned from Judge Richey's opinion. While the court was "painfully aware that plaintiffs claim to be in danger because of actions taken by the United States... the proper forum for airing these grievances is not this Court but the Congress and the voting booth." Indeed, the vigorous and widespread opposition to U.S. intervention in Central America eventually did convince Congress to end aid to the Contras, but it was too late for one of the plaintiffs.

We appealed. While the appeal was pending, Benjamin Linder was murdered by the Contras. It was a terrible shock to us and brought home the reality of the war against Nicaragua. I had taken an academic approach to the case; Ben Linder's death reminded me that the harm caused by our government's policies was not merely the abuse of process or disregard of abstract formalities. This human tragedy was brought about by our aid to the Contras.

We argued the appeal in November 1987 before a liberal panel of the D.C. Court of Appeals: Circuit Judges Aubrey Robinson and Ab-

479 Id. at A230.
480 Id.
481 Id. at A231.
ner Mikva and District Judge Gordon, sitting by designation. In a scholarly forty-six-page opinion, the court dismissed our claims. The court of appeals did not hide behind the political question doctrine, as the district court had done. The court was, in fact, particularly troubled by the political question dismissal of the individual plaintiffs’ Fifth Amendment claims, for “[a]s Appellants point out, the Supreme Court has repeatedly found that claims based on such rights are justiciable, even if they implicate foreign policy decisions.”

As expected, however, the court followed precedent in finding that a congressional derogation from a prior treaty commitment or rule of customary international law was binding, as a matter of domestic law, on the judiciary. While ruminating that neither “our republican form of government [nor] our constitutional supremacy clause requires this subordination of treaties to inconsistent domestic statutes,” the court was bound by the “dualist” view of international and domestic law accepted by the Supreme Court.

We had sought to create an exception to this precedent by arguing that certain fundamental norms of international law are binding on both Congress and the President. The Nuremberg judgment rejecting the Nazis’ argument that they were only obeying domestic law, the holding of the Second Circuit in Filartiga v. Pena-Irala that foreign officials could be sued in U.S. courts for violations of certain fundamental norms, and the views of the Framers of the Constitution all seemed to require that certain international legal norms be accorded constitutional stature.

The D.C. Circuit appeared sympathetic to this argument when it agreed that “if Congress and the President violate a peremptory norm (or jus cogens), the domestic legal consequences are unclear.” The court expanded on this idea:

Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law. Such a conclusion was

483 Judge Mikva had been a liberal congressman before being named to the bench by President Carter. He had been a member of the World Federalists in its early years. Judge Robinson had been a NAACP lawyer prior to appointment to the bench.


485 Id. at 935.

486 Id. at 937.

487 630 F.2d 876 (2d Cir. 1980).

488 859 F.2d at 935.
indeed implicit in the landmark decision in Filartiga v. Pena-Irala, which upheld jurisdiction over a suit by a Paraguayan citizen against a Paraguayan police chief for the death by torture of the plaintiff’s brother. The court concluded that “official torture is now prohibited by the law of nations.” The same point has been echoed in our own court. Judge Edwards observed in Tel-Oren v. Libyan Arab Republic, that “commentators have begun to identify a handful of heinous actions—each of which violates definable, universal and obligatory norms,” and that these include, at a minimum, bans on governmental “torture, summary execution, genocide, and slavery.”489

Ultimately, though, the court concluded that the obligations created by Article 94 of the UN Charter and customary international law had not reached the stature of fundamental or peremptory norms of international law.490 Finally, the court of appeals found that governmental recklessness could give rise to a constitutional tort, but that in the foreign policy context the standard for finding reckless conduct was very high—and we had not met it.491

The court’s decision, like the whole case, received little media attention. Most of the coverage followed the lead of the New York Times in describing the ICJ decision as purely “hortatory” and unenforceable. This foolhardy, radical case brought by organizations of mostly aging Post-World War II international government types and American citizens living in Nicaragua was not particularly newsworthy.

On a grass-roots level, we had more success in getting our message heard. The World Federalist Association organized around the case, and a group of people not normally sympathetic to the Sandinista cause became involved in anti-U.S. intervention work. Many activists around the country looked at the ICJ decision as justifying their civil resistance to U.S. policy. These activists could draw support from the Nuremberg Tribunal’s statement that an individual’s “international duties . . . transcend the national obligations of obedience imposed . . . by the individual state.”492 The CUSCLIN case dovetailed with this civil resistance.

But CUSCLIN clearly had only a very limited impact on the movement to end Contra aid. It received little press attention and was not the subject of a major organizing campaign. As Walter Hoffman, the then-Executive Director of the World Federalists, pointed out, “the main reason for doing the case was for the future.” Although we lost the case, we did receive a serious, analytical opinion that left hope for the future. The court had accepted our argument that fundamental

489 Id. at 941 (citations omitted).
490 Id. at 942.
491 Id. at 950.
492 1 INTERNATIONAL MILITARY TRIBUNAL: TRIAL OF MAJOR WAR CRIMINALS (Nuremberg 1948), 223 (1945).
norms of international law could potentially restrain the President and the Congress. The *CUSCLIN* case is one precedent from our era that a future court might use to overcome the now-prevalent dualist theory that isolates the tenets of international law from our domestic legal order. Indeed, other judges and litigators have cited *CUSCLIN* for the proposition that norms of international law may restrain the political branches in their conduct of foreign policy.493

That this development in the case law was a significant achievement may perhaps be appreciated when one considers that it was also unexpected. A little before the *CUSCLIN* case was filed, I attended a panel discussion at the annual meeting of the American Society of International Law on whether the President could violate international law. I asked the panel whether Congress and the President—even acting jointly—should be constitutionally permitted to violate basic norms of international law. A very well known professor of international law answered that he doubted that any court would so hold in my lifetime.494 I'm now sure he was right, but the *CUSCLIN* case comes the closest to such a holding.

The radical nature of the *CUSCLIN* case illustrates some of the tensions inherent in such litigation. Our claims were similar to the constitutional abolitionist theories in that they had so little chance of winning that the mainstream establishment ignored us totally. Our outsider status made it difficult to organize around the case. For example, *Dellums* and *Crockett* generated much more excitement about the cases themselves. That occurred, in part, because those cases were perceived as more legitimate, that is, having a greater likelihood of being accepted by the elite. In addition, *CUSCLIN* was even more removed from the Nicaraguan people than *Dellums* or *Sanchez* had been. In *CUSCLIN*, none of our plaintiffs were Nicaraguan. We wanted to avoid the problem raised in *Sanchez* as to whether aliens living abroad were entitled to constitutional protection, but this strategic decision made it all the more difficult for the public to identify with our claims. Despite its radical critique, *CUSCLIN* was in many respects the most isolated and academic of all our litigation during the 1980s.

Yet the *CUSCLIN* litigation also presented the most radical and far-reaching critique of U.S. interventionist policy. *CUSCLIN*, unlike *Reagan v. Wald*, *Dellums*, and *Beacon Products*, directly challenged an

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493 Chief Judge Wald of the D.C. Circuit recognized that *CUSCLIN* "left open the possibility that 'peremptory' norms might supersede domestic law." Antolok v. United States, 873 F.2d 369, 394 n.17 (D.C. Cir. 1989); see also Siderman de Blake v. Argentina, 965 F.2d 699, 714-17 (9th Cir. 1992) (citing *CUSCLIN* extensively for the proposition that *jus cogens* is the highest form of international law and that prohibition against torture had *jus cogens* status), cert. denied, 113 S. Ct. 1812 (1993).

important norm of current U.S. constitutional law—that the U.S. government can do anything it wants abroad without being subjected to judicial scrutiny. I may have been fighting a losing battle, but at least my courtroom arguments in CUSCLIN did not focus primarily on procedural issues such as standing, ripeness, or mootness.

CONCLUSION

The prophetic vision of justice as a constant struggle has a certain kinship with the Sisyphus myth. Sisyphus overcomes his tragic situation through a conscious recognition that there is no hope of ever reaching the summit. Camus once argued, "The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy."495

Derrick Bell tells law school graduates that as a radical lawyer you will often be unable to reach your goals and "will feel less like a crusading reformer than like the mythical Sisyphus."496 Bell reads Camus as finding "strength in Sisyphus's course, not because Sisyphus continues to push the rock to the mountain's top, but because he returns to the bottom to retrieve it—knowing he will never get it to the top."497 Bell argues against instrumentalism: reaching the substantive goal, having an impact, is secondary. What is crucial is the courage to struggle, the attempt itself to transcend existing reality despite the difficulty of doing so.

The prophetic Jewish scholar Abraham Heschel used imagery very similar to the Sisyphian myth.

Sometimes we stand before a wall. It is very high. We cannot scale it. It is hard to break through it, but even knocking our heads against the wall is full of meaning. Ultimately, there is only one way of gaining certainty of the realness of any reality, and this is by knocking our heads against the wall. Then we discover there is something real outside the mind.498

An important difference between the Sisyphian and prophetic traditions is that for the prophets, God offers both a vision of doom and

496 Bell, supra note 71, at 10. When this Article was in its final stage of editing, I discovered Derrick Bell's excellent book, CONFRONTING AUTHORITY, REFLECTIONS OF AN ARDENT PROTESTER (1994), which elaborates on the themes of his commencement address at the University of Pittsburgh.
497 Id.
498 ABRAHAM J. HERSCHEL, THE INSECURITY OF FREEDOM: ESSAYS ON HUMAN EXISTENCE 260 (1966), quoted in MAURO FRIEDMAN ET AL., YOU ARE MY WITNESS 87-88 (1987). Martin Buber, another prominent Jewish philosopher, used the same image when he wrote "I cannot know how much justice is possible in a given situation unless I go on until my head hits the wall and hurts." Id. at 88.
The prophetic litigators discussed in Part III of this Article were able to criticize their realities while foreseeing a redemptive future. Albion Tourgee characterized himself as a fool who understood the difficulty of the situation he faced, yet "hoped that in some inscrutable way the laws of human nature would be suspended, or that the state of affairs at first presenting itself would be but temporary." Arthur Kinoy, who co-argued the Youngstown plant closing case, recounts how, despite his awareness of the incredible odds against winning, an incredible feeling of faith and optimism in the steelworkers' cause came over him when he got up to argue before the court of appeals. It is that constitutional faith in the face of a hopeless situation that characterizes both the fool and the prophetic litigator and distinguishes them from Sisyphus.

The faith that sustains the constitutional litigator facing a difficult task often comes from images and symbols taken from past struggles. Albion Tourgee took his symbols from the bible and the abolitionists. Susan B. Anthony involved the fugitive slaves' legal struggle to assert her rights before Judge Hunt. Staughton Lynd's most powerful recurring images were drawn from the Hungarian revolt against Soviet tanks. A recurring image that I was drawn to as the losses mounted in the litigation I participated in was of a lawyer in Nazi Germany struggling hopelessly to stem the tide of reaction. What attracted me to that image was obviously not the danger or martyrdom quality of my work, since the personal risk I took in my litigation was virtually nonexistent and that of anti-Nazi lawyers great. Rather it stemmed from a recognition that despite the pronouncement of Justice Jackson at Nuremberg, the likelihood of United States courts proscribing United States aggressions against Latin American nations and people was not substantially greater than German courts enjoining Hitler's aggression against the peoples of Europe. That an anti-Nazi lawyer could work in

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499 The prophets criticized their reality and predicted disaster, yet at the same time held out a redemptive view of the future. Samuel Eisenstadt, The Prophets 45, 92, 134-35 (1971). The prophetic faith bears a "short range pessimism and a long range optimism." Olan, supra note 49, at 117. While Amos prophesied that "Fallen, not to rise again, is Maiden Israel abandoned on her soil with none to lift her up," Amos 5:1-2, he went on to say "seek the Lord and you will live . . . I will restore my people Israel. They shall rebuild ruined cities and inhabit them, they shall plant vineyards and drink wine; they shall till gardens and eat their fruits." Amos 9:14. The juxtaposition of doom and salvation is associated with other important biblical prophets. See, e.g., J. Lindblom, Prophecy in Ancient Israel 188 (1962) (discussing tension in Isaiah).

500 Tourgee, supra note 37, at 155.

501 Stephen Wexler recounts the conflict between waking up in the middle of the night screaming "we can win" yet knowing "realistically, we can't." Stephen Wexler, Practicing Law for Poor People, 79 Yale L.J. 1049, 1061 (1970).
the face of such hopeless odds fascinated me. I never knew whether such lawyers existed outside my imagination, although I assumed they must have. In the course of researching this Article, I came across a lawyer who actually fit the image that I had.

The lawyer’s name was Helmuth James von Moltke. Moltke was legal adviser to the High Command of the German Armed Services during World War II until he was executed by the Nazis in January 1945. He fought many a lonely and courageous battle against Nazi wartime policy.

I have always wondered what it must have been like to have been an anti-Nazi lawyer in the Third Reich. Moltke’s letters to his wife provide some answers. After the remarkable fact of singlehandedly convincing twenty-five military men to moderate a directive on economic warfare against Britain in 1939, he wrote home:

Today I won my case. But it was like winning a victory over a hydra. I chopped off one of the monster’s heads, and 10 new ones have grown in its place.

The next year, after waging a hard, but losing fight to protect the rights of Poles, he wrote his wife in despair, “It’s no use, unfortunately, but at least our honour was saved. . . .” In 1943, after a year in which he fought hard to save the Jews, and against the various war crimes being committed by German troops, Moltke feared that his personal situation and that of the German people would dramatically deteriorate. For him:

The most irritating part is that I consider all the work being done now as having no chance. But it has to be done with all due care all the same, so that others, and we ourselves, can’t blame ourselves for having missed any chance.

Moltke’s justification for his difficult struggle, like that offered by Albion Tourgee, the New Departure leaders, and Derrick Bell, focuses on the personal dignity and courage achieved by opposing evil. Yet Moltke’s legacy, like that of the nineteenth-century litigators who sought to extend Americans rights beyond the bounds their era could tolerate, extends much further than vindicating his personal honor. His example served as an inspiration for others such as George Ken-

502 For a description of Moltke’s character, see George F. Kennan, Memoirs 1925-1950, at 121 (1967).
504 Id. at 77.
505 Id. at 270.
506 For example, the New Departure leaders quoted Milton in Paradise Lost after the Supreme Court rejected their claim in Minor v. Happersett, 163 U.S. 552 (1896): “What though the Field be lost? All is not lost: the unconquerable will and courage never to yield.” Suffrage, supra note 197, at 755.
nan, just as Albion Tourgee, Francis Minor, and Alvan Stewart helped inspire the struggle of future generations to achieve the constitutional rights they had fought vainly to secure.

507 The image of "this lonely, struggling man," provided Kennan with a model "of moral conscience and an unfailing source of political and intellectual inspiration." See KENNAN, supra note 502.