LITIGATION CAMPAIGNS AND THE SEARCH FOR CONSTITUTIONAL RULES

Mark V. Tushnet*

This Journal's focus on appellate practice and procedure suggests that it might be appropriate and productive to take a somewhat unusual approach to *Brown*[1] and its significance. *Brown* was most important, of course, for its role in the transformation of American race relations. From the point of view of the appellate courts, *Brown* is significant in another way. *Brown* was the culmination of a sustained campaign of strategically designed litigation—or so it came to be thought.[2] Lawyers subsequently took the strategic litigation campaign they saw ending in the triumph of *Brown* as a model for their own causes, and developed strategies to use litigation in the service of a wide range of causes: women's rights, prison reform, abolition of capital punishment, protection of property rights, and the undermining of affirmative action, among others.[3] In each of these campaigns, the lawyers of course sought favorable rulings from appellate courts. But—and this is my primary point—they typically sought favorable rulings *of a particular type*. In general, the ultimate goal was a simple and easily understood rule, parallel to the rule condemning state laws

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

1. *See Brown v. Bd. of Educ.*, 347 U. S. 483 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

2. My analysis of the litigation campaign concludes that the NAACP's litigation campaign is best understood as more catch-as-catch-can than as the systematic pursuit of a plan set forth in advance, but that in retrospect lawyers both within and outside the NAACP did reconstruct the litigation as the execution of a strategic plan. See generally Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (U.N.C. Press 1987), on which much of what follows draws.

3. For a discussion of other aspects of the legacy of *Brown* for strategic litigation campaigns, see Mark Tushnet, *Some Legacies of* Brown, 90 Va. L. Rev. ___ (forthcoming 2004).

mandating the separation of children by race. The reason, I argue, is that favorable rulings that take the form of general standards are not nearly as useful to the cause lawyers, who typically have relatively limited resources and cannot afford to litigate the kinds of fact-intensive cases that standards (rather than rules) favorable to them generate.

The NAACP's litigation campaign began with cases that sought to require school districts to take the equality component of "separate but equal" seriously. Initially the cases involved teachers' salaries. Some of these posed no serious litigation challenges, as when school boards conceded that they paid African American and white teachers different salaries because of their race. Others presented in the small the problem that broader equalization challenges would pose. In these more troublesome cases—from the litigators' point of view—school boards contended that they did not make their decisions explicitly on the basis of race, but rather paid salaries to teachers based on their qualifications. Penetrating that argument by showing that black and white teachers with equivalent qualifications got different salaries was sometimes difficult. How, for example, could one compare a teacher with a master's degree and five years of experience with a teacher who had no graduate degree but twenty years of experience?

These litigation difficulties would have been immensely compounded had the NAACP attempted to enforce "separate but equal" with respect to the material conditions of elementary and secondary schools.[4] The lawyers would have had to make school by school comparisons, measuring many different characteristics of the schools: their age, the quality of their plumbing, their athletic facilities, their science laboratories, and more. Often, of course, the schools for African Americans would be unequal to the schools for whites with respect to every one of these characteristics. Sometimes, though, the litigators would have to persuade a judge that a newer school for African Americans without good science laboratories was unequal to an older,

4. Throughout, I refer to "the NAACP's lawyers," but technically the lawyers were employed by the NAACP Legal Defense and Education Fund, a distinction that became important in later years as the two organizations began to pursue somewhat different litigation agendas.

somewhat more run-down school for whites with better science labs.[5]

In the abstract, these equalization cases could have gone forward.[6] The NAACP's litigators, though, did not have the resources to pursue them in any systematic way. The NAACP staff was limited, with no more than five or six lawyers available at any one time to deal with all of the legal issues the NAACP wanted to pursue. Further, the legal staff was located in New York, far from the Southern districts in which the litigation would have to be conducted. The legal staff tried to locate lawyers in each locality who could help out in carrying the burdens of litigation. There were few such lawyers, however, no more than one or two—if that—in the states in the deep South. Financial resources were as limited as human ones. Conducting equalization lawsuits would require investigations and, sometimes, expert testimony. The salary equalization litigation had its greatest successes in challenging policies in Southern cities and petered out as the NAACP's lawyers had to slog through rural districts. Equalization lawsuits dealing with the schools themselves would have been much worse: The most substantial outcomes would come in the South's cities, but the investigations and comparisons there would be the most expensive; victories in rural areas might be easier to come by, but the physical dangers of investigating and litigating in those districts were substantial, and the payoffs of even successful suits would be relatively small.

Switching from an equalization strategy to what was called the direct attack on segregation—the effort to get a Supreme Court decision declaring that segregation as such was unconstitutional—made sense from the point of view of litigators acting under severe resource constraints.[7] Later

5. This problem was compounded as the *Brown* litigation proceeded and some Southern governors, notably James Byrnes of South Carolina, supported relatively large appropriations to be dedicated to upgrading the segregated schools for African Americans. These newer schools would have undoubtedly been better than the older schools for whites in some respects, but worse, despite their recent construction, in others.

6. For a description of some early efforts in Virginia, which does not provide much detail on the resource question, see Peter Wallenstein, *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia* 94-96 (U. Va. Press 2004).

7. In making the observation in the text, I do not mean to suggest that the decision to pursue the direct attack was dictated solely by resource concerns. In fact, the NAACP's

strategic litigation campaigns had a similar structure: an initial resource-intensive stage invoking a general standard of constitutional law to challenge practices in particular settings, followed by a change to a strategy of seeking a flat and easily enforced rule that would make it clear that practices in a large number of settings were unconstitutional.

Before sketching the way in which this structure has characterized post-*Brown* litigation campaigns, I must note another part of the story as it developed. In the most general terms, we can call it the problem of the legally ambiguous victory that generates a backlash, whose effect is to force the litigators to engage in a new form of resource-intensive litigation. Here too the story can be seen in the *Brown* litigation. *Brown I* was ambiguous in its identification of why segregation was unconstitutional. To use the terms that have since become common, segregation might have been unconstitutional because it involved a racial classification, or it might have been unconstitutional because it constituted a system of racial subordination.[8] Judge John Parker noted the ambiguity in his opinion on remand in the South Carolina case decided along with *Brown*, writing that *Brown* "does not require integration . . . [but] merely forbids the use of governmental power to enforce segregation."[9] The ambiguities were made even more apparent in *Brown II*, the decision on remedy. There the Court said that desegregation should proceed "with all deliberate speed," that courts could consider "problems related to administration," but that "the vitality of the[] constitutional principles [stated in *Brown I*] cannot be allowed to yield simply because of disagreement with them."[10] Everyone knew that mere problems of administration could not justify any substantial delay in implementing *Brown* and that the Court's real concern was resistance predicated on "disagreement" with *Brown*. The

goal had always been to obtain a declaration of segregation's unconstitutionality. Equalization litigation was an intermediate strategy, pursued on the way to the direct attack.

8. For a recent discussion of these ambiguities, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 Harv. L. Rev. 1470 (2004).

9. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

10. *Brown II*, 349 U.S. at 300, 301.

Court's position made most sense if *Brown* did indeed require integration, but *Brown* never said what it did require.

These ambiguities licensed *Brown*'s opponents to defend extremely limited desegregation plans as entirely legal. That, in turn, re-created the litigation problems that the NAACP's lawyers had sought to overcome through the direct attack. Now, instead of challenging unequal facilities district by district, the lawyers had to challenge inadequate desegregation plans district by district. Eventually the courts got fed up and basically shifted the burden from the NAACP's lawyers to those representing the districts, forcing the latter to justify any additional delays.[11] By that time, however, real opposition to *Brown*'s implications for integration had developed. Gradually *Brown*'s admirers were placed on the defensive. They began to win only occasional victories, and often relatively small ones, and suffered increasingly large defeats. At the end of the story, then, from the litigators' point of view, they were essentially back at the starting point, having available to them constitutional doctrines that were favorable in the abstract but that they could not effectively enforce because of resource constraints.

I turn now to some brief discussions of how the patterns revealed in the litigation associated with *Brown* recurred as other lawyers emulated the strategic litigation campaign they saw there.[12] The NAACP Legal Defense Fund itself pursued a campaign against the death penalty, believing that its administration was racially disproportionate and therefore an appropriate matter of concern to an organization dedicated to the interests of African Americans.[13] At its outset, that campaign had two components. The first was an effort to eliminate the availability of the death penalty in certain categories of cases—notably, rape and robbery—where its racial impact had been

11. *See e.g. Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work. . . . It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation.").

12. I condense complicated stories here and sometimes distort the actual sequence of events, in particular by placing in different stages events that sometimes occurred essentially simultaneously.

13. For the story of the early stages of this litigation campaign, see Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (William Morrow 1974).

most severe. These categorical challenges basically failed.[14] Second, the lawyers mounted challenges to the processes by which capital punishment was administered. They challenged the exclusion from juries of potential jurors who had principled objections to the death penalty, arguing that the "death qualified" juries that resulted were more likely to convict defendants and then more likely to sentence them to death; they challenged the instructions jurors received on the question of sentencing defendants to death; and they sought to obtain a rule that the jury that convicted the defendant could not go on to consider whether the defendant should be sentenced to death. The results of these challenges were mixed. The Supreme Court limited the use of "death qualified" juries,[15] but did not overturn existing procedures for instructing juries and allowing a single jury to decide both guilt and sentence.[16]

The categorical challenges were not terribly resource-intensive, although to the extent that the categorical challenges sought to take advantage of a sense that African Americans received death sentences more often than whites did for crimes like rape and robbery, they did require the accumulation of some social-scientific evidence. The other challenges *were* resource-intensive. The litigators had to develop significant records, not so much about the facts of the cases themselves, but about the social science they believed bore on their constitutional claims. Partly because of their mixed successes in the first stage of the litigation campaign against the death penalty, the litigators turned to the ultimate issue, the constitutionality of capital punishment itself. For present purposes, what is notable about this development is that it shifted the litigation from resource-intensive challenges to litigation seeking a flat and easily administered rule.

To the litigators' surprise, they won.[17] As with *Brown*, the victory was ambiguous. The Court held that capital punishment,

14. One reached the Supreme Court, which disposed of it on other grounds. *Boykin v. Ala.*, 395 U.S. 238 (1969) (avoiding the determination of whether capital punishment should be available for robbery by finding that Boykin's guilty plea was not made voluntarily).

15. *Witherspoon v. Ill.*, 391 U.S. 510 (1968).

16. *McGautha v. Cal.*, 402 U.S. 183 (1971).

17. *Furman v. Ga.*, 408 U.S. 238 (1972).

as then administered, was unconstitutional because it led to the arbitrary imposition of death sentences. That held out the possibility that some other system of administering capital punishment might be constitutional if decision-makers had sufficient guidance to eliminate the arbitrariness. Chief Justice Burger's dissenting opinion provided a road-map for legislatures to follow. And they did. The Court then acceded to the backlash by upholding capital punishment under the revised statutes.[18]

After the restoration of capital punishment, litigation against the death penalty again took two forms. The first was, once again, an effort to obtain some categorical exclusions from eligibility for death. Some of the categorical exclusions were by crime—rape,[19] and felony murder,[20] for example. Others were by nature of the offender—persons with mental retardation,[21] and offenders who killed when they were young.[22] These efforts met with mixed success. The second category involved challenges to the administration of capital punishment on the particular facts of the case. At the Supreme Court level these challenges were rather more successful. Once again, for purposes of this Essay, what matters about them is how fact-intensive they are. It might well be the case that a very large proportion of all cases resulting in death sentences are infected by the kinds of constitutional errors the Supreme Court has identified in these fact-intensive cases, and yet anti-capital punishment litigators simply do not have the resources to win every legally meritorious case.

The pattern of resource-intensive, fact-specific litigation followed by efforts to obtain a flat rule (followed by a backlash leading to a return to fact-specific litigation) also characterizes prison reform litigation.[23] Prison reformers began by winning lower court decisions holding that the totality of the circumstances at individual prisons could amount to cruel and

18. *Gregg v. Ga.*, 428 U.S. 153 (1976).

19. *Coker v. Ga.*, 433 U.S. 584 (1977).

20. *Enmund v. Fla.*, 458 U.S. 782 (1982); *Tison v. Ariz.*, 481 U.S. 137 (1987).

21. *Atkins v. Va.*, 536 U.S. 304 (2002).

22. *Stanford v. Ky.*, 492 U.S. 361 (1989); *Thompson v. Okla.*, 487 U.S. 815 (1988).

23. For a relatively optimistic view of prison reform litigation, see Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge U. Press 2000).

unusual punishment.[24] The cases accumulated to the point that the Supreme Court did not have to, and never did, deal with a "totality of the circumstances" case on the merits.[25] The "totality of the circumstances" approach was obviously resource-intensive. As prison populations expanded in the 1970s and 1980s, prison reformers narrowed their focus, seeking a declaration that double-celling—the practice of placing two or more prisoners in cells designed for a single inmate—was unconstitutional. Here too, had they succeeded, they would have replaced a resource-intensive standard with an easily administrable rule. The Supreme Court rejected the challenges, though.[26]

There was a congressional backlash as well. Responding to concerns that lower federal courts were "micro-managing" prisons, Congress enacted the Prison Litigation Reform Act in 1996. For all practical purposes, the statute *confined* constitutional challenges to "totality of the circumstances" ones. Prison reform litigation continues, but it once again takes the form of litigation aimed at altering the practices at particular prisons, and resource limitations inevitably restrict the ability of litigators to achieve broad reforms.[27]

The NAACP's litigation campaign, and many of its imitators, sought to advance liberal causes. Conservatives too came to believe that strategic litigation campaigns might help their causes.[28] Property rights litigators overreached in their efforts to secure constitutional rules effectively barring regulatory takings and development exactions, winning victories that fell short of their goals and forcing their litigation into the

24. *See e.g. Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

25. The Court endorsed the approach in *Hutto v. Finney*, 437 U.S. 678 (1978), where the issue before the Court was collateral to the merits.

26. *See Rhodes v. Chapman*, 452 U.S. 337 (1981).

27. *But cf. Johnson v. Cal.*, ___ U. S. ___, 124 S. Ct. 1505 (2004) (granting certiorari to *Johnson v. Cal.*, 321 F.3d 791 (9th Cir. 2003) (challenging policy of racial segregation in California's prisons)).

28. Conservative litigation goes back a long way. *See* Daniel Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (U. Ill. Press 1995) (describing litigation by employers against labor unions at the turn of the twentieth century and after).

fact-intensive form that always limits what litigation can accomplish for cause lawyers.[29]

My final example of the role of rules in strategic litigation campaigns is the challenge that conservative public interest litigators mounted against affirmative action. Like other strategic litigation groups, these litigators did not have large staffs or financial resources.[30] They carefully selected plaintiffs who, they believed, would present sympathetic claims. They hoped to obtain a flat rule effectively barring the consideration of race in university admissions. Constitutional doctrine, though, turned out to pose an obstacle to that achievement.

Doctrinally, the anti-affirmative-action litigators sought to get the courts to declare that the use of race in university admissions processes was subject to "strict scrutiny." Satisfying that standard would require universities to demonstrate that race-based admissions processes were extremely well-designed ("closely tailored," in the constitutional jargon) as techniques of accomplishing extremely important ("compelling") governmental goals. And, the litigators believed, universities could never make such a demonstration.

Careful reflection on the other major recent strategic litigation campaign focused on obtaining a favorable doctrinal structure might have given the anti-affirmative action litigators pause. Women's rights groups set out to get the courts to declare that gender-based distinctions in the law were subject to strict scrutiny. They never quite succeeded, even as they won Supreme Court victory after Supreme Court victory. Starting with a minor case in which the Court invalidated a statutory gender discrimination because it did not satisfy the Constitution's least demanding standard, minimum rationality,[31] the Court gradually ratcheted up what governments had to do to justify gender-based discriminations, culminating in the Virginia Military Institute case, in which the Court held that such

29. *See e.g. Tahoe-Sierra Preservation Council v. Tahoe Regl. Plan. Agency*, 535 U.S. 302 (2002); *Palazzolo v. R.I.*, 533 U.S. 606 (2001).

30. Useful studies of conservative litigating groups include Steven P. Brown, *Trumping Religion: The New Christian Right, the Free Speech Clause, and the Courts* (U. Ala. Press 2002); Clint Bolick, *Voucher Wars: Waging the Legal Battle over School Choice* (Cato Inst. 2003); and John P. Heinz, Anthony Paik, and Ann Southworth, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 L. & Socy. Rev. 5 (2003).

31. *Reed v. Reed*, 404 U.S. 71 (1971).

discriminations required "exceedingly persuasive justification[s]."[32] The Court described this as "skeptical scrutiny,"[33] not quite strict scrutiny but something constitutional law professors have come to describe as "intermediate" scrutiny.

What is notable about the women's rights litigation campaign is that it was clearly a massive success even though it never accomplished what its designers wanted. Indeed, the Court managed to transform the standard of review from mere rationality to "skeptical scrutiny" without ever acknowledging that it was in fact ratcheting up the requirements.[34] A careful reader of the Court's opinions might have taken the lesson of the women's rights litigation to be that the standard of review did not really matter. How it was applied did. The applications of the various standards the Court articulated in the women's rights cases were almost uniformly favorable to the strategic litigators.

In the end, the anti-affirmative-action litigators got the doctrine they favored, but in doing so suffered a substantial defeat for their overall goals. The Michigan affirmative action decisions held, as the litigators wanted, that the use of race in university admissions was indeed subject to strict scrutiny.[35] In the case involving undergraduate admissions, the Court invalidated a system in which applicants from minority groups were awarded a fixed number of points towards admission, but in the case involving law school admissions, the Court upheld a system in which race was taken into account in what the Court thought was a sufficiently flexible way, by means of reviews by admissions officials of the entire file of each applicant.

From the litigators' point of view, this combination of results amounts to a real defeat. Instead of eliminating all admissions programs that take race into account, the Court struck down only those that did so in an unreasonable or inflexible way. Future challenges to affirmative action programs

---

32. *U.S. v. Va.*, 518 U.S. 515, 534 (1996) (quoting *Miss. U. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

33. *Id.* at 531.

34. The key opinion, which was not for the Court, may have been Justice William J. Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), which demonstrated beyond doubt that the *Reed* decision, see note 31, *supra*, actually had already abandoned the "mere rationality" standard. After *Frontiero*, just about everyone knew that, whatever the words, the standard the Court was using was getting increasingly stringent.

35. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

will have to resemble the equalization litigation the NAACP abandoned; they can take the form only of challenges to particular programs, on a school-by-school basis, for being insufficiently flexible. Like the equalization litigation, these challenges will be resource-intensive, because the challenges will have to gather substantial information through discovery to determine exactly how a nominally flexible program is actually being implemented. Further, a decision striking down a program at one school will have few implications for programs at other schools, whose lawyers will certainly be able to point to differences in flexibility that, they will claim, are sufficient to distinguish their programs from the invalidated one. The anti-affirmative action litigators are unlikely to have sufficient resources to make a serious dent in university affirmative action programs.

My focus on one small facet of the litigation campaign that culminated in *Brown v. Board of Education* may seem peculiar in seemingly failing to appreciate that decision's monumental importance in twentieth century history and law. In modest self-defense, I suggest that great decisions are great because they send their tendrils out in many directions, not all of which are obvious at the moment they are decided. *Brown* set a pattern for later litigation campaigns. Its effort to transform segregation litigation from a fact-intensive activity into a rule-based one was repeated by other litigation campaigns. So was the fact that *Brown*'s success in doing so was followed by a backlash that reintroduced fact-intensive litigation at a different, but equally important, stage of the litigation. The lesson to be learned from this perspective is a small one, perhaps, but I think an important one.