

become our objective. Equality is easiest to achieve not by equal assistance, whatever that may mean, but by not assisting religion at all. It is this equality in each religion's relationship with government which enables our religions—both majority and minority, of differing sizes, wealth and membership—to confront each other as equals. The equality among our religions fostered by the separationist principle has nurtured religious pluralism.

At this writing, there are more than 1200 religions and sects in the United States.²³ With this new and ever-growing religious diversity,²⁴ a moral consensus is more elusive than ever. For Goldberg and others, this stands as an indictment of today's society. Yet the diversity would seem to stand for an altogether different message. As Madison found, it is evidence of America's ever-growing religious freedom²⁵—a freedom that requires independence from government.

CONSTITUTIONAL LITIGATION: By Kenneth F. Ripple.¹ Charlottesville, Va.: The Michie Company. 1984. Pp. xxii, 674. \$50.00.

*Brian K. Landsberg*²

Constitutional law, perhaps more than any other body of law, has long been the preserve of the legal theorist. If "the lot of the constitutional theorist is not easy,"³ the lot of the lawyer who must merge theory and practice to litigate a constitutional case is even more difficult.

Ripple attempts to improve the lot of the litigator facing his first foray into a realm which intimidates even veterans. Ripple's treatise is, to my knowledge, the first effort to create a constitutional law practitioner's primer. It must, however, compete with more encompassing treatises which between them cover most of the same

23. J. MELTON, *A DIRECTORY OF RELIGIOUS BODIES IN THE UNITED STATES* xiii (1977).

24. See *Abington v. Schempp*, 374 U.S. 203, 240 (1963) (comparing a relatively homogeneous religious composition during the time of the Founders with its evolving modern diversity).

25. See *THE FEDERALIST* No. 51, at 351-52 (J. Madison) (J. Cooke ed. 1961).

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3. Auerbach, *Book Review*, 1 *CONST. COMM.* 137, 163 (1984).

ground.⁴ Ripple's chronological treatment of the development of a constitutional case and his practical approach to each stage of litigation may prove useful to many practitioners who resist the thematic method of the hornbooks. One reader recommends this \$50 text be "included in the library of any law firm that engages in constitutional litigation."⁵ Others may question the usefulness of any discussion of constitutional law practice divorced from substance.

This review will address four questions about Ripple's effort to divorce practice from substance. First, can one really instruct on how to litigate constitutional cases without writing a full-fledged text on the substance of constitutional law? Ripple's effort, though occasionally flawed, suggests that it can be done. Second, who can benefit from such a text? Both institutional lawyers and lawyers with a private practice representing individuals or corporations may need guidance on constitutional litigation. While Ripple's book provides some insights which would benefit both classes of lawyer, the plaintiff's lawyer in private practice will find more help there than will the institutional or defense lawyer. Third, what does close examination of the primer reveal about its depth and helpfulness in instructing the practitioner as to the specifics of litigation strategy? Review of Ripple's chapter on the choice of state or federal forum yields a mixed conclusion. Finally, do the differences between constitutional and nonconstitutional litigation warrant a separate text? Perhaps. The lawyer uneasy over a maiden voyage into the seas of constitutional litigation will find here useful charts to each port of call. More complete charts exist, but not in one place.

I

Ripple recognizes that a practitioner preparing to litigate a constitutional case needs familiarity with constitutional theory. His solution to the problem of reconciling the need for a theoretical base and the demands of a practical guide is twofold. He begins with an introductory unit on the "Basic Characteristics of Constitutional Litigation." He then selectively illustrates practical points with substantive case studies. This approach does not, however, allow these substantive issues to be covered in depth. Ripple's discussion of intent in constitutional cases illustrates this difficulty.

Although intent is an element of many common law and statu-

4. See, e.g., today's standard hornbooks on constitutional law [J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* (2d ed. 1984); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978)], federal courts [C. WRIGHT, *FEDERAL COURTS* (1976)] and civil rights [S. NAHMOD, *CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION* (1983)].

5. Levitan, Book Review, 70 A.B.A. J., Oct. 1984, at 140, 142.

tory causes of action, it poses special problems in the context of a constitutional challenge. Those problems flow from the fact that the Court requires proof of the government's intent, not just the intent of some individual. The Court itself has often recognized the difficulties attending any effort to show legislative intent, and it continues to eschew an intent requirement in litigation under some clauses of the Constitution. As a leading proponent of the intent requirement for race or sex discrimination noted, in rejecting a search for actual intent in a commerce clause challenge, an intent requirement "assumes that individual legislators are motivated by one discernible 'actual' purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons."⁶

Ripple cites only three types of cases requiring proof of intent: cases under 42 U.S.C. § 1981, under the fifteenth amendment, and under the equal protection and due process (incorporating free speech) clauses of the fourteenth amendment.⁷ One might quibble about these examples. Section 1981 is not the Constitution. Even in equal protection litigation under the fourteenth amendment to remedy vote dilution caused by malapportionment, no showing of intent is required.

But more basic questions must be asked, and Ripple provides no meaningful discussion of their answers. Do other clauses of the Constitution require proof of intent?⁸ And how is intent to be proved? Ripple addresses the latter question in cursory fashion relying primarily on quotes from three leading cases.⁹ These references are helpful. Perhaps given the nature of the task Ripple has undertaken they suffice. But at the least it would have been helpful to discuss, for example, why the showing of disproportionate impact was sufficient in *Castaneda v. Partida*,¹⁰ but not in *Arlington Heights*. (Presumably discrimination was a more probable explanation for the statistics in the jury discrimination case.) Why was it

6. Rehnquist, J., dissenting in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 702-03 (1981).

7. K. RIPPLE, *CONSTITUTIONAL LITIGATION* 265-273 (1984).

8. See the running dialogue between Justices Brennan and Rehnquist in, e.g., *Kassel* (commerce clause) and *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (equal protection challenge not based on suspect classification). See also *Larson v. Valente*, 456 U.S. 228 (1982) (Brennan, for the majority, finds deliberate establishment of religion; White and Rehnquist, dissenting, argue discriminatory intent must be and has not been shown).

9. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977); and *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). See K. RIPPLE, *supra* note 7, at 265-270.

10. 430 U.S. 482 (1977).

insufficient in *City of Mobile v. Bolden*,¹¹ but sufficient in a very similar fact situation in *Rogers v. Lodge*?¹² (Because the proof in *Rogers* was aimed at showing legislative intent rather than simply a collection of factors?)

Another example of the difficulty inherent in an effort to teach constitutional litigation without thorough exploration of theory lies in Ripple's chapter on remedies. Ripple offers practitioners this sound advice: "[T]he time to worry about the remedy is not after liability has been established but during the early stages of the litigation."¹³ He explains, too, the tension between the so-called tailoring principle ("the nature of the violation determines the scope of the remedy")¹⁴ and the traditional flexibility of equity.¹⁵

His discussion of structural injunctions provides information about the pros and cons of the planning technique and use of special masters.¹⁶ But he omits explanation or even description of the theoretical underpinnings of the structural injunction. A practitioner attempting to formulate and support (or oppose) structural relief needs a theoretical framework within which to work. Central to this is the developing distinction between primary and secondary relief. Primary relief is aimed directly at the practice which offends the Constitution, while secondary relief reaches practices that have not been shown to violate the Constitution. Although the district court has "ample authority" to "address each element contributing to the violation," as well as enjoining the violation itself,¹⁷ the practitioner also should know that courts are attempting to develop principles governing the use of such secondary remedies. Most notable is *Ruiz v. Estelle*,¹⁸ where the court approved much of the structural decree against the Texas prison system. The court disapproved several items of secondary relief because they were "not demonstrably required to protect constitutional rights and intrude unduly on matters of state concern." Implicit in the *Ruiz* opinion is a kind of doctrine of inadequacy of remedy: indirect, secondary relief is warranted only where primary relief is demonstrably inadequate to assure compliance with constitutional standards.

Again, greater emphasis on the theoretical and historical underpinnings of constitutional law would have been helpful in chap-

11. 446 U.S. 525 (1980).

12. 458 U.S. 613 (1982).

13. K. RIPPLE, *supra* note 7, at 306.

14. *Swann v. Board of Educ.*, 402 U.S. 1, 16 (1971).

15. K. RIPPLE, *supra* note 7, at 302-03; see also Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46-50 (1979).

16. K. RIPPLE, *supra* note 7, at 314-318.

17. *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

18. 679 F.2d 1115, 1126 (5th Cir. 1982).

ter 13 on "Plenary Review." This chapter not only touches on brief writing and oral argument but also devotes considerable space to a discussion of the uses of history in constitutional adjudication. Ripple provides examples of the use of history in cases involving such disparate issues as jury trial, the religion clauses, and separation of powers. The chapter could be enhanced by more explicit explanation of the various uses of history. For example, the religion cases sometimes use the fact that a practice has long been followed to validate it. Or, as Ripple says, "[T]o a very great extent, the Court's cases in this area during modern times are an attempt to distinguish those civil-ecclesiastical relationships which have a successful 'track record' in American society from those that do not and that, consequently, may cause significant strife in a pluralistic society."¹⁹ But except for a brief quote from an opinion showing concern for the framers' motives in adopting the religion clauses, Ripple does not point out that evidence of historical practice may also instruct us on the underlying purposes of the Constitution. The practitioner should know that history may be used either to help define constitutional values, to define particular practices disfavored by the framers, or to shed light on which relationships "have a successful 'track record.'" Moreover, prior practice may either show what the Constitution embraced or what it was meant to repudiate. Finally, the practitioner could have benefited from pointers on researching constitutional history.

II

In offering us a text on constitutional litigation, Ripple is necessarily suggesting that legal strategy and the shaping of a case from the very beginning can make a difference in the Supreme Court's application of the Constitution. If he is correct, the lawyer who handles an occasional case raising constitutional issues desperately needs a how-to-do-it primer—assuming a primer can tell us how to do it. For in most constitutional litigation, at least one of the parties is an institutional litigant (e.g., the United States, a state or local government, the NAACP Legal and Educational Defense Fund, the American Civil Liberties Union, the Pacific Legal Foundation). Those litigants begin with certain advantages: flexibility in selecting cases in which to seek constitutional review, constant exposure to Court trends, expertise not only in the substance and procedure of constitutional litigation but also in controlling timing, and resources to shape the facts—both adjudicative and constitutional. Some liti-

19. K. RIPPLE, *supra* note 7, at 484.

gants, recognizing the importance of expertise in constitutional litigation, have planned elaborate strategies to effect long-range constitutional change. The modern paradigm is the NAACP's strategy to overturn *Plessy v. Ferguson*. More recently state attorneys general have become much more aware of the advantages of such strategies.

To be sure, the institutional litigant also confronts disadvantages. Awareness of those disadvantages may sharpen the ability of the private practitioner to litigate against an institutional opponent. In turn, the institutional lawyer could benefit from strategic insights stemming from understanding the unique setting in which she litigates. Political realities may require the lawyer for such a litigant to embrace a stance even though she recognizes it as detracting from the litigant's chances of success. Positions taken in one case constrain the institutional litigant in future cases. A change in position may undermine credibility. A government lawyer may feel so confined by her institutional responsibilities that she will allow herself to be boxed into an untenable position. Indeed, Ripple, in his discussion of "position development and the problem of overkill"²⁰ provides the vivid example of the trial court argument of Assistant Attorney General Baldrige in the *Steel Seizure Cases*. One step at a time the district court's questioning led Baldrige to this denouement:

The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?

Mr. Baldrige: That is the way we read Article II of the Constitution.

The exchange was reproduced in the steel companies' Supreme Court brief, and the Solicitor General's position in the case was weakened by the necessity to repudiate any claim that in an emergency the President was not bound by the Constitution. Ripple draws a valuable lesson from the interchange (along with several other examples): "Perhaps the most important step counsel can take is to think through—in advance—the logical extension of the characterization and determine what limitations must realistically be placed upon it."²¹ This advice applies with special force to the institutional litigant; it is not accidental that all the examples in this section involve over-argument by counsel for the government. It is easy for counsel concerned only with the case at hand to limit her argument to the position demanded by that case. Counsel for an

20. *Id.* at 256-263.

21. *Id.* at 262.

institutional litigant must take care not only to avoid giving the case away but also not to compromise the institutional position in future cases. She must identify in advance and with precision the point at which she will limit her argument.

In addition to strategic information and fundamentals of constitutional law helpful to a private litigant, Ripple seeks to direct the private litigant to ready sources of help. He suggests, for example, that a litigant leery of directly advancing a novel argument arrange for an institutional amicus curiae to do so.²² To that end he devotes a full chapter to "the amicus curiae in Supreme Court litigation." Ripple would have done well, however, to begin by responding to the notion that "[i]t is probably true that the Justices do not see most of the amicus curiae briefs that are filed with the Court. If that is so, the Court is playing a cruel hoax on those who request their counsel to file them."²³

Moreover, the Court may look askance at efforts of an amicus to argue an issue not presented by the parties. Although the Court did adopt the suggestion of an amicus in *Berry v. Doles*, prudence dictates attention to Justice Powell's suggestion that

the Court would be fully justified in holding that the United States, which is not a party to this suit and did not participate in the court below, is barred from injecting a new issue into the case by requesting the Court to grant relief that appellants themselves never have sought.²⁴

The case does tend to support Ripple's later point that the Solicitor General's influence as amicus is often great (but note that the Court may well grant greater deference to invited views, as in *Berry*, than to a volunteer).²⁵ Yet, Justice Powell's point counsels tempering one's expectations of help from amici. The Solicitor General recently made a similar point in the course of oral argument as amicus curiae in an abortion case. Asked by Justice Blackmun why he was not asking that *Roe v. Wade* be overruled, the Solicitor General replied: "That is not one of the issues presented in this case, and as amicus appearing before the Court, that would not be a proper function for us."²⁶

In sum, *Constitutional Litigation* offers help to both the institutional and private lawyer, but primarily to the latter. The reader

22. *Id.* at 503.

23. Kurland & Hutchinson, *The Business of the Supreme Court, O.T. 1982*, 50 U. CHI. L. REV. 628, 647 (1983).

24. 438 U.S. 190, 199 (1978).

25. K. RIPPLE, *supra* note 7, at 527.

26. 138 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 1982 TERM SUPPLEMENT 818 (P. Kurland & G. Casper ed. 1983).

who treats it as an introductory course will be off to a good start. The reader who ends his education there will be ill-served.

III

Having concluded that Ripple's book might be helpful to a private litigant, as well as to an institutional litigant in certain circumstances, I thought it useful to consider Ripple's coverage and analysis in an area which would be of considerable importance to someone using the book—the issue of choice of state or federal forum.

The brevity of chapter 5, "The Choice Between Federal and State Courts," may encourage the practitioner to slight this central issue. Ripple himself almost encourages this when he recites that the case law proceeds on the assumption that state and federal courts are equal, quoting two of the elder Justice Harlan's encomiums to the then-fashionable doctrine of dual sovereignty.²⁷ But as Paul Bator has pointed out, the Court has simultaneously followed two rhetorical traditions, one of equality between state and federal courts and one "running directly to the contrary."²⁸ For example, the Court has consistently held that Congress intended to create a federal remedy, not dependent on state courts, when it enacted 42 U.S.C. § 1983: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked."²⁹

While overstating the theory of equality of federal and state courts, Ripple also understates the potential advantages of mounting one's constitutional challenge to a state law in state court. He correctly advises the practitioner to choose consciously between a state and federal forum where the law permits. The common sense factors he urges for consideration include comparative competence, attorney's fees, immunities, statutes of limitations and other such

27. K. RIPPLE, *supra* note 7, at 141-42.

28. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 607 (1981).

29. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Similarly, the second Justice Harlan added that Congress held "the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Harlan, J., concurring, *id.* at 196. The Court most recently reaffirmed this view just three years ago: "[I]n passing [Section 1983], Congress assigned to the federal courts a paramount role in protecting constitutional rights." *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982). The state courts do share with federal courts responsibility for applying the Constitution to cases before them; nonetheless, much of the law under 42 U.S.C. § 1983 rests on the premise that federal courts have a special role to play.

procedural issues. He also points out that available remedies may differ in the two court systems, and that the litigant may wish to invoke the state constitution or laws. However, while aware of the varying appellate routes, he neglects to inform the lawyer of the impact of this choice on appellate review. Not only may challenging the constitutionality of a state statute in state court entail an extra appellate level before United States Supreme Court review is available, the choice of forum will also affect the type of Supreme Court review available. Under 28 U.S.C. § 1254, a plaintiff challenging the constitutionality of a state law has this reason to prefer state court: if the plaintiff ultimately prevails in federal court, the defendant will be entitled to invoke the Supreme Court's mandatory appellate jurisdiction, but if plaintiff loses in federal court Supreme Court review is discretionary. However, under 28 U.S.C. § 1257 the converse is true of a state court challenge: defeat in state court provides the plaintiff with mandatory appeal, while plaintiff's victory leaves certiorari as defendant's only recourse. Thus, other factors being equal (or even tilting toward a federal forum), the plaintiff may be better off mounting his constitutional challenge to a state law in a state forum, whether he expects to win or to lose in state court. True, some Justices will scarcely differentiate between an appeal and certiorari at the screening stage. The Court disposes of the majority of "mandatory" appeals summarily, generally by summary affirmance or by dismissal for want of a substantial federal question. Nonetheless, the Court hears a larger percentage of the appeals presented to it than of the certiorari petitions. The figures for the 1981 Term are not unusual. The Court noted probable jurisdiction or set for argument twenty-six percent of the appeals acted on that Term; it granted only five percent of the petitions for certiorari. Probably refinement of these figures would close the gap somewhat.³⁰ The point remains that the appellate route may influence the likelihood of Supreme Court review.

In discussing whether immunity of particular defendants should affect choice of forum, Ripple provides only one sentence: "It is also well-established that federal standards apply to questions of immunity," citing *Martinez v. California*.³¹ While *Martinez* does approvingly quote a lower court statement that violations of § 1983 "cannot be immunized by state law," no case precludes a state from granting *less* immunity than federal law grants state officers charged with constitutional torts. A state may, for example, waive sovereign

30. See K. RIPPLE, *supra* note 7, at 454-56; R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 260, 261 (5th ed. 1978); 1982 *Report of the Attorney General* 7-8.

31. 444 U.S. 277, 284 (1980).

immunity in state court without waiving its eleventh amendment immunity from federal court suit. Or it may subject a county to state court suit for constitutional torts even though the federal courts may not entertain such suits.³² These distinctions can be crucial to the success of a constitutional action and deserve greater attention than Ripple gives them.

Ripple correctly observes that, after *Pennhurst State School v. Halderman*,³³ "the existence of a strong state-based claim might well indicate that the state forum is the most advantageous." He might have added that the party who prevails on the state claim gains another advantage: the Supreme Court will not review a state court constitutional decision which rests on an adequate and independent state ground. The litigant who is more interested in winning the case than in establishing federal constitutional doctrine thus has some chance of completely insulating his case from Supreme Court review if he prevails.

Ripple pays scant attention to differences between state and federal procedure as an institutional factor influencing choice of forum. Perhaps, as he says, "the use of the federal rules, sometimes with adaptations, by many states has mitigated, substantially, differences in procedure."³⁴ Yet an eminent constitutional law practitioner and teacher recently concluded that in New York, even assuming substantive parity, "the ease of drafting an acceptable and predictable federal pleading and the difficulty of drafting a predictable state pleading will naturally incline the lawyer toward federal court."³⁵

One need only read *Zorach v. Clauson*,³⁶ to appreciate this point. In the course of approving New York's program of releasing students during the school day so they could attend religious school the Court said: "If in fact coercion were used . . . a wholly different case would be presented." The state courts, however, had excluded evidence of coercion on the ground that the issue had not been properly raised; under federal procedure the complaint would have sufficed to raise the issue. Since the state procedural ground presented no federal issue, the Supreme Court refused to review the

32. See *Edelman v. Jordan*, 415 U.S. 651, 677 (1974); *Moor v. County of Alameda*, 411 U.S. 693, 710 n.27 (1973). Ripple does point out that the eleventh amendment applies only to federal court actions.

33. 104 S. Ct. 900 (1984).

34. K. RIPPLE, *supra* note 7, at 148.

35. Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 739 (1981).

36. 343 U.S. 306, 311 n.7 (1952).

exclusion of the evidence which, as the Court said, would have presented "a wholly different case."

In short, Ripple raises some of the right questions, but in some instances does not explore them in sufficient depth to enable the reader to rely on this text exclusively. Worse, on occasion the text fails to provide any warning that seemingly definitive discussion is only a beginning point.

IV

Do the differences between constitutional litigation and other litigation warrant this separate text? After over twenty years of litigating and teaching about both constitutional and statutory cases in the federal courts, I am not at all certain that the differences between the two are as great as the similarities. To be sure, analytical approaches to the uses of history, underlying values, *stare decisis*, legislative fact, and characterization may differ. Similarly, procedures (for example, bases for Supreme Court review) may differ. On the other hand, the tools of litigation are basically identical, and one wonders whether Ripple's general approach of assuming constitutional litigation's uniqueness doesn't camouflage attributes that all litigation shares.

Ripple's book is at its best in describing differences that clearly exist. It is weakest in discussing more ephemeral distinctions. These strengths and weaknesses are apparent if one contrasts Ripple's treatment of the Supreme Court's screening function, interim relief, characterization (attaching a theory to the facts), and *stare decisis*.

Chapter 12 is an excellent summary of the Supreme Court's screening function which, however, exaggerates differences between constitutional and other litigation. Ripple states,

Here . . . our focus is on the special concerns of the constitutional case. Reducing the constitutional case to manageable size—while still preserving a sharp focus on the values at stake—is no small task. The "eye of the needle" through which such a case must pass is indeed a small one and is shaped by many legal and extra-legal forces.³⁷

Ripple then explains the Court's appellate and certiorari jurisdiction and its internal workings, concluding with very sound advice as to how to write an effective petition for certiorari or jurisdictional statement. However helpful the advice, it must be noted that suggestions such as "articulate precisely the criterion for selection upon

37. K. RIPPLE, *supra* note 7, at 451-452.

which you rely"³⁸ and "mold your presentation to fit the articulated standard" apply equally to all Supreme Court litigation. For the most part, techniques and strategies of Supreme Court practice simply do not vary between constitutional and nonconstitutional litigation.

Ripple's comments are misleading regarding the remedial differences between constitutional and nonconstitutional litigation. If different principles were to govern interim relief for constitutional and nonconstitutional wrongs, one would expect that a litigant seeking interim relief from a denial of constitutional rights would have a higher claim than other applicants for such relief. Ripple asserts, however, that school board applications to stay school desegregation orders "are a particularly good example" of the need for interim relief to avoid social disruption. His appendix of chambers opinions on requests for interim relief shows, however, only one exception to the Justices' general practice of *denying* school board requests for stays of school desegregation orders.³⁹ This is one instance where Ripple's apparent views seem to skew his description of the case law.

Chapter 1 emphasizes the importance, in constitutional litigation, of characterization of the facts and the issues. Ripple argues that characterization in constitutional cases is "significantly dissimilar" from "private law cases" from the vantage points of subject matter and methodology. No doubt the Court's approach differs in some cases. But in many instances the analysis differs not at all.⁴⁰ Perhaps, as Ripple suggests,

38. *Id.* at 461. One other note on chapter 12: it treats only the strategy of the party seeking review; much could also be said of the techniques of warding off Supreme Court review.

39. *Id.* at 534. The one stay the appendix shows was granted, *Columbus Bd. of Educ. v. Penick*, 439 U.S. 1348 (Rehnquist, Circuit Justice 1978), resulted in yet another year's intentional segregation of the schools, remedied only after the Supreme Court affirmed the concurrent findings of the district court and court of appeals that school officials had engaged in a policy of systemwide racial segregation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979). Compare *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969).

40. Compare, e.g., *General Elec. Co. v. Gilbert*, 429 U.S. 125, (1976) (statutory), and *Geduldig v. Aiello*, 417 U.S. 484 (1974) (constitutional). In *Gilbert* the outcome turned on whether the Court viewed the disability system as an insurance package which insures some risks and not others (and equally includes risks incurred by men and women alike), or as excluding a risk incurred only by women while not excluding risks incurred only by men. The statutory analysis was governed by the analysis of the similar issue in *Geduldig*. Similarly, in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978), the majority opinion's characterization of the issue leads inevitably to its conclusion: "whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics." This statutory case is used to illustrate issues of constitutional law in casebooks. E.g., E. BARRETT & W. COHEN, *CONSTITUTIONAL LAW* 835 (6th ed. 1983); G. GUNTHER, *CONSTITUTIONAL LAW* 885n.3 (10th ed. 1980).

generality and ambiguity are inherent in the process of characterization in the constitutional case. . . . [F]luidity is the major characteristic which distinguishes the constitutional case from its common law and statutory cousins and must always be the chief concern of the constitutional litigator.⁴¹

More likely neither the constitutional case nor its common law and statutory cousins can be so pigeon-holed. Imaginative characterization, based on careful study of the precedents, is an important tool of the litigator in much litigation, whatever the subject matter.

Ripple scores more accurately in chapter 13's excellent discussion of stare decisis. It is helpful for the practitioner to know that stare decisis carries less weight in constitutional litigation than in cases of statutory construction or common law. But no text can teach a practitioner how and when to mount an attack on seemingly settled constitutional doctrine. Who could have predicted that, in *Pennhurst State School v. Halderman*, the Supreme Court would repudiate "at least 28 cases, spanning well over a century of this Court's jurisprudence, proclaiming instead that federal courts have no power to enforce the will of the States by enjoining conduct because it violates state law?"⁴² As a lawyer for one of the parties, I can only admire the audacious prescience of defense counsel, who tied together the Court's flirtations with expanding the meaning of the eleventh amendment, the Court's prior indications⁴³ of disquietude over the extensive structural relief in the case, and its obvious desire to avoid the substantive federal constitutional issues relating to liability.

V

In sum, Ripple provides the practitioner with a good beginning point.⁴⁴ Although the treatise slights some important issues, it alerts the practitioner to other issues which will need to be more thoroughly explored in the case law and in the recognized treatises. The novice litigator, faced with his first major constitutional case, will gain valuable insights at each stage of litigation.

Constitutional litigation does differ in some important respects from other litigation. Exposure to those differences, whether of substance, procedure, or nuance, should help the lawyer structure the case properly from the outset.

41. K. RIPPLE, *supra* note 7, at 19-20.

42. 104 S. Ct. 900, 922 (Stevens, J., dissenting).

43. *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981).

44. Ripple's text is well laid out, with frequent subheadings and ample indexing. Footnotes, however, appear at the end of each chapter, necessitating frequent page turning. His "case histories" often underscore points effectively.