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Book Review

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

*Reviewed by Francis X. Beytagh, Jr.**

"Government by lawsuit" is the striking phrase used by the late Justice Robert H. Jackson in describing the process of constitutional litigation.[1] That this process plays a vital role in shaping the resolution of many of this country's important policy questions has been evident at least since *Marbury v. Madison*.[2] It is thus ironic, and indeed a bit mystifying, that constitutional litigation—as a discrete subject independent of either constitutional law or litigation in general—has received little in the way of focused attention from commentators. Happily, Professor (now Judge) Ripple's recently published book moves significantly in the direction of remedying this deficiency.

Persons reading and reviewing books take differing views on the worth of the preface. Some dwell on the author's introductory words, while others seem to ignore them. When a publication breaks new ground, as Ripple's does, one should at least seek to discuss the objectives the author had in mind in writing the book. Ripple straightforwardly states, in his Preface, that the book "is principally designed to assist the practicing attorney who, confronted with a constitutional issue, realizes that a different litigation approach is necessary if the issue is to be presented effectively and if he is to enhance the probability of eventual Supreme Court review" (p. xix). In my judgment, that is a laudable, if modest, goal. Two decades of experience in litigating constitutional questions as well as teaching seminars in constitutional litigation have persuaded me of our systemic shortcomings in this unique and crucial field. Competence in handling constitutional cases not only benefits an attorney's client but assists the courts in dealing more effectively with such matters, and thus inures to the benefit of the public generally. The process of deciding constitutional questions is not limited to the courts alone, but, as Professor Paul A. Freund aptly observed, involves "judge and company."[3] Ripple understands this only too well and, in "suggest[ing] an approach to litigating the

* Cullen Professor of Law, University of Houston; Coauthor, P. KAUPER & F. BEYTAGH, CONSTITUTIONAL LAW: CASES AND MATERIALS (5th ed. 1980).

1 R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 286 (1941).

2 5 U.S. (1 Cranch) 137 (1803).

3 P. FREUND, THE SUPREME COURT OF THE UNITED STATES 145 (1949).

constitutional case" (p. xx), identifies and seeks to address an important need of our legal system.

In his early chapters, contained in a unit entitled "The Basic Characteristics of Constitutional Litigation," Ripple sets out to establish that constitutional litigation possesses special features that distinguish it from "other forms of civil litigation" (p. 1). Perhaps in this regard, the author protests a bit too much. Constitutional litigation is at once unique yet not dissimilar from litigation in general. In contrast to the situation in some western democracies, the American judicial systems (federal and state) entertain cases presenting both constitutional and nonconstitutional questions. We have no "constitutional courts," yet in a real sense all of our courts qualify as such. This adds to the complexity of a lawyer's task in handling cases presenting constitutional questions. It is in this practical respect—the differences in consequences for attorneys involved with such cases—that Ripple's distinctions are most telling. He recognizes this and, although the effort seems somewhat labored and concededly possesses "a certain theoretical quality" (p. 1), his message comes through. Whether a busy practitioner will bear with the 136 pages Ripple uses to do this is another matter.

Although the chapters addressing the characterization of constitutional issues (chapter 1), constitutional and adjudicative facts (chapter 2), and justiciability (chapter 3), are informative, emphasis might have been placed not only on *why* constitutional litigation is different in some respects from ordinary litigation, but also on what the resulting practical consequences are to litigators. More specifically, chapter 3 seems out of place and is probably unnecessary. Justiciability issues are not unique to constitutional litigation. But they may, as Ripple notes, play a special role in this context in view of judicially developed prudential doctrines for avoiding constitutional decisionmaking. And, of course, subject matter jurisdiction is in any event a necessary predicate to justiciability issues, although not in terms mentioned by the author. More pertinently, though, justiciability-related concepts are simply too complex to be examined in a limited number of pages. As a consequence, the discussion tends to be oversimplified and possibly misleading to novices in this court-created thicket. It might have been preferable simply to refer the reader to the various texts on federal jurisdiction and like sources.

At the risk of elaborating the obvious, a more logical place to begin this whole discussion would seem to be with "recognition" of constitutional issues in the first instance, instead of with "characterization" of such questions. Perhaps it is safe to assume that practitioners will ordinarily have a sufficient sensitivity to the possible

presence of a constitutional issue in a given factual pattern that recognition can safely be taken for granted. Unfortunately, this may not always be so. This is not intended to suggest that Ripple's discussion of characterization is not helpful. In particular, the "case studies" included in chapter 1 not only illustrate the complexity of characterization in the constitutional litigation but also provide some valuable lessons in that regard. In a similar vein, Ripple's analysis of developing and handling adjudicative and constitutional facts in chapter 2 is illuminating, as is his treatment of the NAACP's litigation strategy in the area of school desegregation (contained in the short chapter 4), leading up to the overruling of the "separate but equal" doctrine of *Plessy v. Ferguson*[4] in *Brown v. Board of Education*.[5] Some may have difficulty applying the lessons of that monumental constitutional crusade to the typically less cosmic issues that run-of-the-mill constitutional cases present. Nonetheless, the insights are interesting and valuable ones, especially with regard to the Court's perspective, including cases "not actually before it" (p. 123), as it shapes and develops constitutional doctrine.

Chapters 5 through 10 constitute what Professor Ripple regards as the second "unit" of the book—a section he entitles "Putting the Case Together." In a number of important respects, these chapters are the heart of the book and predictably will prove to be of great value to practitioners seeking assistance in handling the occasional constitutional case that may come their way. Ripple's introductory notes set the tone for the entire section and are worth quoting. Constitutional law, he writes, "is not made solely in the Supreme Court of the United States; it is the product of the entire litigation process which progressively refines the judicial focus on the constitutional values at issue in the case" (p. 137). I suspect that experienced litigators are aware of this, but inexperienced ones—and many legal academics who help to shape prospective litigators' attitudes toward constitutional law—may not be.

Chapter 5 deals with "the choice between federal and state courts," a topic that is infrequently addressed in a thorough and thoughtful way. Ripple's key point is that "the choice between [the federal or the state forum] ought to be a reasoned and deliberate one based not on generalities, but on a careful appraisal as to how the *particular* case in question would be treated in each forum" (p. 139). And he then proceeds, in an interesting and insightful manner, to spell out and discuss the various factors that should be considered in making such an appraisal. His critical assessment of the "conventional wisdom" of federal courts' superiority in dealing

4 163 U.S. 537 (1896).
5 347 U.S. 483 (1954).

with constitutional questions is especially pertinent, and sheds considerable light on an increasingly important matter that has thus far received rather limited attention. He notes that in a number of instances a litigant cannot, for a variety of reasons, choose between a federal or state forum (as, for example, in criminal cases, or because of some statutory or federally mandated policy favoring one court system over the other). But in those situations where a choice exists, Ripple writes, the conventional wisdom regarding the comparative competence of federal and state court judges and with respect to perceived institutional differences should not be followed blindly. "[M]ajor institutional changes have taken place in state judiciaries throughout the country" (p. 146), he notes, and "the supposedly greater receptivity of the federal judiciary to constitutional issues is also questionable—at least as a general proposition" (p. 147). Ripple may overstate the case for state courts somewhat, but the overall point he makes is well-taken. Lawyers should not thoughtlessly file every case potentially presenting federal constitutional issues in a federal court, for, in some instances at least, a state court may be a more available and congenial forum for such litigation. But Ripple might have added that state court judges are still elected in a number of states, and are thus less likely to deal aggressively with controversial and potentially unpopular positions. And, as with federal courts, state court competence will clearly vary from one state to another, and even from one court to another within a particular state. Ripple's treatment is nonetheless effective and perceptive, especially in dealing with the question of remedies and with the increasing availability of a *state constitution* as a basis for protecting what historically have been viewed as federal constitutional rights. Pragmatic considerations such as docket load might have warranted more attention, but on the whole, the chapter constitutes an exceptionally fine treatment of an important and timely topic that warrants the attention of both experienced and fledgling litigators.

Ripple returns to "threshold problems of justiciability" in chapter 6. What he says about this complex subject is necessarily tied to the earlier discussion in chapter 3, but is more practical in its thrust. Especially useful is his delineation of "lessons" for the practitioner regarding justiciability and related matters. One might quibble a bit with his treatment of the doctrine of standing, but the overall discussion is successful and is likely to be of considerably more interest to the busy practitioner than the earlier, theoretical consideration of the subject. They might profitably have been combined in a single chapter.

Chapter 7, dealing with "issue development and the problem of characterization," is one of the most interesting and useful chap-

ters in the entire book. As noted earlier, the "issue spotting" to which Ripple makes passing references is an aspect of recognition which, at least to my way of thinking, logically precedes characterization of a constitutional question. Ripple acknowledges that alternative or complementary characterization "is a tough balancing act for the constitutional litigator" (p. 225), but suggests that this still may be desirable in some situations in view of the uncertainty that may exist about the decisionmaker's reaction and disposition in given circumstances, the impact of other issues pending in the same (or even other) courts, and the like. Ripple deserves a loud hurrah for noting that litigators too frequently overlook the benefits to be derived from a comparative law assessment, especially when the constitutional issue presented is one which constitutional courts in countries with systems similar to ours (for example, Germany, Japan, Canada, Italy, and Ireland) may previously have examined. More frequent reference by lawyers to foreign constitutional cases might go a long way toward stimulating American courts to overcome their traditional provincialism in this regard. As Ripple aptly notes, the widespread ignorance in this country of major constitutional developments in a growing number of western democracies during the post-World War II era is a lamentable defect that needs correcting.

In like vein, Ripple's discussion of supporting the litigator's characterization of his case with "constitutional facts" is illuminating and insightful. This, he says, is "basically an educative task" (p. 233). Of special value is his insistence that thorough development of the record at trial is usually preferable to reliance on a "Brandeis brief" on appeal, once the record has been irrevocably determined. He includes helpful examples of pretrial development of the record, along with the supporting reasons. And his discussion of the "ghost of past cases" (p. 255)—the judiciary's tendency to rely on stereotypes in various areas of constitutional litigation—is deserving of thoughtful attention, as is his admonition to avoid the potential for "overkill" through overbroad characterization of the issue or exaggeration of the supporting facts. The appendices included at the end of the chapter contain illustrative examples, taken from actual cases, of the effective presentation of constitutional and adjudicative facts.

In chapter 8 Ripple deals with the important matter of "thinking ahead" to the question of remedies as one shapes litigation presenting constitutional issues. Again, it is a useful and effective discussion. His consideration of federalism concerns is especially valuable, as is his emphasis on the litigator's responsibility in this regard. "[T]he framing of the remedy is too important," he writes, "for counsel to leave it to the court alone" (p. 307). His treatment

of "institutional litigation" is very worthwhile, in particular his suggestions regarding drafting and implementing the sought-for decree. His analysis of the possible immunities which defendants in constitutional cases might claim is sound and thorough, with the leading cases of recent years effectively considered and summarized. The chapter concludes with a perceptive discussion of the thorny matter of the retroactivity or prospectivity of law-changing decisions, along with analysis of case law under the Civil Rights Attorneys' Fee Awards Act of 1976, an item of no little interest to lawyers litigating in the federal courts.

In chapter 9 attention is shifted to the appellate process, more specifically the "intermediate appeal." Ripple aptly describes the contrasts between trial and appellate courts, insofar as the "litigation ambience" of the two is concerned. Recent changes affecting how appellate courts function are discussed. Valuable practical suggestions are included, such as the influential effect of the trial court's opinion, the importance of stating the "question presented" effectively, the need for dealing "forthrightly and completely" with threshold questions relating to jurisdiction and justiciability, and the often overlooked importance of the "summary of argument" contained in the appellate brief. Some mention of the Federal Rules of Appellate Procedure, and their counterparts in state intermediate appellate courts, might have been included.

Chapter 10 seems to involve some backtracking on the author's part, as it peruses on the matter of "treating the federal question in the state case," a logical companion to the discussion in chapter 5 and, in any event, something that seemingly should precede rather than follow consideration of the intermediate appeal. That organizational query aside, the chapter contains a helpful analysis of a difficult and important topic. Ripple reminds the litigator to ensure that the "case or controversy" requirement of article III is satisfied because a state court case presenting a federal constitutional question might eventually work its way into the United States Supreme Court, where that jurisdictional prerequisite, along with other federal court concerns relating to justiciability, would become pertinent. His suggestions as to the "when" and "how" of raising the federal question in state court litigation, and then of preserving it, are very helpful. His discussion of the "final judgment" rule, and in particular the slippery notion of "practical finality," is effective but perhaps a bit labored. He includes a valuable quotation from the court's recent decision in *Michigan v. Long*,[6] clarifying and to some extent changing the approach toward the "adequate and independent" state law ground of decision. Overall, the treatment of the

6 103 S. Ct. 3469 (1983).

special factors involved in state court consideration of federal questions, and in turn in Supreme Court review of state court cases, is sensibly included and effectively presented.

The final "unit" of Professor Ripple's book deals with the specific subject of handling constitutional litigation in the Supreme Court. Chapter 11 provides an effective introduction to this unique governmental institution. Ripple emphasizes that, because of its decisive role in the constitutional litigation process, the Court views such issues "from a perspective distinctly different from that of other courts" (p. 430). The Court is a "continuing institution" with a refined sense of its institutional capacity, a body with a "special kind of intellectual environment" (p. 431), he tells us. Ripple also focuses on the Court's "workload" problem, and discusses the impact of this phenomenon (and the Justices' perception thereof) on the Court's case-screening and decisional processes. He also elaborates on "some special members of the cast" (p. 440-50), discussing the office of the Chief Justice, the role of the Solicitor General, and the work of the Justices' law clerks—all matters about which those handling cases in the Court should be adequately informed. Ripple does a fine job of providing a capsule look at each of these, in an informing but not overly simplistic way. The short chapter is well worth reading for anyone dealing with or interested in knowing how "judge and company,"[7] again to use Professor Freund's apt phrase, operate.

Chapter 12 addresses the Court's "screening function." Ripple first considers the distinction between appeal and certiorari cases, under the pertinent congressional statutes and the applicable Supreme Court rules. He notes that, while a higher percentage of appeal cases are given plenary review, the supposedly distinct categories of cases are in fact treated similarly by the Court (though the "nomenclature" of the papers filed and actions taken differ significantly). The Court's "internal machinery" for handling cases is effectively treated, as is what Ripple terms the "overall litigation ambience" in the Supreme Court. His list of "specific guidelines" for litigators seeking to persuade the Court to give plenary consideration to a case filed with it is thorough and insightful. He might have added that, because about only one-fourth of the cases that come to the Court are in fact discussed by the Justices at a Court conference, the first challenge for the litigator is getting over that initial hurdle. Ripple aptly labels the "court below" as the "new party" in a case filed in the Supreme Court (p. 466), but he could have elaborated more extensively on the crucial importance of lower court opinions in the Justices' and law clerks' screening

7 *See* note 3 *supra*.

processes. Not infrequently, these materials are consulted first, and they may leave an indelible impression. The "real opposition," as Ripple notes, is in fact "all the other cases that vie for the Court's attention" (p. 467). Why *this issue* and why *now* are both vital questions for the litigator to answer convincingly, he points out. Ripple correctly underscores the importance of carefully drafting and selecting the "question presented" as stated in the certiorari petition or jurisdictional statement. He also includes an insightful analysis of ways in which counsel can make a given case as attractive to the Court as possible. At the risk of nitpicking, Ripple might have noted that, more frequently than not, the Court grants plenary review to reverse the decision below (and that counsel should be aware of the consequences of this), and that the Court decides a significant number of cases summarily (on the merits, but without briefing or oral argument so that counsel should attempt to include enough in the initial papers filed to at least avoid bringing a case in this fashion). Ripple also notes that lawyers seeking to convince the Court to grant plenary consideration on the basis of a conflict between circuit courts of appeals are more likely to succeed if they have obtained (or at least sought) an en banc decision from the court of appeals that decided the case in question. Indeed, a conflict between two or more en banc decisions is an even more likely candidate for receiving the Court's attention.

In chapter 13 Ripple discusses the Court's plenary review of the constitutional case. After some introductory consideration of the "very special setting" which the Court constitutes, he deals at considerable (perhaps excessive) length with the Court's use of history in considering constitutional questions, giving specific examples from various recent cases. He also includes a useful assessment of the Court's attitude toward the doctrine of stare decisis, but says little about the consequences for handling constitutional litigation. With respect to the brief on the merits, Ripple soundly focuses on the importance of providing the Court with sufficient information about the facts and law underlying the case, and includes helpful suggestions about approach and technique. More emphasis might have been placed on the importance of the "summary of argument" section of an appellate brief, which in the Supreme Court sometimes provides the Justices with their first (and perhaps lasting) impression of the litigator's position and which often is consulted to refresh recollection as the oral argument begins. And Ripple might have noted the subtle differences between "topside" and "bottomside" briefs—and, similarly, oral arguments. More specifically, counsel should realize, especially in the Supreme Court, that a bottomside approach should at once be self-contained yet responsive, and requires a great deal of spontaneity and flexibil-

ity. Ripple's discussion of oral argument is very sound and insightful. Perhaps he could have emphasized how crucial time will predictably be, especially in a complex case, and that counsel might help himself in this regard by outlining his argument at the outset and by attempting to anticipate as many questions as possible (and being prepared to answer them, of course). Passing mention of when and how to use rebuttal time might have been included as well. Overall, the chapter is a very useful summary of most of the key notions associated with this large and complex subject, one treated at length elsewhere, such as in the Stern and Gressman "bible" for Supreme Court practitioners.[8] One small disappointment was Ripple's omission of any reference to John W. Davis's classic article on Supreme Court advocacy.[9] It should be required reading for anyone handling cases in the Court, and has lost little of its value with the passage of forty-five years since it was first published.

The two remaining chapters seem more like afterthoughts than integral parts of the book. Chapter 14 relates to the amicus curiae participation in Supreme Court litigation. Ripple's categorization of the varying roles played by amici is interesting. And his analysis with regard to agreeing to or opposing amicus involvement is sound. Some attention could have been given to the specific requirements of the Supreme Court rules regarding amicus participation, as well as to amici as important sources of information for the court in certain types of cases, where the issues are complex and the parties might, for one reason or another, not illuminate the questions sufficiently. Inclusion of a final chapter on the "chambers practice" of individual Justices, in particular with regard to stay applications, seems at most peripheral to the gristmill of constitutional litigation. As a consequence, the book ends more with a whimper than a bang, but Ripple presumably had his reasons for the chapter's inclusion. His analysis of the factors considered by Justices in deciding whether to grant stays is interesting and, at least in certain constitutional cases, may be of some value to the litigator. As an aside, one might add, if such a chapter is thought to be needed, it should at least mention the utility (and versatility) of the litigator's "best friend" in a federal court—the so-called All-Writs Act, now contained in 28 U.S.C. § 1651. Ripple might well consider combining the amicus curiae discussion with material contained in an earlier chapter, and shifting the essentials of chapter 15 (regarding chambers practice) to an appendix, in the next edition of his otherwise fine book.

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8 R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE (5th ed. 1978).

9 Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895 (1940); *see also* Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 861 (1951).

The several appendices contain "Research Tips in Constitutional Law" (a very valuable listing of pertinent source materials, from which *U.S. Law Week* is, perhaps inadvertently, omitted), "Selected Extra-Judicial Writings of the Justices" (a veritable lodestar for the constitutional litigator and Court-watcher), "Chambers Opinions of Justices Currently Sitting" on the Court (without any explanation as to why these are included, and how they might be useful to the litigator), "Selected Sections of the Federal Judicial Code" (since the book is not limited to litigation in the Supreme Court, jurisdictional and similar statutes relating to the federal district courts and circuit courts of appeals might have also been included), and finally, "Selected Rules of the Supreme Court."[10]

To my knowledge no one has ever attempted anything of the magnitude of Professor Ripple's book in this oft-neglected field. Such a work has been long overdue, and it is a tribute to Ripple's extensive experience with constitutional litigation and his care and precision as a scholar that this pioneering effort is of such a high quality. If war is too important to be left to the generals, then constitutional litigation is too important to be left to the litigators—often ones not adequately equipped to represent their clients effectively, much less assist the courts in resolving such crucial matters in an informed and consistent fashion. And it is the public, and the policies reflected in judicial decisions that affect the public, that suffer when constitutional litigation is not handled well. Minor omissions and several organizational quirks aside, Ripple has written a very useful and insightful book on an important subject. But, one might hope, he has done more than that. He has initiated a dialogue on this topic that will not only assist the practitioner, but will influence the courts (and maybe even the law schools) as well. Beyond that, one also might hope, he has legitimized an area of the law that heretofore was not looked at coherently or comprehensively. All of us who care about how constitutional issues are dealt with are in his debt.

10 Ripple includes a bibliography organized on a chapter-by-chapter basis and also provides extensive footnotes at the end of each chapter, which provide the reader with valuable sources supportive of the preceding discussion.