Strategies for Civil Rights Litigators Amid the Supreme Court's Constitutional Counterrevolution

By Thomas J. Henderson

Federal civil rights litigation is and has been a primary means by which the protections of the law have been enforced and the promise of the Constitution has been fulfilled for millions of people. Unfortunately, litigating such cases today is like playing a game in which the rules constantly change to the disadvantage of civil rights plaintiffs. These are not minor adjustments to the rules that can be addressed by litigation strategies alone. In some cases, the changes eliminate the possibility of playing the game at all. These changes make other, broader legal strategies imperative.

This article briefly explores how the U.S. Supreme Court has altered the interpretation of the Constitution, and then examines strategies for civil rights litigation in the wake of the Court's new approach to federalism.

The Nature of the Challenge: What Rules Are Changing?

In what my friend Norman Redlich, dean emeritus of New York University School of Law, has termed the "Conservative Constitutional Counterrevolution," the current majority of the U.S. Supreme Court through a series of largely 5-4 decisions has interpreted the Constitution to invalidate, and sharply limit the power of Congress to enact, civil rights legislation, and has announced sweeping interpretations of the Eleventh Amendment that bar Congress from providing to the people the right to obtain remedies for violations of the Constitution and federal law by the states.

Specifically, the current majority has held the Violence Against Women Act (VAWA) to be an unconstitutional exercise of the Commerce Clause power because it did not regulate matters "economic in nature," *United States v. Morrison*, 529 U.S. 598 (2000), and has created restrictions on the Spending Clause power that would eliminate the authority to impose even voluntary conditions on the states in large federal grants. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). The current majority has also sharply limited Congress's power under section 5 of the Fourteenth Amendment (section 5) to shape the substantive content of rights, confining Congress's power to preventing or remedying only the denial of rights recognized and limited by the Supreme Court holdings. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court has held private discrimination beyond the reach of section 5, even as a remedy for discrimination by the states. *United States v. Morrison*, 529 U.S. 598 (2000). It has abandoned "rational basis" judicial review of section 5 legislation and has created an entirely new standard of "congruence and proportionality," by which it has invalidated civil rights legislation and imposed rigorous standards for legislative fact-finding and evidence that, in each instance, have not been satisfied. *Garrett*, 531 U.S. 356 (2001); *Morrison*, 529 U.S. 598 (2000); *Kimel*, 528 U.S. 62 (2000); *Boerne*, 521 U.S. 507 (1997).

Finally, the current majority has interpreted the Eleventh Amendment far beyond its narrow text and transformed it into a principle of constitutional interpretation to reorder constitutional powers and relations between the Court and Congress and among the federal government, the people, and the states. It has held that not only federal courts but state courts and federal agencies are without authority to act on complaints by the people of violations of federal rights by states. *Alden v. Maine*, 527 U.S. 706 (1999); *Federal Maritime Commission v. South Carolina Ports Authority*, No. 0146, 2002 WL 1050457 (May 28, 2002). It has also held that Congress has not authority to provide for private actions to enforce the Constitution or federal law against the states, except under section 5, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and has suggested that even that power is limited to legislation that the Court finds appropriate to remedy widespread patterns of unconstitutional discrimination by the states. *Garrett*, 531 U.S. 356 (2001).

Limits of Litigation Strategies: Need for a Constitutional Response

The Supreme Court's "federalism" decisions threaten the very existence of federal civil rights and the ability of people to enforce those rights. These decisions do not simply alter substantive standards of liability, impose heightened burdens of proof, or interpose additional procedural obstacles. Nor are the constitutional interpretations susceptible to legislative solutions. Rather, the Court is fundamentally narrowing the power of Congress to establish federally guaranteed rights and eliminating the authority of the courts to enforce them.

Responses to these rulings must necessarily involve efforts far beyond litigation, and even legislative, strategies. Our Constitution provides for checks and balances among the three branches of government. Here, the judiciary is interpreting the Constitution to eliminate and restrict federal guarantees and the power of the legislature to define and enforce them. Congress's constitutional check on the judiciary is found in article II, section 2, and the required "advice and consent of the Senate" with respect to judicial appointments. Thus, Congress has the ability to reclaim its constitutional powers by refusing to confirm Supreme Court and other federal judicial nominees who agree with interpretations of the Constitution that erode those powers, and by confirming only those nominees who would restore and sustain those powers.

Identifying the means of restoring federal rights and Congress's powers is simple. The more complex task is edu-

cating Congress and the public about these constitutional transformations, the profound impact they are having on our form of government, and the necessity of acting at once to revive federal guarantees and the authority of Congress. This is not a matter of partisan political differences: legislation advanced by each political party, and by both conservatives and liberals, has been invalidated in this campaign of constitutional reinterpretation.

Lawyers have unique knowledge and skills to contribute to this task. They understand the profound importance of constitutional interpretation and have the ability to translate legal doctrine into practical consequences for real people. Thus, the first strategy for civil rights litigators is one to follow outside the courtroom. Lawyers must lead in making the case to the public and Congress for restoring federal guarantees through change in the composition of the federal judiciary. We must point the way to the constitutional restoration of a national government that can afford its people rights and liberties that are secure and enforceable.

The Need for Strategic Collaboration

Altering the course of constitutional development through the process of judicial appointment is fundamental but does not eliminate the need for litigation strategy. In order to achieve successes in civil rights litigation, to exploit available avenues, and to avoid unnecessary opportunities for further erosion in the law, strategic thinking is absolutely necessary. Thoughtful consideration of the cases to be brought, the statement and characterization of claims, and the context in which they are presented are all necessary. These questions must be considered not only in light of the holdings of recent decisions but also with an eye toward the anticipated trajectory of those decisions and the trends they represent.

The fact that so many lawyers are bringing such a large number of cases that potentially involve important questions of civil rights law today—employment and housing discrimination cases, and a wide variety of cases under 42 U.S.C. § 1983, for example—makes urgent the need for careful collaboration and coordination across a wide spectrum of civil rights cases. Accordingly, national civil rights organizations are attempting to reach out to litigators across the country to an unprecedented degree. And cooperation between civil rights organizations and national, state, and local plaintiffs' bar groups can provide a vital means of disseminating strategic thinking and discussion and of linking lawyers to other collaborators. Thus, a second avenue for civil rights litigators to pursue is recognizing the importance of approaching litigation strategically and seeking out sources and opportunities for collaboration and assistance.

Strategic Litigation Approaches

Testing Theories of Sovereign Immunity. The Supreme Court's sovereign immunity decisions are difficult to address through litigation strategy because these decisions fundamentally reinterpret the Constitution and because a majority of the Court has shown a creative and deliberate insistence on reaching particular results.

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Nevertheless, both the expansion of the sovereign immunity of the states and restrictions on the powers of Congress are premised on recent reinterpretative theories of a slim majority of the Court. These theories are not grounded in the text of the Constitution and have not been thoroughly articulated, examined, or tested by the Court. The apparent reach of these untested theories may not extend to their logical conclusion—an uncertainty that allows for the possibility of exceptions to these interpretations or the reexamination of the theories in contexts different from those thus far presented to the Court.

For example, the current majority's rulings on the Eleventh Amendment immunity of the states arise from a theoretical construct of state sovereignty, said to predate the Constitution, that admittedly has no basis in its text. One predicate for this line of interpretation is the apparent ruling in *Seminole Tribe* that Congress's powers under article I of the Constitution do not provide a basis to abrogate state sovereign immunity, and that such authority resides only in section 5. Yet one potential basis for reexamination of the holding is suggested by the Court's handling of the issue in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002).

Here, the Court interpreted the statute at issue as not applicable to the states in order to avoid deciding a constitutional question. The question it chose to avoid was adoption of the respondent's assertion that *Seminole Tribe* deprived Congress of any constitutional authority to impose the statute on the states. In part, that reluctance appears to be based on the fact that the Court was troubled by the apparent consequence of such a ruling. Specifically, the petitioner's responsive argument pointed out that such a rule would mean that the war power of Congress does not provide it the authority, in a similar statute, to protect those serving in the armed forces from state court proceedings by the states.

Raygor at least suggests that some members of the current majority may not be prepared to embrace the full extent and consequence of its newly pronounced rules. The importance of article I's war power is a striking illustration of the need for preeminence of national authority over notions of state sovereignty. Thus, advocacy that examines and presents a basis for federal legislation in an alternative to article I and other powers can illustrate the Framers' intention to grant the national government predominance in critical functions, and may lead to a reexamination of these new doctrines.

The Fourteenth and Thirteenth Amendments. The current majority's narrowing of the authority of Congress to legislate under the Fourteenth Amendment is similarly difficult to address through litigation strategy. In particular, in *Morrison,* the Court held that Congress exceeded its authority under the Fourteenth Amendment in enacting a portion of VAWA and that the Fourteenth Amendment provides virtually no basis on which to regulate private conduct, even where aimed at addressing discrimination by the states. These holdings, coupled with the Court's simultaneous limitation on the power of Congress to regulate activities

other than those "economic in nature" on the basis of the Commerce Clause, may represent the broadest and most dangerous new precedent. In light of *Morrison* and related rulings, the nature and extent of Congress's powers under the Fourteenth Amendment must be a focus of continued advocacy, particularly as a basis for the protection of those who suffer from discrimination based on factors other than race. Such efforts are reflected in the briefs submitted in *Nevada Department of Human Resources v. Hibbs,* No. 01-1368, a case on the Court's docket this term.

With respect to legislation against race discrimination, however, there is an alternative to the Fourteenth Amendment as a basis of congressional power. The Thirteenth Amendment has been recognized as a source of congressional power to regulate private conduct involving discrimination that can be related to the institution of slavery and enforced servitude. As such, it can serve as an alternative to the Fourteenth Amendment in some instances. For example, in *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002), the Second Circuit held that a civil rights criminal statute, 18 U.S.C. § 245(b)(2)(B), was constitutionally grounded in the Thirteenth Amendment, given the role of private violence in maintaining the institution of slavery and attempts to perpetuate its equivalent after the Civil War. Care should be taken in asserting the Thirteenth Amendment as a source of congressional authority, and particular effort is necessary to relate the prohibited conduct to slavery and the post-Civil War conditions to which the amendment was directed.

Discriminatory Intent and Disparate Impact. The current majority's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that no private cause of action can be premised on Title VI regulations containing a disparate impact standard, together with those in *Kimel* and *Garrett* holding antidiscrimination statutes unconstitutional because they prohibited conduct beyond the discrimination prohibited by the Constitution, raise serious concerns regarding the litigation of discrimination cases. These suggest strategies both with respect to the litigation of claims of intentional discrimination and of statutory disparate impact claims.

These decisions suggest that claims of intentional discrimination should be given more careful attention than they have received in the past. Since adoption of the intent standard in the late 1970s, the obvious difficulty of proving unlawful subjective intent as an element of a discrimination claim, together with legislative, judicial, and regulatory embrace of the more accessible disparate impact standard, have resulted in a relative lack of attention to the development of intent claims. Although there is no question that a standard of subjective intent imposes undesirable, unique, and difficult burdens, there are several means of proving intent cases that may provide successful strategies for civil rights litigation.

First, it is important to emphasize early and often that direct evidence of discriminatory intent is not required and will be available only rarely. Rather, in the usual case, a finding of intent will need to be based upon logical inferences drawn from the facts. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Second, the various criteria outlined in *Arlington Heights*, including history, context, and procedural and substantive irregularities, provide a broad canvas on which to paint all evidence relevant to the inference of discrimination. Third, *Columbus Board of Education v. Penick,* 433 U.S. 406 (1977), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979), show that the examination of the origins and history of conditions and decisions can often provide the source of intentional discrimination. The reality of our history is that much of the present has been shaped by a not-too-distant past in which intentional and explicit discrimination was an integral feature of decision making. Delving into that past will often reveal that established policies or conditions have their origins in intentional discrimination and that current practices have perpetuated and maintained that unconstitutional intent. Finally, the burden-shifting model of *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973), first adopted in Title VII cases and applied to other discrimination claims, also provides a useful means not only for emphasizing the inferential basis of deciding the question of discrimination but also for establishing an inference in favor of the plaintiff and narrowing the determinative factors to the defendant's credibility or the legitimacy of its asserted rationale. Although the challenge of proving an intent claim cannot be minimized, creative and expansive use of alternative means of establishing intent can maximize the possibility of success.

Further, recent Supreme Court decisions also suggest strategic considerations in the litigation of statutory disparate impact claims. Such claims have been inaccurately characterized as involving only "the numbers," or as a means of securing or enforcing quotas. But the disparate impact standard is related to and serves largely the same function as the intent standard, which is to make unlawful acts that are not justified by a rationale central to the undertaking in question or supported by a rationale that can be served through less discriminatory means.

Litigating disparate impact standard cases with recognition of their origins and similarity to intent cases can strengthen their presentation and raise questions regarding the relative significance of the question of subjective intent. To the extent that unjustifiably and unnecessarily discriminatory acts will be sustained only on the basis of an inability to determine the subjective motivation of the actors, the viability of the current intent standard is called into doubt. At the same time, disparate impact cases presented in tandem with, and including all evidence relevant to, an intent case provide a stronger basis for a favorable judgment on the disparate impact claim and afford a court the opportunity to consider available evidence of intent, both on the question of impact and in order to draw inferences in the accompanying intent claim.

Conclusion

The Court's "federalism" decisions call for a wide range of responsive strategies. Those discussed here are important but do not represent an exhaustive treatment of the necessary approaches.

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