The Supreme Court's Impact On Litigation

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by

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Many lawyers pay attention to the Supreme Court of the United States, not just as an idle intellectual exercise. They are particularly likely to pay it heed if they are engaged in certain types of litigation; one such type is civil rights litigation. That lawyers pay heed to the Supreme Court should not surprise us; after all, lawyers are expected to follow precedent, and U.S. Supreme Court rulings are the ultimate precedent on many matters. Civil rights lawyers pay heed to the Supreme Court in deciding on areas of the law in which to focus their efforts or cases they will pursue and in developing their presentation of those cases. They look at both the justices' opinions in individual cases and the culminative effect of a set, or line, of cases. They look at these matters particularly if they wish to take a case to the Supreme Court in an effort to establish precedent. However, they do so even if that is not their goal, because if they win in the lower courts, they wish to know if their opponents are likely to be able to drag them to the Supreme Court by seeking review. That also causes them to look at the areas of law in which the Court most, or least, frequently grants review.

Moreover, the Court's effect on larger publics in turn affects what lawyers are able to do and how they view efforts to proceed with litigation aimed at reaching the Supreme Court. If the effect on the general public were the same as the effect on lawyers, this would not be important, but Supreme Court rulings do not necessarily have the same effect as they do in legal circles. For example, Brown v. Board of Education1 "heightened black aspirations" but did not produce immediate efforts to challenge segregation, at least in certain areas of the Deep South.2 That would certainly have affected the ability of NAACP lawyers to proceed with litigation following up Brown.

The effects of Brown were thus both large and small. The ruling's "indirect consequences," later wrote NAACP attorney Robert Carter, "have been awesome. It has completely altered the style, the spirit, and the stance of race

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relations." Carter also noted that the ruling "promised more than it could give." Thus because it was primarily only symbolic, it had negative effects, including contributing "to black alienation and bitterness, to a loss of confidence in white institutions, and to the growing racial polarization of our society." 

Supreme Court rulings constitute only one vector affecting attorneys' actions. Rulings of lower courts are not ignored, for they can also have important effects, as this comment indicates:

Which side wins in the lower courts, what issues are stressed in the opinions, what cases are cited as precedent, and the timing of the opinions are all factors that introduce elements of uncertainty and risk into the litigation process and affect the choice of Supreme Court test cases.

Some attorneys think the Court's rulings are "less crucial in going from the district court to the court of appeals" than from the court of appeals to the Supreme Court, and that "what the Supreme Court does really comes into play after a major lower court decision" as lawyers decide whether to seek certiorari. According to litigators, "seldom is a case keyed solely on the Supreme Court," although "tactics in trying a case" are. For some lawyers, particularly if they initiate a case with no intent to go to the Supreme Court, the trial court is the primary focus of their attention. This is even more so if the Supreme Court has not yet spoken on the issue under litigation.

In any event, in the short run, the lawyers must devote their immediate attention to the trial judge, whose rulings are crucial in forming the record that may later be used in an appeal. Yet even in that situation, the Supreme Court has a definite effect by being a constant part of the background for the activity in the trial court. The Court is closer to the foreground to the extent the justices have ruled on the matter being litigated or on related matters.

The Supreme Court's actions "more affected how a case was brought, not whether," particularly with the cases, like the sit-in cases, which "had to be brought" to respond to civil rights workers' actions. Thus "causes addressed" are not affected but there is a desire to frame issues to satisfy the Court's majority. Former NAACP General Counsel Nathaniel Jones said that "his responsibility

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4 Derrick Bell, The Dialectics of School Desegregation, 32 Ala. L. Rev. 281, 293 (1981) ("The Brown ruling itself was more symbolic than substantive.").
5 Carter, supra note 3, at 247.
7 Material in quotation marks without attribution is drawn from the author's interviews of civil rights attorneys, undertaken on the condition that quotations would not be attributed to named individuals.
[was] to square NAACP litigation with his interpretation of what Supreme Court decisions require." And litigators seeking to protect the rights of the mentally ill shifted their argument in *O'Connor v. Donaldson* from a "right to treatment" to due process, in part for tactical reasons "dictated by an assessment of the attitudes of the members of the Supreme Court" and of Chief Justice Burger's antagonism to his former D.C. Circuit colleague David Bazelon. These instances illustrate that lawyers' doctrinal arguments are affected by precedent but also include efforts to alter that precedent as the lawyers attempt to get the justices to rethink past cases. Lawyers seeking to change the law run a risk if they concentrate exclusively on new doctrinal theory in their arguments: if the Court doesn't adopt the new doctrine, the case may be lost. On the other hand, if lawyers offer the justices only slight incremental changes from existing precedent, the Court may adopt such changes, thus retarding forward movement the advocates seek.

The focus of this article is on that segment of the litigation cycle in which lawyers' attention to the Court's rulings affects the cases they bring and how they bring them. To indicate the Court's importance for litigating organizations' existence and functioning, we first explore a set of cases involving the NAACP. These cases, involving the organization's survival, show how the need for organizational maintenance affects an organization's ability to litigate as it would like to do. Drawing on the law of procedure, we next examine cases affecting organizations' ability to bring cases. Then we turn to see how Supreme Court rulings are thought to affect civil rights litigators' choice of areas of law in which to bring cases. In keeping with our emphasis on how Supreme Court rulings can affect the dynamics of ongoing litigation, we give more extended attention to the Denver and first Detroit school desegregation cases, which allow us to recapitulate the variety of effects Supreme Court rulings have on continuing litigation and its dynamics.

**LAWYERS' ATTENTION TO THE COURT AND ITS DIRECTION**

Lawyers engaged in civil rights litigation, particularly litigation campaigns ("planned litigation"), not surprisingly give the Supreme Court's rulings substantial attention and analyze them closely to see which issues have been settled and which are left unresolved. Lawyers give attention not only to opinions of the Court, but also to concurring and dissenting opinions. In *Milliken v. Bradley*, the first Detroit school case, the majority failed to look at the relationship of schools and housing, thus limiting the way in which litigators can

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8 Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 492 (1976) (Letter from Nathaniel Jones, NAACP General Counsel, to Derrick Bell (July 31, 1975)).
present school cases. But because of his suggestion that a link between housing discrimination and school desegregation might be accepted,\textsuperscript{12} civil rights lawyers paid considerable attention to Justice Stewart's concurrence.

Even dissents from certiorari denials receive close scrutiny. Justices Goldberg, Brennan, and Douglas dissented from the denial of review to two 1963 death penalty cases, arguing that the Court should decide the constitutionality of the death penalty for rape.\textsuperscript{13} Their \textit{not} mentioning racial discrimination as a consideration was "an omission which lawyers close to the Court took to mean that in 1963 it was still too early for many to accept that an interracial rape was not a more serious crime than an intra-racial rape." However, the case's "careful readers" were said to have "readily concluded that, if \textit{proven}, a claim that the Southern states reserved the death penalty for blacks who raped whites was an even more compelling constitutional argument against capital punishment for the crime of rape" than some the justices mentioned.\textsuperscript{14}

Lawyers also watch the Supreme Court's receptivity to particular types of cases and claims. "The receptivity of the Supreme Court and the lower federal courts" is a major factor encouraging use of "a law-reform strategy."\textsuperscript{15} The Court directly affects what types of cases are brought to it both through its supporting or rejecting certain claimed rights and by the frequency with which it grants or denies review to particular types of cases.\textsuperscript{16} In the 1950s and 1960s, the Court's apparent unwillingness to grant review to challenges to urban renewal and related housing issues served to depress the number of housing cases brought to the Court.\textsuperscript{17} However, litigators attempted to change the Court's pattern. Concerned about earlier denials of review to challenges to racial restrictive covenants, the NAACP put more effort into getting the "right" cases to the Court and into framing petitions for review.\textsuperscript{18}

\textsuperscript{12} \textit{Id.} at 755 (Stewart, J., concurring).
\textsuperscript{14} MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 28-29 (1973).
\textsuperscript{17} WASBY ET AL., supra note 16, at 230-35. The justices later also refused to hear some major cases under the Fair Housing Act of 1968, but those denials of review left pro-civil rights decisions in place with respect to the incorporation of the City of Black Jack, Missouri (voided as a way of avoiding integrated housing) or Parma, Ohio (ordered by the Sixth Circuit to plan for integrated housing). The ACLU, through the New York Civil Liberties Union, had been involved in the Black Jack case. The National Committee Against Discrimination in Housing filed an amicus brief. For the decisions below, see Park View Heights Corp v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979), \textit{cert. denied, sub nom.} City of Black Jack v. Bates, 445 U.S. 905 (1980); City of Parma v. United States, 644 F.2d 887 (6th Cir. 1981), \textit{cert. denied}. 456 U.S. 926 (1982).
Changes in Direction

The existence and nature of changes in the Supreme Court's overall direction have regularly received lawyers' particular attention. Sometimes, this is because there is hope of better reception in the future. Albion Tourgee, the principal lawyer in the Plessy case, was concerned that the timing of that challenge to Jim Crow laws was inappropriate because of the Court's post-1877 conservative posture on race relations. Although the alignment did not favor him, he felt the situation might improve with time. "Slowly the justices who had ruled against the black race in various cases would change their minds or leave the bench; slowly, too, public opinion might shift."21

Frank v. Mangum22 was a federal habeas corpus due process challenge to a case in which mob influence had been present. The Court had defined due process narrowly and deferred generally to state judicial processes, which did not make it likely that the convictions of blacks in connection with riots in Phillips County, Arkansas, could be overturned.23 However, the defendants' lawyers were aware that Frank was not unanimous and that several members of the Frank majority had left the Court, while Holmes, who had dissented there, remained.24 In this instance, however, the personnel changes "were not necessarily favorable to [Moorfield] Storey and the NAACP" because the Taft Court "was more conservative than it had been during the tenure of Chief Justice White."25

In the Burger Court's early years, civil rights lawyers, expecting conservative rulings to erode earlier victories, paid particular attention to the Court's direction. "From an organizational point of view, the decision to go up has as a component who is sitting on the Court."26 Although the defeats of the nominations of southern federal judges Clement Haynsworth and G. Harrold Carswell, leading to the confirmation of Justice Harry Blackmun, left some lawyers sanguine about the Burger Court in its early years, the controversy over those nominations helped create a conservative aura even before the new Court handed down any decisions. In any event, attention to the Court's anticipated shift affected lawyers' actions, including those of Legal Services Program lawyers.27

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19 Plessy v. Ferguson, 163 U.S. 537 (1896).
20 Jack Greenberg, Litigation For Social Change: Methods, Limits And Role In Democracy 12-13 (Cardozo Lecture, 1973); See also Neier supra note 10, at 39-45.
22 237 U.S. 309 (1915).
24 Id. at 145.
25 Id.
27 Susan E. Lawrence, The Poor In Court: The Legal Services Program And Supreme Court Decision Making 53 (1990).
Changes in the Supreme Court's direction are important because when cases reach the Court can determine the outcome. An NAACP lawyer has observed that if the increasingly liberal Justice Blackmun of the early 1980s had been sitting in the first Detroit school case in 1974, it "would have left a whole new picture." Likewise, an NAACP Legal Defense Fund attorney has suggested that had the issue of senior system's discriminatory effect reached the Supreme Court when certiorari was first sought, the "thoroughly briefed and researched" case probably would have been won. However, when the issue was finally decided in 1977 in *Teamsters,*28 the issue "was not as central and was not as thoroughly treated." The Supreme Court ruled adversely, and in a footnote, wiped out the court of appeals' rulings favoring LDF's position.29

When the Court did not become as conservative as expected, there was some surprise, but it was coupled with realistic evaluation of what the Court had done. Civil rights advocates recognized that the justices "exhibited a reluctance to extend previously announced legal principles to claims for new remedies" in their mid-1970s rulings and used "various braking devices, such as the requirement that lower court judges make more careful and detailed findings, to slow down the progress of desegregation."30 However, the lawyers also realized that the Court had not withdrawn from earlier commitment to important principles, so that with the thrust of rulings like *Swann*31 and *Keyes*32 still "alive and viable," lawyers had "sufficient authority to do the things in the district court and court of appeals" that they felt needed to be done.

The element of surprise, just noted, is not uncommon. It can be seen in the remark that *Brown v. Board of Education* was decided by a "court still functioning at the pinnacle of a Cold War conservative society," and that "very often there is no effective way to know how the Court will decide certain issues without trying," so that "we could take nothing for granted with this Court."33 Later, after U.S. courts of appeals had rejected several NAACP-initiated school desegregation challenges based on the claim that school systems should be desegregated regardless of whether "state action" caused segregation, the Supreme Court's affirmation seemed "ominous." However, it proved "to be less ominous than was originally perceived"34 because the NAACP Legal Defense Fund was subsequently successful when it sought to prove *de jure* segregation by school boards.

29 See id. at 346 n.28. See also 431 U.S. at 378-80 (Marshall J., dissenting).
Perceptions of shifts in the Court's approach have led lawyers to state publicly their concern about avoiding "bad" Supreme Court precedent. Typical of national organizations' reactions was the ACLU's legal director's statement that the organization had made "a very conscious decision' and was 'doing everything we can to keep away from the Supreme Court'."35 Ironically the same attorney, later anticipating President Reagan's appointments, talked about increasing the number of cases taken to the Court before matters got even worse.36 Then-NAACP Legal Defense Fund Director-Counsel Jack Greenberg remarked that "Certain cases should not be brought if they are likely to be lost. Lawyers ought to try to avoid creating a new Plessy v. Ferguson and should apply energies where they will be most productive."37 At times lawyers go beyond concern: when an NAACP branch president argued against bringing school desegregation litigation in Omaha "based on the fact that the case might eventually go before the U.S. Supreme Court, which with its new Nixon conservative leanings would use the case to reverse earlier prointegration decisions," the local NAACP withdrew from active participation in the case.38

Reaction to shifts in the Court's openness to civil liberties and civil rights claims is affected by perception of state courts and whether the latter will be more receptive. In some instances, the Supreme Court's closing the door means that litigators have little choice but to proceed in state court if they wish to pursue their claims at all. In mental health litigation, Pennhurst v. Halderman39 led lawyers to question whether they should have proceeded in federal court. Their changed view led them to call the Supreme Court's attention to a recent Massachusetts case, and the case was remanded for reconsideration in light of that ruling.40 Cases like Pennhurst v. Halderman II,41 precluding use of 42 U.S.C. § 1983 to enforce state law; Edelman v. Jordan,42 under the Eleventh Amendment, preventing suits against the states requiring payment of state funds; Warth v. Seldin,43 severely limiting standing to challenge exclusionary zoning in federal court; and San Antonio v. Rodriguez,44 cutting off federal court challenges to state financing of education, all affected civil rights' litigators choice of federal forum, making use of state courts more attractive. Ironically, state courts, which

36 Bruce J. Ennis, In the Courts, CIV. LIBERTIES 1, 6 (#335, Nov. 1980).
37 GREENBERG, supra note 20, at 38.
43 422 U.S. 490 (1975).
civil rights groups had earlier avoided, later issued favorable rulings on school finance.

We should be wary of accepting at face value lawyers' public statements about not taking cases to a more conservative Supreme Court. Out of the public eye, some litigators say that they go ahead nonetheless. For example, a former senior ACLU attorney said, "There was always talk of being more selective" in the cases taken "as Supreme Court positions changed," but "we don't stop litigating." "That's the only Supreme Court we've got!" he said, adding, "We don't select who is prosecuted" and thus who needs defending. A former attorney for a national civil rights organization also conceded that "if they have a big case, lawyers will go up with the case, even if they might lose." And another leading civil rights litigator, although he had had "a lot less trepidation with the Warren Court than with the Burger Court," put it concisely, "Many cases have gone forward anyhow, or Brown wouldn't have happened."

Litigating interest groups' multiple goals lead to multiple reasons why lawyers pursue cases even with a diminished likelihood of victory. A major reason for proceeding is that there are principles to defend: "We've got to continue to defend civil liberties. There is a need to keep the flame alive inside the courts and out." Particularly with cases brought both for precedent and for "propaganda" purposes, an organization could "win even when losing." There was also strategy: "If the ACLU would trim, the [Court's] ultimate position would be further off the mark." Lawyers' "enormous egos" were offered as another reason for pursuing a weak case, as is an organization's momentum. Other pending cases may also create a situation requiring continued litigation. Thus, even after the 1935 Schechter Poultry Corpo r v. United States, 295 U.S. 495 (1935), government attorneys found the Agricultural Adjustment Administration's powers had to be tested in the Supreme Court because of "a flood of cases filed by processors seeking injunctions to restrain the AAA from collecting the processing tax."46

THE RANGE OF EFFECTS

What is the range of possible effects of the Court on litigation?47 "Mobilization, exit, or continuance" are possible responses. The American Civil Liberties Union (ACLU) "exited after the Court rejected its call for . . . reversal" of Miller v. California.48 The Media Coalition, with a litigation focus different from the ACLU's, came into existence soon after Miller to protect its members' commercial interests. The Court's rulings also served as a catalyst for

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46 IRONS, supra note 6, at 186.
47 Joseph Kobylka, A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity, 49 J. Of Pol. 1061, 1065 (1987); see also id. at 1069.
48 413 U.S. 15 (1973); Kobylka, supra note 47, at 1074.
establishment of litigating interest groups such as Americans for Effective Law Enforcement, an organization presenting to the courts the position of police and other law enforcement officials in criminal procedure cases. This organization "was established in response to a specific set of U.S. Supreme Court decisions and to the circumstances surrounding those decisions."49 Further, there is little question that the Roe v. Wade50 abortion decision served to spur the development of pro-life organizations, including some groups using litigation as a tool.

Mobilization and exit, perhaps polar responses, have varying meanings. "Exit" may mean only departure from litigation on a particular subject -- the ACLU with respect to obscenity. However, it may also mean withdrawal from all litigation, perhaps to focus on litigation or administrative proceedings. Mobilization may mean the creation of a new group, as it did after Miller, but it may also entail an existing litigating organization turning its attention to an area of law on which it had not previously focused, or to a new approach.

Perhaps the best known instance of an organization turning to a new approach is the effect on the NAACP's attack on segregated education which arose from the Court's attention to intangible factors in Sweatt v. Painter,51 the ruling ordering desegregation of state law schools.52 This led the NAACP to shift toward a more direct attack on "separate but equal." Marshall, on reading Sweatt and McLaurin v. Board of Education53 found the opinions "replete with road markings telling us where to go next" -- "to begin the direct attack on segregation."54 Three weeks after Sweatt and McLaurin were decided, NAACP attorneys met to map out strategy and produced a resolution, adopted by the NAACP's Board of Directors, that future litigation would seek no relief other than desegregation.55 However -- and it is an important "However" -- in Sweatt the NAACP had argued both inequalities, including intangibles, and an attack on Plessy. Thus Sweatt did not start the attack on "separate but equal," although it may have made it irrevocable. There was interaction between the litigators and the Court rather than an abrupt shift of a result of Sweatt, because the NAACP had tried to nudge the Court toward use of intangibles and knew that such use would be a major step toward an outright attack on Plessy, and the Court itself knew that adoption of intangibles as part of inequality committed the justices to going farther.56

49 Lee Epstein, Conservatives In Court 89 (1985).
50 410 U.S. 113 (1973).
52 Id.
55 Id.
56 See id. ch. 7.
The Court's removal of threats to an organization's very existence, at times seeming to rescue them from extinction, and removal of impediments to their functioning, thus allowing them to continue to serve as litigators, is clearly related to Kobylka's "continuance." That can also mean an organization continues to litigate on subjects on which it had earlier litigated or that, whether because of conscious evaluation of the Court's rulings or interia, it will also repeat its use of arguments rather than reframing them. Reframing arguments to fit the Court's rulings is a part of continuing pursuit of existing objectives while adjusting litigation tactics to fit the rulings. So is pressing for reversal of disliked Supreme Court rulings. The effects of Supreme Court cases on litigating interest groups may vary with the group's age. An organization with longevity may be better able to absorb a negative ruling than a new organization seeking to establish itself. However, even a newcomer to civil rights litigation, bringing cases to achieve publicity, may be able to profit from such adversity, particularly if a ruling, even if negative, gives some legitimacy to its stance.

At times, Supreme Court rulings, particularly when the Court limits protection of civil rights, cause litigators to delete arguments or retreat from their principal points. Thus "the inauspicious beginnings of Supreme Court litigation involving slavery" produced a narrow legal focus to manumission societies' early-19th century litigation to assure blacks' freedom. The lawyers may, however, proceed with their arguments nonetheless, perhaps because they have invested time in developing them. During the test of Louisiana's requirement of separated races in transportation that produced Plessy v. Ferguson, the Supreme Court upheld Mississippi's provision for separate cars as applied only to intrastate travel, and thus "cast doubt" on an argument the Louisiana lawyers wanted to use. But the lawyers continued to pursue an interstate commerce argument, perhaps because they read the ruling not to answer the key issue of mandatory assignment of passengers by race. Here a ruling by the Louisiana high court, reading the Supreme Court decision to exclude interstate passengers from the state's separate transportation law, "seriously undercut the test case" being arranged.

A more recent example is provided by the effect of Washington v. Davis, with its requirement that intent to discriminate be proved. That case came down from the Supreme Court one month before the trial in City of Mobile v. Bolden.

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57 Although Kobylka, in his trilogy of responses, does not mention the impact of the Court's rulings on organizations' framing of legal arguments, it is prominent in his discussion. For example, "the legal context narrowed the arguments of . . . libertarian groups." Kobylka, supra note 47, at 1074.


59 163 U.S. 537 (1896).

60 Louisville, New Orleans & Texas Ry. v. Mississippi, 133 U.S. 587 (1890).

61 LOFRENN, supra note 21, at 33-36, 40.


63 446 U.S. 55 (1980).
and the lawyers in the case had to try to distinguish the ruling so that it would not be applied to the voting rights situation they were litigating. One of the lawyers in the case has said that, given Washington v. Davis, he was not surprised at plaintiffs' defeat in the Supreme Court in Bolden.

At other times, a ruling may prompt lawyers to proceed with an otherwise abandoned case or to add to their requests. For instance, the Supreme Court's reentry into the school desegregation fray with the 1968 Green-Raney-Monroe trilogy effectively eliminated "freedom of choice" and led plaintiffs in the then-pending Swann litigation to move for further relief and to initiate the Forsyth County (Winston-Salem) school litigation. As the challenge to a resident's exclusion from use of a community swimming pool in Sullivan v. Little Hunting Park, progressed through the state courts, "manna from heaven" was provided in the "wholly unanticipated" decision in Jones v. Mayer. Without it the litigation would probably have ended, but instead the plaintiff's lawyer sought certiorari and won.

An instance in which the Court ruled favorably to litigators, but only after lawyers had been put to much unnecessary effort by the timing of a Supreme Court ruling, was West Coast Hotel v. Parrish, on the acceptability of state minimum wage laws. The government's lawyers "who struggled during the long winter days (and nights) to distinguish Schechter and Carter [v. Carter Coal] were unaware that only the accident of Justice Stone's illness [which delayed the announcement of West Coast Hotel] prevented them from learning that the Supreme Court had already initiated the 'constitutional revolution'."70

The extended nature of planned litigation for social change makes it more likely that changes in the Supreme Court's posture will affect its dynamics at some point. A Supreme Court ruling at the very early stages of a case can have considerable impact on those preparing it, not only lawyers but also social scientists conducting research on employees for a job discrimination case. The 1977 Teamsters seniority case, by changing "how discrimination and liability would be determined," served "drastically [to] alter the research design and work

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68 300 U.S. 379 (1937).
70 IRONS, supra note 6, at 77.
effort" of their task. A ruling from the Supreme Court coming in mid-litigation can undermine the heart of a litigant's legal theory and thus can force immediate reconsideration of existing plans. Thus *Pennhurst v. Halderman*, which failed to take an expansive view of the rights of those in institutions for the mentally retarded, caused mental patients to view "with much trepidation" the state's taking to the Supreme Court a case in which they were involved. Also affecting timing was the ruling in *United States v. Butler*, invalidating the Agricultural Adjustment Act. This came as National Labor Relations Board lawyers were pressing for an acceleration of a decision in a test case. As a result, "NLRB lawyers prudently decided to hold off a Supreme Court test of the Wagner Act until the following session of the Court." 

Prison litigation was likewise affected by Supreme Court rulings. While *Rhodes v. Chapman*, an attack on "double-celling" in prisons, was pending on appeal in the Sixth Circuit, the Court decided *Bell v. Wolfish*, on jail conditions for pretrial detainees. That ruling was taken by many to indicate the Court's outlook on prison conditions more generally. The ruling increased the likelihood that the appeals court would decide against the plaintiff, who had won in the trial court. The decision in *Rhodes* itself affected Alabama prison litigation that was in process. After the trial judge had ruled, the appellate court found *Rhodes* applicable, and said it enunciated a new standard that had to be applied to the trial judge's orders.

If a new ruling is handed down after the court of appeals has completed its work on a case, defensive action may have to be taken for the first time in certiorari petitions and in briefs in the Supreme Court. Lower court judges may hold cases for a pending Supreme Court ruling, perhaps to protect themselves from reversals, further increasing the likelihood of such effects. For example, the Mount Vernon, New York, desegregation case was delayed after the school board sought, and was granted, an extension of time on the grounds that the Supreme Court was deciding the Swann school case.

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74 Neal Milner, Legal Mobilization and the Emergence of Mental Health Rights Litigation: A Comparative Analysis 36 (paper presented to Law & Soc'y Ass'n, 1983); *See also* Milner, *supra* note 40, at 469.
75 297 U.S. 1 (1936).
76 *Irons, supra* note 6, at 259.

http://ideaexchange.uakron.edu/akronlawreview/vol26/iss3/2
The absence of a Supreme Court ruling may hinder lawyers, as they must forestall efforts to derail their cases until the Court rules. Justice Department attorney John Doar proceeded with the case stemming from the murder of Viola Liuzzo, although "the legal basis of the prosecution was at best questionable" because the Supreme Court had not ruled in the Price and Guest cases, testing the reach of federal criminal civil rights statutes. The government thus "had to overcome defense efforts to get the indictment dismissed, or at least to delay the proceedings until after the Court ruled." The Court resolved Price and Guest favorably to the government, thus "remov[ing] all doubts about whether the federal government possessed the legal authority to prosecute Ku Klux Klan conspirators for anti-civil rights killings in the South." The government then proceeded with more cases against KKK members -- in addition to the Alabama cases initiated before the Court's rulings. The Court's favorable decisions in Price and Guest also allowed the government to proceed with new legislation dealing with violence aimed at efforts to achieve civil rights.

Although lawyers can often calculate what the courts may do and the effects of such action, some consequences of Supreme Court rulings -- or of the underlying litigation itself -- may be unanticipated. Lawyers' skill may be measured in part by their ability to "anticipate the unanticipated," that is, to imagine the wide range of possible consequences of the litigation in which they engage.

EFFECT ON ORGANIZATIONS

Survival

In addition to affecting ongoing interest group litigation, the Supreme Court has a direct effect on those organizations as organizations and on their fundamental ability to pursue litigation. These rulings provide for footing the organizations. They also demonstrate the need for an organization to expend resources in self-defense, thus illustrating the role of organizational maintenance in litigation planning.

If organizational survival was affected by the Court's actions, so was the personal and financial well-being of organization leaders. The Supreme Court's refusal to allow a shift from state to federal court of the libel case that ultimately

84 Belknap, supra note 82, at 190.
85 Id.
86 Id. at 183.
87 Id. at 210.
88 See generally Tushnet, supra note 54.
produced *New York Times v. Sullivan* led to state auction of the property of four ministers who were officials of the Southern Christian Leadership Conference (SCLC) and the attachment of other property. Here, "the family treasures of relatively prosperous men" were likely to be taken if judgments subsequent to the initial one were enforced. "Together with jail and violence, such financial persecution was driving the SCLC's leadership from the toughest parts of the South." That the plaintiffs against the civil rights leaders in *New York Times v. Sullivan* were government officials proceeding as individuals -- even if government per se did not belong in the case -- illustrates how, at important times, civil rights advocates have to engage in responsive, or defensive, litigation as a result of government actions, instead of being able to devote all their attention to initiating challenges to government action.

The most important set of cases affecting organizations stemmed from the South's post-*Brown v. Board of Education* counter-attack against the NAACP. The most protracted litigation was *NAACP v. Alabama*, resulting from the state attorney general's efforts to enjoin the NAACP from conducting further activities in the state and to obtain organizational documents, including the names and addresses of all NAACP members there.

The Supreme Court's initial favorable rulings were insufficient to end the state's efforts, so the litigation produced four Supreme Court rulings before it ended, and the organization was effectively put "out of business" in Alabama for some time. This indicated the length of time the case occupied the organization, as well as the resources necessary for the litigation. The Court's consistent support of the right of association was, however, eventually to help keep the organization intact. The Court first upheld the NAACP's standing to assert its members' associational rights (in a decision on the law of standing with important long-term effects) and ruled that the NAACP did not have to produce membership lists. The Court also overturned state efforts to hold the NAACP in contempt and told lower federal courts they had jurisdiction over an NAACP suit. However, the NAACP still found itself unable to operate. The Supreme Court was able to end this strand of the litigation only by ordering prompt entry

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of a decree permitting the NAACP to register to do business, and Justice Harlan, indicating it was within the Court's power to write the state court decree, welcomed the NAACP's return to court should it not obtain relief.98

At the same time, the NAACP also had to deal with government efforts against it in five other states. The Court unanimously overturned a municipal ordinance in Arkansas requiring submission of membership lists for an organization to obtain an occupational license, because disclosure would interfere significantly with NAACP members' freedom of association.99 The Court later used that decision to sustain a federal court injunction against Louisiana laws requiring annual complete membership lists and barring organizations affiliated with groups on the Attorney General's list or cited by the House Un-American Activities Committee.100 The Court also invalidated Arkansas' requirement that school teachers list all organizations to which they had belonged in the last five years101 and also disposed of Florida's efforts, through state legislative anti-Communism "investigating committees," to obtain NAACP membership lists.102

Virginia's efforts in the post-Brown anti-NAACP activity were of a different sort -- hindering NAACP litigation efforts through laws that barred stirring up litigation (barratry) or raising or expending money for litigation. Here, too, winning a favorable Supreme Court ruling took more than one trip to the Supreme Court. After initial skirmishes over remands to state court for interpretation of the statutes,103 the NAACP won an important victory in NAACP v. Button.104 Justice Brennan's opinion for the Court provided strong support for organizational litigation in aid of constitutional rights, particularly where an organization like the NAACP was not seeking money through litigation. This ruling was reaffirmed 15 years later when South Carolina disciplined an ACLU-affiliated attorney for advising women of their legal rights.105

In the Port Gibson, Mississippi, boycott case, NAACP v. Claiborne Hardware Co.,106 by overturning a major judgment against the NAACP, the Supreme Court removed a major financial risk to that group. This case provides the best example of non-government actions threatening an organization's financial basis to which it must respond. White merchants whose trade was damaged by a boycott, claiming boycott leaders threatened reprisals against non-supporting blacks, sued boycott participants and the NAACP and obtained a $1.2

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103 Harrison v. NAACP, 360 U.S. 167 (1958); See also NAACP v. Bennett, 360 U.S. 471 (1958).
million judgment. After the NAACP avoided bankruptcy by staving off execution of the judgment, the Supreme Court ruled unanimously in its favor, saying it could be held liable only were it shown to have authorized or ratified improper conduct; only those who had urged violence when it in fact occurred could be liable and then only for the violence, not for the boycott's economic effects. The Court thus lifted a large financial cloud from the NAACP and terminated a serious financial drain of resources to fight the case.

Of course, any negative ruling -- even if directly affecting a litigating organization's ability to function -- may lead to the expenditure of considerable resources. For example, "adverse effects" of City of Mobile v. Bolden, in which the Court required proof of intention to discriminate to make out a voting discrimination case under Section 2 of the Voting Rights Act or the Fifteenth Amendment, led to the expenditure of "tens of thousands of dollars, at least 6,000 hours of lawyers' time, 800 hours of paralegals' time, 4,400 hours of expert witnesses and research assistants' time, and eleven and a half days of trial" to win the case on remand.

An organization may also have to go to court to combat other efforts to hinder obtaining the resources drained by defending against such actions by the state. One such unsuccessful instance was the challenge to the Reagan administration's exclusion of groups "that seek to influence... the determination of public policy through... litigation on behalf of parties other than themselves." A 4-3 majority found no violation of First Amendment rights of association and upheld the administration's policy.

Unfavorable Supreme Court rulings can, however, contribute to organizational well-being by providing an excuse for raising money. For example, the ACLU based pleas to its contributors on negative Supreme Court rulings and the Reagan administration's civil rights posture. Likewise, the Court's 1986 ruling in Bowers v. Hardwick, upholding the application of sodomy statutes to private consensual homosexual behavior, helps explain the growth of the Lambda Legal Defense and Education Fund, to which "contributions shot up dramatically" as a result of the case, although concern about AIDS is what prompted "mainstream foundations" to give the organization grants.

107 Id. at 893.
108 Id. at 920, 926, 933-34.
The Law of Procedure

Particularly significant among the Supreme Court's effects on litigating organizations are rulings on basic procedural aspects of cases, particularly on access to the courts, such as the law of standing. How -- or even whether -- an organization proceeds with litigation is also affected by sets of rules for bringing class actions (in which one or more named plaintiffs sue on behalf of all others similarly situated) and obtaining attorney's fees. These two are interrelated because civil rights organizations prefer the scale of class actions over individual suits and their lesser likelihood of dissolving through settlement; this preference is reinforced by the substantial potential attorney's fees class actions may provide.

a. Standing and Class Actions

The Court's granting the NAACP standing to sue on behalf of its members has already been noted. The Burger Court's tightening of standing rules made bringing certain types of civil rights suits far more difficult. *Laird v. Tatum*, 114 denying standing to those who would curtail Army surveillance of civilians, "placed a violation of constitutional rights beyond the reach of litigation."115 *Allen v. Wright*, 116 which blocked standing to challenge Internal Revenue Service decisions on tax-exemption of private schools that were said to engage in racial discrimination, complicated efforts to enforce school desegregation and ended the *Adams* litigation.117

The Court's rulings, stemming in part from the new majority's desire to limit federal court intrusion into local affairs, especially affected challenges to police misconduct and to housing practices. In *O'Shea v. Littleton*, 118 standing was denied to plaintiffs claiming illegal bonding, sentencing, and jury fee practices because they were said not to have identified the injury they had suffered or were personally likely to suffer, and in *Rizzo v. Goode*, 119 standing was denied to those challenging police practices against minority citizens of Philadelphia because they were complaining only about a small, unnamed minority of officers. That case led the NAACP Legal Defense Fund to "write off" police brutality cases.

*Warth v. Seldin* 120 serves as a prime example of a Supreme Court ruling seriously hindering -- indeed, almost precluding -- civil rights litigation. In a

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114 408 U.S. 1 (1972).
115 NEER, supra note 10, at 161.
117 Adams v. Bell, 743 F.2d 42 (D.C. Cir. 1984); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).
120 422 U.S. 490 (1974).
challenge to suburban zoning practices excluding low and moderate-income residents, the Court required a showing that without the zoning rules, plaintiffs would have been able to buy or lease in the municipality and that a court ruling would provide appropriate relief. On this basis, a nonprofit corporation attempting to alleviate the housing shortage; central city taxpayers with claims of higher taxes from the concentration of low-income citizens there; racial and ethnic minorities from areas of low and moderate incomes; and a Home Builders Association all lacked standing. This Court-created hurdle was thought insurmountable at the time, but later a developer, who had been unsuccessful in getting a zoning change, was able to satisfy the requirement, only to have the Supreme Court rule against the developer on the merits. Showing unpredictability, the Burger Court did allow access to the courts to challenge other types of housing discrimination.

_Gulf Oil Co. v. Bernard_ illustrates the Supreme Court's ability to assist civil rights litigation, if only by striking down procedural limitations, such as those in this case, on lawyers' communication with potential class members in an employment discrimination suit. That the case was brought by the NAACP Legal Defense Fund was thought significant by Justice Powell, who called the group "a non-profit organization dedicated to the vindication of the legal rights of blacks and other citizens." Powell also supported class actions, stating that they "serve an important function in our system of civil justice," but he expressed concern that they provide "opportunities for abuse as well as problems for courts and counsel in the management cases." Chief Justice Burger, however, was hostile, saying in _General Telephone v. Falcon_ that broad Title VII class action cases, instead of "promoting judicial economy, . . . had promoted multiplication of claims and endless litigation."

b. Attorney's Fees

Rulings on the availability of attorney's fees have both assisted and created problems for litigating organizations. After _Newman v. Piggie Park Enterprises_, allowing such fees under Title II of the 1964 Civil Rights Act, the public accommodations provision, "the proportion of public interest law firms'
operating budgets derived from attorneys' fees awards" increased in a major way.131 The case hardly was the direct cause of the subsequent proliferation of public interest law firms. However, in an important indirect effect, the Ford Foundation was led to "provide seed money for the establishment of diverse kinds of interest groups dedicated to using the courts as well as for the creation of litigating arms with 'traditional' interest groups" which could use attorney's fees to build their own budgets.132

The 1974 ruling that attorney's fees were available in cases still pending on appeal when the Educational Amendments Act of 1972 became law133 assisted civil rights organizations that had brought school desegregation cases. However, the Court severely set back organizational litigators by ruling in *Alyeska Pipeline Co. v. Wilderness Society*134 that attorney's fees were not to be awarded unless Congress specifically authorized them. This case, brought by an environmental group, illustrates that civil rights organizations have to pay heed not only to civil rights cases but also to cases in other areas of law where rulings are "transportable" to civil rights litigation, perhaps by filing *amicus* briefs.

The civil rights bar and others negatively affected by *Alyeska Pipeline*135 were successful in getting Congress to reverse the thrust of the Court's ruling with the Civil Rights Attorneys' Fees Awards Act of 1976.136 Now, in federal court civil rights actions, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."137 The Supreme Court then made the new law not merely a boon but also a matter of concern for civil rights litigators. Only two years after its passage, the Court ruled that, although fees could not be awarded against plaintiffs simply because they lost, prevailing defendants, for example businesses sued for discrimination, could obtain attorney's fees when the plaintiff's action was frivolous, unreasonable, or without foundation.138 The ruling troubled the civil rights litigation community because of the tendency of judges and others hostile to civil rights cases to label them "frivolous," and some of the litigation over the claims themselves has been quite difficult.

Moreover, the Court did not settle some important aspects of the statute until a dozen years after the Act's passage. This prevented litigators from planning on


132 Id. at 240.


135 Id.


137 Id.

attorney's fee awards as litigation resources. They had to engage in considerable litigation to determine the basis for calculating fee awards under the new statute. Such litigation, when successful, often paid for itself, but nonetheless distracted litigators from enforcing substantive discrimination statutes. Further, some judges have complained that the attorney's fee statutes create unnecessary "satellite" litigation in addition to litigation on the merits of a claim. Even Justice Brennan, supportive of attorney's fees, observed that "appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee" are among "the least socially productive types of litigation imaginable," serving to discourage civil rights litigation.139

Among the questions to be answered were, "For what portions of a lawsuit should plaintiff's attorneys be awarded fees?"140 "At what rate should the attorney be paid?"141 "Are some fee awards too large?"142 Of particular significance for civil rights lawyers were rulings on attorney's fees in connection with settlements. In a case on the rights of emotionally and mentally handicapped children argued by a leading NAACP Legal Defense Fund attorney, Evans v. Jeff D.,143 the Court handed down the ruling with most serious ramifications for large discrimination lawsuits. The Court said that a defendant could demand release from liability for attorney's fees or costs as a condition of entering into consent decrees. All damages would thus go to plaintiffs, with no fees for attorneys who often depended on attorney's fee awards as partial reimbursement because they had taken the case for plaintiffs who could not afford to pay for their services. As the dissenters argued, the ruling clearly would "make it more difficult for civil rights plaintiffs to obtain legal assistance, . . . plainly contrary to Congress' purpose."144

c. Burden of Proof

Rulings allocating burden of proof between plaintiffs and defendants, however arcane they may seem to nonlawyers, are crucial. Both burdens of proof and closely-related substantive standards like those to be met to prove discrimination are quite significant because of their effect on whether they can win at all and on the effort litigators must make to win. The intent standard

140 See id. (on successful claims when plaintiff did not fully prevail); New York Gaslight Club v. Carey, 447 U.S. 54 (1980) (on administrative agency proceedings prior to court action).
142 See City of Riverside v. Rivera, 477 U.S. 561 (1986) (holding that attorney's fees need not be proportional to damage awards and can exceed them).
143 475 U.S. 717 (1986).
144 Id. at 743.
imposed by the Court in *City of Mobile v. Bolden* made immediately clear to voting rights lawyers that they "would have to spend a great deal of time and money to accumulate the evidence needed to reach an indefinable goal that might satisfy at least a lower court, if not the U.S. Supreme Court"; moreover, "the investment that will have to be made in terms of human effort and financial support will have to be far greater than it was in the past." At least initially, the ruling also halted litigation against dilution of the minority vote. Civil rights organizations in the voting rights field held back from filing constitutional challenges and even withdrew lawsuits already filed. Moreover, in large measure because "the resistance of those communities still in litigation ... stiffened," no cases were settled.

The most important burden-of-proof ruling in school segregation was *Keyes v. Denver School District*, which allowed plaintiffs, once they had shown part of a school district improperly segregated, to shift the burden to defendant school district to disprove segregation elsewhere in the district. Without this rule, proving discrimination throughout entire large Northern school districts would have seriously limited the number of cases that could have been pursued. In Title VII litigation, after *McDonnell Douglas v. Green* set out the basic allocation and shifting of the burden of proof, *Texas Department of Community Services v. Burdine* decreased the employer's burden of proof to explaining nondiscriminatory reasons for its action rather than persuading the court of their existence. The ruling was regarded "as a case that made it difficult for a plaintiff to win his or her case."

Particularly crucial, not only with respect to job discrimination but also for other civil rights issues, was the Court's adoption in *Washington v. Davis* of an "intent" (disparate treatment) standard rather than an "effects" (disparate impact) test in constitutional cases. The ruling, which foreshadowed the Court's movement to use of such an approach in statutory cases, served to make the civil rights litigator's task far more difficult: "establishing a discriminatory purpose behind a law or practice is a formidable undertaking," making such cases "among

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147 Steve Suitts, *Blacks in the Political Arithmetic After Mobile: A Case Study of North Carolina*, in *THE RIGHT TO VOTE* at 47.
151 See id.
153 *NAACP LEGAL DEFENSE FUND, supra* note 110, at 2-3.
the most difficult to litigate."\(^{155}\) It is also said to have "dealt a fatal blow" to women's advocacy groups. After drawing on "the NAACP strategy in going for the easy wins first, thereby building up a momentum of success" before they "would . . . incrementally bring more problematic cases," they had "moved on to sex-neutral government policies that had a disparate impact on women."\(^{156}\) However, after *Washington v. Davis*,\(^ {157}\) showing disparate impact was now clearly insufficient.

After *Washington v. Davis*, victims of racial discrimination were deterred from filing cases, with an effect larger than that visible from overall win/lose figures.\(^ {158}\) However, the effect of Supreme Court rulings, particularly of individual cases, on litigation has been questioned with respect to employment discrimination law. If changes were producing an increase in case filings, "a shift in the composition of cases," should have been produced with cases brought under novel legal doctrines comprising an increasingly important share of all cases filed" -- but such changes are not apparent.\(^ {159}\)

The Court made the applicability of *Washington v. Davis* to school litigation quite evident by remanding the Austin, Dayton, and Indianapolis school cases for reconsideration in light of that decision.\(^ {160}\) Those remands gave school officials in the Wilmington, Delaware, case "still more reason to hope" for their position,\(^ {161}\) because the State Board of Education "had consistently argued that neither it nor the state had engaged in discriminatory actions," and judges had not found intentional discrimination by the state.\(^ {162}\)

**AREAS OF LAW**

Supreme Court rulings may affect interest groups' litigation strategy by influencing the areas of law in which the groups litigate or the relative attention they invest in various areas. Sometimes this is the result of a single court ruling; at other times, it is the result of a set of cases. Instances of a Supreme Court

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ruling or rulings depressing litigation have been quite common. *Miller v. California* had this effect on the ACLU and obscenity cases.

There have been many such examples over the years. For example, *Prigg v. Pennsylvania* was "a serious blow" to litigation in aid of fugitive slaves that had brought together organizations of diverse antislavery persuasion. Fifty years later, *Plessy v. Ferguson* "so disheartened advocates of racial desegregation that it took nearly a decade and a half before they organized to attempt to overturn it or to mitigate its effects." Supreme Court rulings have also had heartening effects. For example, *United States v. Classic* held that primary elections were an integral part of the election process. This "gave an enormous lift to NAACP lawyers," because, contrary to *Grovey v. Townsend*, it seemed to bring primaries within the Fourteenth Amendment's reach. NAACP lawyers were likewise "elated" after *Shelley v. Kraemer* struck down enforcement of racial restrictive covenants. Women's rights groups gained optimism for their efforts from the Court's equal pay ruling in *Phillips v. Martin Marietta Corp.* coupled with a contemporary California Supreme Court rulings.

Government lawyers could be affected in the same way. National Recovery Administration (NRA) attorneys "assigned to the job of taking code violators to court began their task buoyed with optimism" by *Nebbia v. New York*, which upheld a state milk pricing law against a due process claim. As other enthusiasts have done, they "overread" it, overlooking "the fact that the due process clause did not control the commerce clause," on which challenges to the NRA would be based. In another instance of "overreading," after the Supreme Court denied an interdistrict remedy in the first Detroit school case and refused to invalidate the property tax financing of local education in *San Antonio Independent School District v. Rodriguez*, Delaware's lawyers in the Wilmington school case "were so confident of their chances on appeal that they took their case directly to the

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165 COVER, supra note 58, at 166.
166 163 U.S. 537 (1896).
167 NEEBER, supra note 10, at 45.
168 313 U.S. 299 (1941).
171 334 U.S. 1 (1948).
174 IRONS, supra note 6, at 37.
175 291 U.S. 502 (1934).
176 IRONS, supra note 6, at 37.
Supreme Court in 1975." However, the Supreme Court handed down a one-line ruling against them.\textsuperscript{179} 

The Court's decisions could also produce mixed reactions. When the Court invalidated a particular state mechanism in the earlier "white primary" case of \textit{Nixon v. Herndon},\textsuperscript{180} NAACP lawyers were "delighted to win," but, showing civil rights lawyers' longer-run concerns, they "reacted differently to the opinion of the Court . . . than to the holding" because the Court's use of the Fourteenth Amendment Equal Protection Clause rather than the Fifteenth Amendment required proof of "state action" and the Court had thus "left a wide loophole available to opponents of black voting."\textsuperscript{181} ACLU-associated lawyers found that the Court, although deciding the 1943 \textit{Hirabayashi}\textsuperscript{182} curfew case adversely, "had made it easier for [them] to frame their strategy"\textsuperscript{183} for the \textit{Korematsu}\textsuperscript{184} direct challenge to relocation. The justices "had effectively foreclosed any further argument" on questions of delegation of authority and the war powers, but they had left open such issues as whether relocation, rather than curfew, was supported by military findings and the relation between evacuating and detaining people.\textsuperscript{185}

Not all interest groups respond to a case in the same way. However, they may react differently to a particular ruling depending on what they see in it for themselves. For example, "reaction among New Deal lawyers to their first defeat in the Supreme Court" in \textit{Panama Oil Co. v. Ryan},\textsuperscript{186} which struck down, on delegation-of-authority grounds, a provision allowing the president to embargo oil produced in excess of state quotas -- "varied from agency to agency."\textsuperscript{187} Justice Department lawyers, who had not wished an early Supreme Court test, took "an I-told-you-so attitude," while the NRA lawyers were not heartbroken because they felt the provision struck down by the Court had been added to the legislation "without giving much thought to its administrative consequences."\textsuperscript{188} The ruling not only "derailed . . . carefully timed strategy" in a follow-up case filed shortly before the Supreme Court's decision but also "shattered the shaky truce between the NRA and Justice Department lawyers."\textsuperscript{189}

\begin{footnotesize}
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\item \textsuperscript{178} \textsc{Wolters, supra} note 161, at 222.
\item \textsuperscript{179} \textit{Evans v. Buchanan}, 423 U.S. 963 (1975).
\item \textsuperscript{180} \textit{273 U.S.} 536 (1927).
\item \textsuperscript{181} \textsc{Vose, supra} note 169, at 305.
\item \textsuperscript{182} \textit{Hirabayashi v. United States}, 320 U.S. 81 (1943).
\item \textsuperscript{183} \textsc{Peter H. Irons, Justice At War: The Story Of The Japanese American Internment Cases} 312-13 (1983).
\item \textsuperscript{184} \textit{Korematsu v. United States}, 323 U.S. 215 (1944).
\item \textsuperscript{185} \textsc{Irons, supra} note 183, at 312-13.
\item \textsuperscript{186} \textit{293 U.S.} 388 (1935).
\item \textsuperscript{187} \textsc{Irons, supra} note 6, at 73.
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{Id.} at 79.
\end{itemize}
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Welfare law provides another example of Supreme Court rulings leading to a significant reduction -- indeed, almost elimination -- of litigation efforts. The Court had granted procedural protections to welfare recipients, but was unwilling to support redistribution. Civil rights lawyers' evaluation that the Court "wasn't going to deal with substantive matters or reallocate resources" led them to move away from poverty cases as "it became less and less realistic to pursue them." The welfare litigation campaign also shows that drastic changes can occur in the Supreme Court and the political atmosphere between litigation's initiation and the arrival of cases before the justices:

[T]he political ambiance altered so greatly between the beginning of the campaign and [1973] that one cannot make a judgment on the litigators. Their decision to bring a large volume of cases and get them to the Supreme Court rapidly seemed to make sense at the time. They could not have known that by the time some of those reached the Supreme Court the climate and indeed the personnel would have changed.

Housing

Housing and employment discrimination provide further illustrations of the effect of Supreme Court rulings on litigators' choice of areas or subareas of law. Particularly when housing litigators sought to go beyond simple housing discrimination cases to challenge suburban exclusionary zoning, the Supreme Court created pervasive problems for them. The Court's "decisions . . . clouded the prospects for sweeping judicial action against suburban exclusion in the federal courts." There were particularly damaging effects from: (1) Warth v. Seldin, restricting standing; (2) James v. Valtierra, upholding laws requiring local referenda only on low-cost housing, so long as race was not the stated reason for the requirement; and (3) Village of Belle Terre v. Boraas, sustaining ordinances limiting the number of unrelated individuals who could occupy a dwelling.

Valtierra "disheartened advocates of open housing, . . . particularly those who had pinned their hopes in the fight against suburban exclusion on a favorable ruling by the Supreme Court." Nor did the Court's "narrow view of racial discrimination and the scope of equal protection" bode well for other

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191GREENBERG, supra note 20, at 30-31.
196DANIELSON, supra note 192, at 191. See also Geoffrey Shields & Sanford Spector, Opening Up the Suburbs: Notes on a Movement for Social Change, 2 YALE REV. L. & SOC. ACTION 300, 310 (1972).
challenges to exclusionary devices. However, some lower court judges did not read the ruling as restrictively as did disappointed civil rights litigators. For example, in a case brought by the ACLU, the Eighth Circuit invalidated the incorporation of a suburb when it was done specifically to exclude low-income housing because of the racial minorities such housing would bring. Belle Terre, on which people had pinned their hopes because it "was the first suburban zoning case to reach the Supreme Court in more than forty-five years," was in a sense "more damaging" because the Court, showing little interest in nonresidents' concerns, "seemed to endorse a wide range of exclusionary devices." 

Jobs

Washington v. Davis's baleful effects on employment discrimination litigation and litigators' only slightly less negative reaction to some burden-of-proof rulings have been noted. As the passage of Title VII meant that litigators and courts were writing on a clean slate, Supreme Court rulings could be expected to be especially important and their effects on litigation particularly pervasive, although some time elapsed after the statute's effective date before Supreme Court rulings supplanted lower federal court decisions in importance.

An attorney regularly involved in Title VII cases has suggested there were "three strands of important cases" -- those dealing with procedural questions, the meaning of "discrimination," and remedy. As to the first, the Court's "strong" encouragement to use Title VII helped explain the NAACP Legal Defense Fund's considerable litigation effort in this area. Positive rulings on procedural issues "made matters easier." In particular, Love v. Pullman Co., which held technical construction of rules inappropriate, "allowed expansion in many ways in the lower courts."

As to the question, "What is discrimination?", there is "no more important case" than the "extraordinarily broad" ruling in Griggs v. Duke Power Co., which "obviously encouraged a whole bunch of cases testing selection devices," cases which also affected sex discrimination. However, only a few years later came the Teamsters decision, which limited the amount and type of seniority to be granted upon proof of employment discrimination. This decision "wiped out 30 appellate rulings," and forced relitigation of pre-1977 rulings in which the NAACP Legal Defense Fund had succeeded in "establishing that seniority

197 Danielson, supra note 192, at 169.
199 Danielson, supra note 192, at 183.
systems that lock older workers into low-paid formerly segregated jobs are non-bona-fide. After Teamsters, "people thought it too hard to go back to find intent 40 years ago."

Despite this "devastating setback," the LDF, getting some "continuing encouragement" from several favorable federal appellate court rulings, "felt it had to attack Teamsters because it affected the people who had suffered the most." It thus "put in an especially hard effort to litigate seniority cases," trying pending cases rather than settling them. However, the subsequent ruling in American Tobacco Co. v. Patterson, upholding seniority systems against minorities' claims that they reinforced racial discrimination, "affect[ed] numerous other cases, making them more protracted and costly."

The Court's 1989 civil rights rulings had a particularly negative effect on civil rights litigators. The Court's Croson decision, making it far more difficult for municipalities to adopt set-aside affirmative action programs, made necessary considerable effort by affiliates of the Lawyers' Committee for Civil Rights Under Law, at times working with local coalitions of interest groups as they tried to restore the programs. And the rulings near the end of the term, in June 1989, particularly the Patterson and Wards Cove cases limiting the types of discrimination claims that could be brought and severely tightening the standards necessary to prove discrimination, led to fewer lawyers taking on suits, and thus to workers being unable to find attorneys to press their complaints. It also led to Congress' reversal of the rulings in the Civil Rights Act of 1991.

DENVER AND DETROIT

The considerable detail in which observers and participants have noted the effects of two major school cases, those from Denver and Detroit, provides us with a better understanding of the effects of Supreme Court rulings on litigation dynamics. The Denver decision affected much litigation that was in progress. In the Indianapolis school desegregation trial, the Denver case "laid to rest the dispute over which specific schools . . . had been found de jure segregated" and "meant that, at a minimum, all the schools . . . must be involved in the

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204 NAACP LEGAL DEFENSE FUND, supra note 110, at 2-3.
205 NAACP LEGAL DEFENSE FUND, ANNUAL REPORT 4 (1980).
207 NAACP LEGAL DEFENSE FUND, supra note 205 at 2-3.
desegregation plan." The Denver ruling did not, however, help plaintiffs in the San Francisco or Los Angeles school cases. The Ninth Circuit remanded the San Francisco case because it said that *Keyes*, handed down after the district judge's order, required a finding of intent the judge had not made, "a harder burden on plaintiffs" than other circuits imposed. Because the parties were inclined to settle, this appellate ruling was of lesser consequence than it might otherwise have been. A state appellate court likewise reversed the trial judge's Los Angeles desegregation order, saying Keyes required a showing of intent, but the California Supreme Court then ruled that the school board should have taken "reasonably feasible steps to alleviate segregation" regardless of its cause.

In the Boston school case, *Keyes* was handed down after the trial although before Judge Garrity's ruling. Apparently wanting to be sure his decision on liability would withstand appeals, he reopened the case for argument on Keyes' implications. The Boston plaintiffs thought Keyes would buttress, not displace, their case. As the question of whether intent or effect was the proper standard for proof had not been resolved when the suit was brought, plaintiffs had dealt with both effect and intent, by "saying we don't need to prove intent but we will." That was done in part because it "looked as if a pure effects test wouldn't survive," as it had not in the already-decided Tenth Circuit's Denver ruling.

After the Supreme Court decision, Judge Garrity made the findings it required; indeed, the judge's two experts said later that he had "applied and ramified the criteria and evidentiary standards . . . with a precision that made a succession of northern urban school civil action suits feasible." *Keyes* also affected Hispanics' place in the Boston school system. The linkage between desegregation and bilingual education programs was worked through there. Judge Garrity handled this procedurally by granting Hispanics intervention at the remedy stage.

The impact of the Detroit case, *Milliken v. Bradley*, was great, not least because it was viewed as a major setback to efforts to desegregate schools and, as a civil rights lawyer stated, both "a contradiction of everything the Court had held about the ability of a court to equity to remedy constitutional violations" and "the

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216 In a similar situation, when the Swann ruling was announced between the Detroit judge's ruling on liability and his ruling on remedy, he was thus provided with more developed law to apply at the remedy stage. See Cooper, supra note 79, at 112.
only big setback that caused people to reevaluate existing litigation," at least the metropolitan school cases. But did the ruling "arrest the movement toward metropolitan correction"? One of its effects was like the impact on litigation just seen from the Denver case. The Detroit ruling was handed down when the Indianapolis case was on appeal, and meant a considerably limited interdistrict remedy. The Seventh Circuit overturned a metropolitan remedy outside Marion County (the Indianapolis area core) and remanded concerning the within-Marion County remedy. When the trial judge renewed the remedy and the Seventh Circuit affirmed the case then ran afoul of the Supreme Court's adoption of an intent test, with the justices remanding for reconsideration in light of *Washington v. Davis* and *Arlington Heights*.

A more general view is that the decision "effectively cut off one possible avenue of remedy," or, as a civil rights attorney succinctly put it, "After *Milliken*, we didn't go running around bringing interdistrict cases." A "prayer for possible metropolitanization (as appropriate or necessary) was included" when the Boston suit was started, said a lawyer in the case, but by the time it was decided, "we knew we wouldn't get that relief" because of the Supreme Court's ruling. When, at a later stage of the proceedings, the Mayor of Boston did propose metropolitization, plaintiffs opposed it: "It was an ingenious theory but it was not plausible so it would fail; it was a waste of resources; and blacks viewed it as diversionary, and it would alienate the suburbs."

These effects extended beyond Boston. James M. Nabrit III, a top NAACP Legal Defense Fund lawyer, said that as a result of the ruling, "In our litigation program . . ., at least for the short run future, we have no plans to pursue requests for interdistrict relief in the courts. I take the *Milliken* case to send us a broad signal that such cases are unlikely to succeed." The NAACP may have seemed more willing than the LDF to seek interdistrict remedies, but one of its lawyers noted that the decision "forced us to concentrate on single districts, except for the Indianapolis case," and made the Cleveland, Dayton, and Boston cases "all the harder." Had the ruling gone the other way, he said, "city districts would have aligned with blacks against suburban school districts" -- true in Detroit itself, in Wilmington, and later in St. Louis.

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219 United States v. Bd. of Sch. Comm'r of City of Indianapolis, 541 F.2d 1211 (7th Cir. 1976).
222 *id.*
223 Bell, *supra* note 8, at 479 n.27.
224 *Id.*
Not all civil rights advocates were prepared to give up on interdistrict remedies after the Detroit ruling. Soon afterwards, a housing litigator suggested that metro-area remedies including "only one or two suburban jurisdictions" would be possible, as well as easier to prove, although he counselled against "confront[ing] the Supreme Court immediately with another case involving a desegregation plan applying to a large number of suburban jurisdictions -- certainly without solid evidence that each of them, individually and collectively, constituted a causal factor in the segregation."225 Another lawyer said he and his colleagues "felt the Court had not closed the door on metropolitan remedies, but one would have to go carefully to avoid another major loss."

CONCLUSION

What do these assembled pieces of information tell us about the Supreme Court's impact on litigation? First, lawyers do pay attention to Supreme Court decisions. At times, or so it appears in hindsight, they over-react, because later rulings do not follow the ruling's implications fully. Second, Supreme Court rulings can have considerable importance for litigating organizations' ability to carry out their work, and even for their survival. Most Supreme Court rulings affect in some way the resources litigators will have to devote to cases; some rulings either facilitate or hinder obtaining resources; and an occasional, exceptional case deals with organizations under attack, so that their economic viability and effective functioning may depend on the speed with which courts resolve the problem. The need to defend against attacks on the organization is illustrative of the more general proposition that litigating organizations must often respond to what other litigators have done, independent of their own evaluation of what litigation they would like to undertake and how they would like to undertake it.

At any time, litigating organizations must remain concerned about Supreme Court rulings, like those on standing to sue, that affect their ability to get into court with their cases and the relative difficulty they will have in proving a case. Potentially seriously detrimental effects can result if a higher standard of proof is announced after lawyers have prepared and initiated a case based on prior standards. The longer the litigation, the more likely a Supreme Court ruling bearing on arguments to be made will be decided, thus affecting the case's internal dynamics. Although litigation may continue along the same track after a Supreme Court ruling as before, lawyers are likely to adjust their actions to fit the Supreme Court's opinions. They do this both by adjusting their arguments and by changing the types of cases they are willing to emphasize. They may have virtually no choice but to adjust if a rule-changing decision is handed down.

during the extended course of another case. Despite alterations resulting from Supreme Court action, we should recognize inertia or momentum, which serves to keep litigators moving along "tried and true" paths. Because of such habits, the lawyers are likely to continue to bring cases to the Supreme Court for review even after making public statements about the negatively-changed atmosphere and intentions to stay away from the justices.