

# Trotter Review

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Volume 4  
Issue 3 *Trotter Institute Review*

Article 2

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September 1990

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*Supreme Court of the United States*

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### Recommended Citation

Marshall, Thurgood (1990) "Remarks Made at the Second Circuit Judicial Conference, September 8, 1989," *Trotter Review*. Vol. 4: Iss. 3, Article 2.

Available at: [https://scholarworks.umb.edu/trotter\\_review/vol4/iss3/2](https://scholarworks.umb.edu/trotter_review/vol4/iss3/2)

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# Remarks Made at the Second Circuit Judicial Conference, September 8, 1989

by

Thurgood Marshall  
Associate Justice

Supreme Court of the United States

Before I begin my formal remarks, let me review the Circuit's record before the Supreme Court in the term just completed. Twelve cases from the Second Circuit came before the Court during the 1988 term; the Circuit was affirmed in seven cases and was reversed in just five. In a thirteenth case, *United States v. Halper*,<sup>1</sup> a district court in the Southern District of New York was substantially affirmed on direct appeal. On the whole, then, it was a relatively successful term.

Today I would like to share with you a few thoughts about the choices confronting the civil rights community in this nation. For many years, no institution of American government has been as close a friend to civil rights as the United States Supreme Court. Make no mistake: I do not mean for a moment to denigrate the quite considerable contributions to the enhancement of civil rights by presidents, the Congress, other federal courts, and the legislatures and judiciaries of many states.

It is now 1989, however, and we must recognize that the Court's approach to civil rights cases has changed markedly. The most recent Supreme Court opinions vividly illustrate this changed judicial attitude. In *Richmond v. Croson*,<sup>2</sup> the Court took a broad swipe at affirmative action, making it extraordinarily hard for any state or city to fashion a race-conscious remedial program that will survive its constitutional scrutiny. Indeed, the Court went so far as to express its doubts that the effects of past racial discrimination are still felt in the city of Richmond, and in society as a whole.

And in a series of cases interpreting federal civil rights statutes, the Court imposed new and stringent procedural requirements that make it more and more difficult for the civil rights plaintiff to gain vindication.<sup>3</sup>

The most striking feature of last term's opinions was the expansiveness of their holdings; they often addressed broad issues, wholly unnecessary to the decisions. To strike down the set-aside plan in *Rich-*



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*mond*, for example, there was no need to decide anything other than that the plan was too imprecisely tailored. Instead, the Court chose to deliver a discourse on the narrow limits within which states and localities may engage in affirmative action, and on the special infirmities of plans passed by cities with minority leaders. The Court was even more aggressive in revisiting settled statutory issues under Section 1981 and Title VII. In *Patterson v. McLean Credit Union*,<sup>4</sup> the Court took the extraordinary step of calling for rebriefing on a question that no party had raised: whether the Court, in the 1976 case of *Runyon v. McCrary*,<sup>5</sup> had wrongly held Section 1981 to apply to private acts of racial discrimination. And in *Wards Cove v. Atonio*,<sup>6</sup> the Court implicitly overruled *Griggs v. Duke Power Co.*,<sup>7</sup> another established precedent which had required employers to bear the burden of justifying employment practices with a disparate impact on groups protected by Title VII. Henceforth, the burden will be on the employees to prove that these practices are unjustified.

*Stare decisis* has special force on questions of statutory interpretation and Congress had expressed no dissatisfaction with either the *Runyon* or *Griggs* decisions. Thus it is difficult to characterize last term's decisions as a product of anything other than a retrenching of the civil rights agenda. In the past 35 years, we have truly come full circle.

Regardless of my disappointment with last term's civil rights decisions, we must do more than dwell on past battles. The important question now is where the civil rights struggle should go from here.

One answer, I suppose, is nowhere at all—to stay put. With the school desegregation and voting rights cases and with the passage of federal antidiscrimination statutes, the argument goes, the principal civil rights battles have already been won, the structural protections necessary to assure racial equality over the long run are already in place, and we can trust the Supreme Court to ensure that they remain so.



This argument is unpersuasive for several reasons. Affirmative action, no less than the active effort to alleviate concrete economic hardship, hastens relief efforts while the victims are still around to be helped. And to those who claim that present statutes already afford enough relief to victims of ongoing discrimination, I say, look to the case of Brenda Patterson. She alleged that she had been victimized by a pattern of systematic racial harassment at work—but she was told by the Supreme Court that, even accepting her allegations as true, federal statutory relief was unavailable.

We must avoid complacency for another reason. The Court's decisions last term put at risk not only the civil rights of minorities, but of all citizens. History teaches that when the Supreme Court has been willing to shortchange the equality rights of minority groups, other basic personal civil liberties like the rights to free speech and to personal security against unreasonable searches and seizures are also threat-

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ened. We forget at our peril that less than a generation after the Supreme Court held separate to be equal in *Plessy v. Ferguson*,<sup>8</sup> it held in the *Schenck*<sup>9</sup> and *Debs*<sup>10</sup> decisions that the first amendment allowed the United States to convict under the Espionage Act persons who distributed antiwar pamphlets and delivered antiwar speeches. It was less than a decade after the Supreme Court upheld the internment of Japanese citizens<sup>11</sup> that, in *Dennis v. United States*,<sup>12</sup> it affirmed the conviction of Communist Party agitators under the Smith Act. On the other side of the ledger, it is no coincidence that during the three decades beginning with *Brown v. Board of Education*, the Court was taking its most expansive view not only of the equal protection clause, but also of the liberties safeguarded by the Bill of Rights.

That the fates of equal rights and liberty rights are inexorably intertwined was never more apparent than in the opinions handed down last term. The right to be free from searches which are not justified by probable cause was dealt yet another heavy blow in the drug testing cases.<sup>13</sup> The scope of the right to reproductive liberty was called into considerable question by the *Webster* decision.<sup>14</sup> Although the right to free expression was preserved in several celebrated cases, it lost ground, too, most particularly in *Ward v. Rock Against Racism*,<sup>15</sup> which greatly broadened the government's power to impose "time, place and manner" restrictions on speech. Looming on the horizon are attacks on the right to be free

from the state establishment of religion: in a separate opinion in the creche-and-menorah case, four members of the Court served notice that they are ready to replace today's establishment clause inquiry with a test that those who seek to break down the wall between church and state will find far easier to satisfy.<sup>16</sup> We dare not forget that these, too, are civil rights, and that they apparently are in grave danger.

The response to the Court's decisions is not inaction; the Supreme Court remains the institution charged with protecting constitutionally guaranteed rights and liberties. Those seeking to vindicate civil rights or equality rights must continue to press this Court for the enforcement of constitutional and statutory mandates. Moreover, the recent decisions suggest alternate methods to further the goals of equality in contexts other than judicial forums.

For example, state legislatures can act to strengthen the hands of those seeking judicial redress. A lesson of the *Richmond* case is that detailed legislative fact-finding is critical. Civil rights lawyers will stand a far better chance in federal constitutional litigation over affirmative action if they are armed with a state legislature's documented findings of past discrimination in a particular area. Thus persons interested in the cause of racial equality can ensure that legislators have access to empirical studies and historical facts that will form the bedrock of acceptable factual findings.

Most importantly, there is Congress. With the mere passage of corrective legislation, Congress can in an instant regain the ground which was lost last term in the realm of statutory civil rights. And by prevailing upon Congress to do so, we can send a message to the Court—that the hypertechnical language games played by the Court last term in its interpretations of civil rights enactments are simply not accurate ways to read Congress's broad intent in the civil rights area.

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In closing, let me emphasize that while we need not and should not give up on the Supreme Court, and while federal litigation on civil rights issues still can succeed, in the 1990s we must broaden our perspective and target other governmental bodies as well as the traditional protector of our liberties. Paraphrasing President Kennedy, those who wish to assure the continued protection of important civil rights should "ask not what the Supreme Court alone can do for civil rights: ask what you can do to help the cause of civil rights." Today, the answer to that question lies in bringing pressure to bear on all branches of federal and state governmental units in-

cluding the Court and to urge them to undertake the battles for civil liberties that remain to be won. With that goal as our guide, let us go forward together to advance civil rights and liberty rights with the fervor we have shown in the past. Thank you very much.

### References

<sup>1</sup>*United States v. Halper*, 109 S. Ct. 1892 (1989).

<sup>2</sup>*Richmond v. Croson*, 109 S. Ct. 706 (1989).

<sup>3</sup>See, e.g., *Price Warehouse v. Hopkins*, 109 S. Ct. 1775 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989); *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989); *Jett v. Dallas Independent School District*, 109 S. Ct. 2702 (1989).

<sup>4</sup>*Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

<sup>5</sup>*Runyon v. McCrary*, 427 U.S. 160 (1976).

<sup>6</sup>*Wards Cove v. Atonio*, 109 S. Ct. 2115 (1989).

<sup>7</sup>*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>8</sup>*Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>9</sup>*Schenck v. United States*, 249 U.S. 47 (1919).

<sup>10</sup>*Debs v. United States*, 249 U.S. 211 (1919).

<sup>11</sup>*Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>12</sup>*Dennis v. United States*, 341 U.S. 494 (1951).

<sup>13</sup>*National Treasury Employees Union v. VonRaab*, 109 S. Ct. 1384 (1989); *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989).

<sup>14</sup>*Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

<sup>15</sup>*Ward v. Rock Against Racism*, 190 S. Ct. 2746 (1989).

<sup>16</sup>*Allegheny Co. v. American Civil Liberties Union*, 109 S. Ct. 3086, 3184 (1989) (Kennedy, Jr., concurring).